

**For information
on 5 May 2008**

**Bills Committee on the
Prevention and Control of Disease Bill**

Mechanism for resolving disputes over compensation claims

This paper explains the mechanisms for resolving disputes over compensation claims under the existing Quarantine and Prevention of Disease Ordinance (QPDO) (Cap 141) and under the Prevention and Control of Disease Bill (the Bill). It also provides the Administration's response to the submissions of the Hong Kong Bar Association dated 5 and 16 April 2008 and of the Law Society of Hong Kong dated 7 and 21 April 2008, and the proposal to amend clause 12 of the Bill.

Dispute resolution mechanisms in QPDO and the Bill

2. Section 17(2) of QPDO provides that any dispute as to the amount of compensation to be paid as ordered by the Director of Health under section 17(1) of the same Ordinance in relation to requisition of vehicles or vessels or the destruction of articles shall, in default of agreement, be determined by arbitration in accordance with the provisions of the Arbitration Ordinance (Cap 341).

3. Clause 12(2) of the Bill provides that any dispute as to whether compensation is payable or the amount of compensation in relation to an order made by the Director of Health under clause 12(1) may, in default of agreement, be resolved or determined by arbitration in accordance with the Arbitration Ordinance (Cap 341).

4. By virtue of section 2AB of the Arbitration Ordinance, section 17(2) of QPDO and clause 12(2) of the Bill are respectively treated as a domestic arbitration agreement to which the Arbitration Ordinance applies.

5. By the use of the word “shall” in section 17(2) of QPDO, the parties in dispute as to the amount of compensation are required to resolve their dispute by arbitration in accordance with the Arbitration Ordinance. In the event that one of the parties chooses not to arbitrate and brings such dispute before the court, the other party may apply under section 6(1) of the Arbitration Ordinance for a stay of the legal proceedings.

6. On the other hand, the word “may” is used in clause 12(2) of the Bill to reflect our intention to provide flexibility to the claimant as to the mode of dispute resolution in default of agreement as to whether compensation is payable or the amount of compensation. It will then be up to the parties to decide whether to resort to arbitration as provided for in the Bill or take the case to the court.

Response to the submissions of the Bar Association

7. The Bar Association considered in their submission dated 5 April 2008 that the Director of Health (Director) may refuse to agree to submit the dispute to arbitration under clause 12(2) of the Bill as currently stands, and the person aggrieved will be left with recourse to an application for judicial review of the legality of the Director’s order. They therefore suggest that the Bill should provide for both options of arbitration and judicial determination for resolving disputes over compensation claims, similar to that in the Telecommunications Ordinance (Cap 106); or the establishment of a compensation tribunal whose determination is subject to appeal to a court.

8. We note that the matters that are subject to arbitration under section 14(5) of the Telecommunications Ordinance and judicial determination under section 15 of the same Ordinance are different in nature. In brief, disputes which are to be resolved by arbitration under section 14(5) are those over the fee payable by a licensee for the use of land for placing and maintaining radiocommunications installation on land belonging to another person whereas those to be referred to the court for determination under section 15 are over compensation payable where fixture or chattels found on land or seabed are damaged as a result of the

exercise of powers by the Telecommunications Authority or the licensee. The mechanisms provided for in sections 14(5) and 15 of the Telecommunication Ordinance, therefore, cannot be applied directly to clause 12 of the Bill.

9. We also do not see the need for setting up a compensation tribunal for hearing dispute cases over the amount of compensation ordered by the Director given the intended flexibility afforded to claimants to resolve disputes on compensation claims by the mode that they see fit.

Response to the submissions of the Law Society

10. The Law Society suggested in their submissions of 7 and 21 April 2008 that clause 12(2) of the Bill should be deleted since arbitration, in their view, is subject to agreement by both parties and it is unclear why a voluntary process can have statutory force. In fact, the reference to arbitration may arise from the agreement of the parties or from statute.¹ Without clause 12(2), a compensation dispute over an order made by the Director under clause 12(1) cannot be referred to arbitration under the Arbitration Ordinance (Cap 341) unless the parties agree to enter into an ad hoc arbitration agreement to that effect. It should be underlined that the provision of arbitration in clause 12(2) does not preclude the claimants from bringing their cases to the court or using other forms of dispute resolution.

Proposal to amend clause 12 of the Bill

11. We met with representatives of the Bar Association and the Law Society on 30 April 2008 to discuss the dispute resolution mechanism provided under clause 12(2) of the Bill. We have explained to them our policy intent to provide flexibility to the claimant as to the mode of dispute resolution, e.g. by arbitration or court proceedings. In addition,

¹ See *Halsbury's Laws of Hong Kong*, Volume 1(2), paragraph 25.001 and section 2AB of the Arbitration Ordinance (Cap 341)

to address the concerns expressed in their submissions, we have also proposed to amend clause 12(2) to the effect that the Director will not refuse to submit the dispute to arbitration if the claimant chooses to resolve the dispute by arbitration. Representatives of the Bar Association and the Law Society have no objection to our proposals, as long as the provision indicates clearly the options that are available to the claimant. They also note our explanations for not setting out in the Bill the factors to be considered by the Director to determine “just and equitable” compensation, and for not setting up a compensation tribunal.

12. Based on the outcome of the discussion, we are consulting the Bar Association and the Law Society on a revised clause 12(2) (with new sub-clauses (3) and (4)) as follows:

(2) Any dispute arising from an order of the Director under subsection (1) on the question whether compensation is payable or the amount of compensation shall, in the absence of agreement, be resolved or determined according to this section.

(3) The dispute shall be resolved or determined by arbitration under the Arbitration Ordinance (Cap. 341) if the party disputing the Director’s order (“the claimant”), within 3 months after the Director makes the order, serves a notice on the Director notifying the Director that the dispute will be referred to arbitration and proceeds to arbitration in accordance with the Arbitration Ordinance.

(4) The claimant may, within 3 months after the Director makes the order, instead of proceeding under subsection (3), institute civil proceedings for the determination of the dispute.

13. After considering the comments of the two legal professional bodies on the above draft provisions, we will submit the final proposal to the Bills Committee.

Food and Health Bureau
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