

Hong Kong Port Areas Bill

Views of the Hong Kong Bar Association

1. The Security Bureau consults the Hong Kong Bar Association (the Bar) on a confidential basis in respect of the proposed approach to deal with “territorial limit of pre-existing and future rights and obligations” in the light of the setting up of “Hong Kong Port Area” (HKPA) at a designated location in Mainland China under an arrangement to co-locate customs and immigration facilities of both Mainland and Hong Kong in a HKPA. The Security Bureau is undertaking the consultation in relation to the formulation of legislative proposals to declare HKPAs and to apply the laws of Hong Kong to the HKPAs.
2. The Bar submits its views on the proposed approach to deal with territorial limit of rights and obligations on the understanding that the views will be embargoed from public release by placing an electronic copy at the Bar’s website until the gazettal of the Hong Kong Port Areas Bill (the Bill).

Two Matters of Constitutional Importance

3. Before stating its views on the proposed approach to deal with territorial limit of rights and obligations, the Bar would make reference to two matters of constitutional importance.

4. The Bar is informed that the Central Authorities will make an authorization for the HKSAR to exercise jurisdiction over the HKPA at the Shenzhen Bay Port, a place outside the territory of the HKSAR where a new and co-located control point will be established for the Hong Kong-Shenzhen Western Corridor; and for the application of the laws of the HKSAR to the HKPA.

5. The Bar understands, from the information supplied, that the Central Authorities' authorization involves law-making at the national level and will bind both the Mainland and Hong Kong systems if made and applied in accordance with the Basic Law of the HKSAR. However, the Bar has not been informed as to manner in which the authorization is intended to be made and applied to the HKSAR in accordance with the Basic Law of the HKSAR. The Bar considers this issue to be of constitutional importance and would be obliged to submit its views if the Security Bureau is minded to indicate to the Bar the present inclinations between the Mainland and HKSAR authorities on this matter.

6. A distinction should be made between a Central Authorities' authorization for laws of the HKSAR to apply to a part of Mainland China outside the territory of the HKSAR (which is law-making in the Mainland system) and the Legislative Council of the HKSAR enacting an Ordinance intended to apply the laws of the HKSAR to the same location (which is law-making in the HKSAR system). The latter issue is concerned with the extent of a HKSAR Ordinance.

7. Bennion on Statutory Interpretation (4th Ed) s 102 makes a distinction between extent and application an Act of Parliament. Extent defines the area within which the enactment is law. Application is concerned with the persons and matters in relation to which the enactment operates, which may be within or outside the area of its extent.

8. In the case of the HKSAR, the extent of a HKSAR Ordinance is by reference to the geographical extent of the HKSAR, conveniently stated in Sch 2 of the Interpretation and General Clauses Ordinance (Cap 1) as "the land and sea comprised within the boundary of the administrative division of the Hong Kong Special Administrative Region of the People's Republic of China promulgated by the Order of the State Council of the People's Republic of China No 221 dated 1 July 1997 and published at SS No 5 to Gazette No

6/1997 of the Gazette” (reproduced in Laws of Hong Kong, Looseleaf Edition, Vol 1, p 14/1).

9. Accordingly, the Bar doubts whether the Legislative Council of the HKSAR, as presently empowered under the Basic Law of the HKSAR, has the legislative competence to enact an Ordinance whose intended extent is a geographical location outside the administrative division of the HKSAR. The Bar maintains its doubts notwithstanding the opinion of Professor Yash Ghai in *Hong Kong's New Constitutional Order* (2nd Ed) p 391 that “the HKSAR legislature is not precluded from legislating on matters which are the responsibility of the Central Authorities or concern their relationship with the HKSAR”. Professor Ghai was, in the Bar’s view, addressing the different issue of subject matter of legislation.

10. The Bar considers that a solution to this issue is for the Central Authorities’ authorization to confer additional legislative power on the Legislative Council of the HKSAR to enact legislation extending to the location, albeit part of Mainland China, of the declared HKPA. Article 20 of the Basic Law of the HKSAR makes provision for the granting of “other powers” to the HKSAR by the National People’s Congress, the Standing Committee of the NPC, and the Central People’s Government. Given that the “other power” that may have to be granted in the present case is legislative power, it is appropriate for

the granting authority to be the Standing Committee of the NPC.

