

立法會
Legislative Council

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**Observations on Clause 9.2 of the Agreement dated 10 October 2003
and made between the Government of HKSAR
and the American Chamber of Commerce
in relation to the "Harbour Fest"**

During the special meeting of the Panel on Financial Affairs on 15 November 2003 (the Meeting), a Member requested the Legal Service Division to look at clause 9.2 of the Agreement dated 10 October 2003 and made between the Government of HKSAR and the American Chamber of Commerce (AmCham) in relation to the "Harbour Fest" (the Agreement). The request was made in the context of Members' queries on the right of the Government to have access to information on individual artists' fees and the disclosure of such information to the Legislative Council and the Executive Council. In February 2004, the Panel Chairman gave instructions that a paper should be prepared in response to the request. This paper sets out the observations of the Legal Service Division.

The Context

2. At the Meeting, Mr. James Thompson was asked to disclose the fees for individual international artists. He confirmed that such information was subject to the confidentiality clause in the agreements signed between AmCham and its agents and/or between its agents and the artists concerned. He further stated that breaching such clause would expose AmCham or himself to legal claims. A Member then referred to clause 9.2 of the Agreement and requested the Administration to provide a breakdown of the artists fees to Members.

Clause 9.2 of the Agreement

3. Clause 9.2 of the Agreement must be understood as part of clause 9, which provides as follows:-

"9.1 Except as expressly provided in this Agreement, all materials and data furnished by or on behalf of the Government and by or on behalf of AmCham or the SPV [special purpose vehicle, i.e. Red

Canvass Limited] pursuant to this Agreement shall be treated as confidential information. Neither party shall, during the continuance of the Agreement or at any time thereafter, disclose to any person the terms and conditions of the Agreement, or any confidential information of the other, PROVIDED that the restrictions on disclosure contained in this Clause shall not apply:

- (a) to the disclosure of any information to any person in circumstances where such disclosure is necessary for the performance of either party's duties and obligations under this Agreement;
- (b) to the disclosure of any information which was rightfully in the possession of such party prior to the commencement of the negotiation leading to this Agreement;
- (c) to the disclosure of any information which is or becomes public knowledge otherwise than as a result of breach of this Clause;
- (d) to the disclosure of any information in circumstances where such disclosure is required pursuant to any law or order of a Court of competent jurisdiction; and
- (e) to the disclosure of any information with the prior written consent of the party.

9.2 Nothing in this Clause shall apply to disclosures made by the Government to the Executive Council and/or the Legislative Council of Hong Kong.

9.3 If AmCham shall appoint any agent or subcontractor then AmCham may disclose such information as may be necessary or convenient to enable the agent or the subcontractor to perform its obligations subject to such agent or subcontractor giving the Government an undertaking in similar terms to the provision of this Clause. The foregoing obligations as to confidentiality shall survive termination of this Agreement."

Observations

4. The text of clause 9 makes plain the following:-

- (a) Clause 9.2 provides an exception to the obligations of confidentiality set out in clause 9.1;

- (b) Clause 9.1 applies to materials and data furnished by or on behalf of the Government or by or on behalf of AmCham or the SPV pursuant to this Agreement and also the terms and conditions of the Agreement and any confidential information of the other party;
- (c) Clause 9.1 also contains express exceptions to the obligations of confidentiality imposed by it; and
- (d) Clause 9.3 empowers AmCham to disclose information necessary for its agents or subcontractors to perform their respective obligations subject to the latter's undertaking to keep confidential of the information so received.

Analysis

5. The obvious effect of clause 9.2 is that the Administration is free to disclose to the Executive Council or the Legislative Council (LegCo) or both any materials and data furnished by or on behalf of AmCham, the terms and conditions of the Agreement and any confidential information of AmCham. This means that if AmCham has furnished the Administration any information on individual artists' fees, it could disclose such information to LegCo in reliance on clause 9.2. If AmCham has not disclosed individual artists' fees to the Administration, clause 9.2 is then irrelevant.

6. In relation to such undisclosed information on artists' fees, the question is whether AmCham has an obligation to disclose such information to the Administration. To answer this question, we need to consider the Agreement as a whole.

7. The Agreement does not appear to have expressly mentioned any obligation to make such disclosure. However, the "Sponsorship Fee" to be paid by the Government is to be calculated with reference to the "Net Deficit" (clause 3.2), which is defined in clause 1.1 as follows -

- (a) "Net Deficit" means the short fall (if any) between the ***Organising Expenses*** and all recognised revenues represented in the 2003 Festival Accounts as cash at bank or in hand which cash is available for payment or distribution by the SPV (not including the Sponsorship Fee as a revenue item for these purposes) associated with and generated by the 2003 Festival ***in the period***

to which the 2003 Festival Accounts are made up. [our emphasis] ;

- (b) "2003 Festival Accounts" means the audited accounts of the SPV (and AmCham, as the case may require) prepared in relation to the 2003 Festival which shall *detail the Organising Expenses*, relevant revenues and the Net Deficit. [our emphasis];
- (c) "Organising Expenses" means all *costs and expenses of an actual or contingent nature* (including, without limitation, all taxes, deductions, withholdings and liabilities of AmCham and the SPV whatsoever) in each case in relation to the 2003 Festival as initially detailed for information purposes only in the indicative Budget (as may be amended from time to time in accordance with the provisions of this Agreement) *as shall be detailed in the 2003 Festival Accounts.* [our emphasis];

It is clear that artists' fees are actual costs and expenses of the "Harbour Fest". As such they should be part of "all costs and expenses as shall be detailed in the 2003 Festival Accounts". However, it is not expressly provided in the Agreement how much details of such costs and expenses shall be included in the 2003 Festival Accounts. Whether the agreement contemplates that in respect of artists' fees, the fees of each individual artists should be set out in the 2003 Festival Accounts would very much depend on the intentions or the contemplation of the parties at the time of the Agreement. For this purpose, it may be relevant to note that the costs and expenses "initially detailed for information purposes only in the Indicative Budget" (the Second Schedule to the Agreement) does not include a break-down of individual artists' fees.

8. In any event, the definition of "2003 Festival Accounts" provides that they should be audited accounts. As such the auditors should be supplied with the individual artists' agreements to enable them to verify the artists' fees. Although not expressly stated in the Agreement, this is implied as the basis for ascertaining the Net Deficit is the 2003 Festival Accounts. Without such information, any audit of the 2003 Festival Accounts would be incomplete. Under paragraph (1)(g) of the "Amcham's Commitments" in the Fifth Schedule to the Agreement, Amcham is only required to "procure that there shall be prepared and submitted to the Government the following information as soon as reasonably practicable after their preparation by the appointed accounts.....audited accounts in relation to the 2003 Festival not later than 28

February 2004 (to include an analysis of revenue and a statement of the source and applications of funds)". It is noted that unlike revenue, no analysis of expenses is required as a commitment by Amcham.

Conclusion

9. To conclude, the foregoing observations may be summarised as follows:-

- (a) Clause 9.2 of the Agreement permits the Administration to disclose information on each individual artist's fees to LegCo if that has been furnished to it by AmCham.
- (b) Whether AmCham should furnish each individual artist's fees in the 2003 Festival Accounts turns on the meaning of the word "detailed" as intended by the parties to the Agreement and no unequivocal intention that it should include individual artists' fees is apparent.

Prepared by

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