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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 10 July 2012**

Law Reform Commission Report on Class Actions

Purpose

This paper gives an account of the discussions held by the Panel on Administration of Justice and Legal Services ("the AJLS Panel") on the Consultation Paper on Class Actions published by the Class Actions Subcommittee of the Law Reform Commission ("LRC").

Background

2. Under the current law in Hong Kong, the sole machinery for dealing with multi-party proceedings in Hong Kong is a rule on representative proceedings under the Rules of the High Court (Cap. 4A) which was criticized as restrictive and inadequate by the Chief Justice's Working Party on Civil Justice Reform. In its Final Report in March 2004, the Working Party recommended that a scheme for multi-party litigation (i.e. class actions) should be adopted in principle.

3. The Class Actions Subcommittee ("the Subcommittee") under the chairmanship of Mr Anthony NEOH, SC was appointed in November 2006 to consider whether a scheme for multi-party litigation should be adopted in Hong Kong and to make proposals to LRC for reform. Both the Director of Legal Aid ("DLA") and the Consumer Council were consulted. The Subcommittee published a Consultation Paper on Class Actions ("the Consultation Paper") on 5 November 2009.

4. Arising from the incident related to Lehman Brothers' minibonds in which a large number of consumer investors would need to take legal action individually for their losses, the AJLS Panel had requested the former Research and Library Services Division of the Legislative Council ("LegCo") Secretariat to conduct a research on the relevant schemes implemented in selected overseas jurisdictions.

The research report entitled "Class action in selected places" (RP01/09-10) was published on 18 November 2009.

Relevant discussions held by the AJLS Panel

5. At the invitation of the AJLS Panel, the Subcommittee Chairman briefed members on the recommendations contained in the Consultation Paper at the meeting on 23 November 2009. The issues raised by members at the meeting are summarized below.

Claims to be dealt with under class actions

6. In response to Dr Margaret NG's enquiry as to whether the disputes concerning the Lehman Brothers-related minibonds were suited to be dealt with by a class action procedure, the Subcommittee Chairman explained that in a class action, a representative plaintiff sued on his own behalf and on behalf of the other persons ("the class") who had a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who had claims that shared questions of law or fact in common with those of the representative plaintiff. Hence, it would depend on whether the complainants shared the same questions of law or fact. For example, while the complainants sharing the same cause of action of alleged misrepresentation of the investment products in the prospectus might be able to take class action, complaints against alleged mis-selling of products by individual staff of retail banks might not be suitable for a class action procedure having regard to the differences in individual circumstances pertaining to each case.

Safeguards against potential abuses

7. While expressing support for the introduction of a class action regime, Dr Philip WONG expressed concern about potential abuse of the class action procedure. The Subcommittee Chairman advised that a class action regime might unduly encourage litigation and therefore procedural safeguards should be established to avoid potential abuse. One of the major procedural safeguards was the proposed certification system for class actions, under which the court would examine whether certain criteria were fulfilled before authorizing the commencement of a class proceeding. The Subcommittee had recommended that the "costs follow the event" rule be retained in the proposed class action regime in Hong Kong, which would help discourage unnecessary and unmeritorious litigation. To guard against potential abuse of the process of the court, the Subcommittee had also recommended that a cautious approach be adopted in implementing the class action regime, with the extension of the District Court

jurisdiction to hear class actions be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedure had been established.

8. According to the Consultation Paper, one potential risk of adopting a class action regime was the considerably higher litigation costs for class action proceedings than individual proceedings, which might wipe out the amount of any compensation and expose the plaintiffs to the potential liability for large amount of costs. There was also the risk that the successful defendant would not be able to recover his costs from an impecunious plaintiff acting as the class representative. Dr Margaret NG enquired how the Subcommittee proposed to tackle such problems.

9. The Subcommittee Chairman advised that under the proposed system, the court would play a major role in filtering out cases which were not suitable for class actions. A certification process would be incorporated whereby the court would be granted the power to decide if a class action should proceed. To minimize potential abuse of the process, the representative plaintiff would have to satisfy the court of five major certification criteria before the class action could proceed, including the criterion that the representative plaintiff should have adequate standing and ability to represent the interests of the class of claimants and the so-called "superiority" criterion that the class action was the most appropriate legal vehicle to resolve the issues in dispute.