Proposed Approach to Territorial Limit of Rights and Obligations

11. The Bar submits its views on the proposed approach to deal with territorial limit of rights and obligations in the paragraphs below.

12. The Bar notes from paragraph 3(c) of the Security Bureau's paper that it is intended that the Bill will, inter alia, make provision for the jurisdiction of the HKSAR courts. The Bar considers that while such provisions may resolve by designation the forum of adjudication, there may be still be a difficulty on the applicable law, particularly in relation to the jurisdiction where there is put into question the title, right or interest to a part of a HKPA (such as questions arising out of the leasing of premises, or rarely, adverse possession of premises), given the intention that the HKPA will remain a part of Mainland China in spite of its newly declared status.

13. The Bar does not object to the approach to be taken in relation to private contracts, as indicated in paragraph 5 of the Security Bureau's paper. The Bar does not foresee any insurmountable difficulty in the extension of the consumer related contracts (such as those relating to insurance and consumer

credit) to cover activities in HKPAs, provided that there are adequate provisions in the Bill to provide for: (a) the applicable law; and (b) the forum for the adjudication of disputes arising out of, or in the course of, acts or omissions, in a HKPA.

14. The Bar appreciates the approach proposed in paragraph 6 of the Security Bureau's paper in "extending the territorial limit" of a limited class of rights and obligations that are required for ensuring effective law enforcement and continuity of certain essential services in a HKPA. The Bar does not quarrel with the approach but considers that proper purpose to achieve with the approach is to ensure that limited class of rights and obligations provides satisfactory coverage to cater for the normal incidence or vicissitudes of activities conducted in a HKPA.

15. The Bar has examined paragraph 8 and Annex B of the Security Bureau's paper with this purpose in mind. The Bar has not found the exercise easy since Annex B only lists a few examples of the rights and obligations to be provided for in the Bill. The Bar finds that the class of rights and obligations adumbrated in the paper does not provide the satisfactory coverage required. For example, a vehicle skidded on leaked fuel oil unattended to at the HKSAR control point in a HKPA and collided into a wall of the HKSAR control point. The driver of the vehicle is injured. The driver would have had

a statutory cause of action under the Occupiers Liability Ordinance (Cap 314) against the HKSAR Government in its capacity as occupier of the HKSAR control point if the HKSAR control point were located within the territorial limits of the administrative division of the HKSAR but the presumption of the extent of an Ordinance would, in the absence of specific language, operate to disable the statutory cause of action by reason that the HKSAR control point in the example is located outside the territorial limits. While the Bar suspects that this example might come under the proposal in paragraph 3(b) of the Security Bureau's paper for the application of the laws of the HKSAR to HKPAs, it remains arguable that the statutory cause of action should be regarded as a pre-existing right or obligation and care should be taken to remove any internal inconsistency between these two proposals. As to the presumption of the extent of an Ordinance, see Bennion on Statutory Interpretation (4th Ed) ss 103 and 106.

16. The Bar has also examined Annex B in so far as it seeks to specify for the extension of the rights and obligations of barristers. The Bar notes that the barristers are admitted to practise as such by the High Court of the HKSAR under s 27 of the Legal Practitioners Ordinance (Cap 159) and that upon admission, the judge signs a certificate of admission. Thus it is necessary to add in the formulation of Annex B(d)(i) of "issued or given under an Ordinance by a public officer, public body or public authority", the reference

to “court”.

17. The Bar has examined paragraph 11 and Annex C of the Security Bureau’s paper with the same purpose in mind as it has done in relation to paragraph 8 and Annex B. The Bar has also not found the exercise easy since Annex C only lists a few examples of the court orders to be provided for in the Bill. The Bar finds that the list in Annex C may not be exhaustive, in that, for example, it has not included an order of the court to disqualify a person from driving under the Road Traffic Ordinance (Cap 374).

18. Turning to future rights and obligations (whether arising from statutory powers or duties, or from court orders), the Bar notes that the proposed approach seems to hinge on a “reference to Hong Kong” in a “future document” of the territorial limit of a right or obligation. The Bar does not object to this approach. The Bar however submits that, to cater for the situation of barristers (as explained above), it is necessary to add in the formulation of paragraph 15(b) of the Security Bureau’s paper of “a statutory power or duty conferred or imposed on a public officer, public body or public authority”, the reference to “court”.

Dated 11th February 2006.
Hong Kong Bar Association