Funding for the class action regime

10. Members considered that litigation cost was a crucial issue in class action proceedings and little could be achieved by a class action regime unless suitable means could be found to fund plaintiffs of limited means. Members noted that the Subcommittee had proposed in the Consultation Paper that the Consumer Legal Action Fund be extended to cover class action litigation in consumer claims.

11. The Subcommittee Chairman advised that consumer claims were particularly suitable for class action litigation and priority should be given to funding class action litigation in this area. As an established mechanism had already been in place under the Consumer Legal Action Fund to provide financial support and legal assistance for aggrieved consumers to obtain legal remedies, the Subcommittee proposed that, in the short term, consideration be given to expanding the scope of the Fund to provide legal assistance in class actions proceedings in consumer claims, with additional resources to the Fund to be provided by the Administration. The existing legal aid regime could also provide a viable source of funding for class actions in the short term in cases where the

representative plaintiff was eligible for legal aid; but the DLA would only be responsible for the costs attributable to the legally aided plaintiff.

12. Mr TAM Yiu-chung considered that the proposed class action regime would enable consumers and small investors of similar background to take collective action against a large multinational corporation or a governmental body. In order to expedite the introduction of a class action regime, he suggested that sectorial funds should be set up to fund class actions in different sectors as a first step. The Subcommittee Chairman considered the suggestion viable and that the Administration could set up funds in certain sectors first to test out the operation of class actions.

Treatment of public law cases

13. Dr Margaret NG expressed concern about the impact of the introduction of a class action regime to public law cases on the current constitutional position in relation to the interpretation of Basic Law ("BL"). For example, when the Standing Committee of the National People's Congress ("NPCSC") issued an interpretation of the relevant provisions of BL which had the effect of reversing an earlier decision of the Court of Final Appeal ("CFA"), the principle that judgments previously rendered would not be affected by the interpretation of NPCSC only applied to the actual parties to concluded litigation.

14. According to the Subcommittee Chairman, in the light of the special constitutional position in Hong Kong, there were arguments for and against the exclusion of public law cases from the class action regime. It had been suggested that a class action regime adopting an opt-out model would effectively deprive an interpretation of the NPCSC of any particular effect, as all potential claimants would automatically be parties to the judgment previously rendered unless they opted out. This would amount to a radical constitutional change. On the other hand, it might be argued that a class action regime with an opt-out model would not affect the constitutional status or validity of an interpretation by NPCSC, which would apply to future litigation and was binding on the Hong Kong Special Administrative Region courts. To this end, the Subcommittee had put forth in the Consultation Paper four options for the treatment of public law cases in a class action regime to deal with the special constitutional situation in Hong Kong.

15. Dr Margaret NG considered that there were both pros and cons for using a class action procedure. In the right of abode cases, individuals with similar claims but who were not parties to the CFA proceedings would have benefited from the CFA judgment and would have been unaffected by the subsequent interpretation of NPCSC had the class action procedure rather than the "test cases" approach been used. However, in other cases, it might be more beneficial to use individual

proceedings. She sought clarification on whether individuals could choose between class action or individual proceedings under the proposed class action regime.

16. According to the Subcommittee Chairman, under the "opt-out" approach recommended by the Subcommittee, once the court certified that a case was suitable for a class action, any member of the class could opt out of the class action within the time limit prescribed by the court order. The court would make a decision on whether a class action procedure should be adopted only upon the application of the relevant parties.

Recent development

17. The LRC Report on Class Actions proposing that a mechanism for class actions should be adopted in Hong Kong was published in May 2012. The AJLS Panel is scheduled to discuss the recommendations contained in the Report with the Subcommittee Chairman at its regular meeting in July 2012.

Relevant papers

18. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix**.

Council Business Division 2
Legislative Council Secretariat
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Appendix

Relevant papers on Law Reform Commission Report on Class Actions

Meeting	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	14.10.2008 (Item III)	Agenda Minutes
	23.11.2009 (Item IV)	Agenda Minutes RP01/09-10
	24.1.2011 (Item IV)	Agenda Minutes
	28.3.2011 (Item IV)	Agenda Minutes

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