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Dear **Mrs. Ma,**

The Member of Public's Comments on the Administration's Submission regarding the review of s.18(3) of Hong Kong Court of Final Appeal Ordinance, Cap. 484 ('the Ordinance') issued by the Director of Administration in September 2001

Thank you for your letter of **1.11.01** telling me that
"You write to advise me that the Panel decided at its meetings on 29.10.01 that the item ***'Review of the Ordinance'*** will be discussed at the next meeting to be held at **4:30 p.m. on 26**

November 2001.

It is noted that from my letter dated 28.10.01 that I have written to the Hong Kong Human Rights Monitor (HRM) on the issue. On the instruction of the Chairman, you have requested HRM to let the Panel have its written views, if any, before the meeting on 26 Nov. 2001. If I require any information, please feel free to contact you or Mr. Paul WOO."

As an information note to assist members of the Panel to prepare for the issue be discussed at the next meeting fixed on 26.11.01, I would like to **submit Comments on the Administration's Submission regarding the review of s.18(3) of the HKCFA Ordinance, Cap. 484** ('the Ordinance') **by the Director of Administration in Sept. 2001,** which was annexed to your letter of 20 Sept. 2001.

First of all, pursuant to **Articles 64. 73 and 104 of the Basic Law** (which stipulate that "the Government of the Hong Kong Special Administrative Region (HKSAR) must abide by the law and be accountable to the Legislative Council of the Region: it shall implement laws passed by the Council and already in force; it shall present regular policy addresses to the Council; it shall answer questions raised by members of the Council; and it shall obtain approval from the Council for taxation and public expenditure", "the Legislative Council of the HKSAR shall exercise the power and functions: (1) To enact,, amend or repeal laws in accordance with the provisions of this Law and legal procedures; ---------- (5) To raise questions on the work of the government; (6) To debate any issue concerning public interest; (7) To endorse the appointment and removal of judges of the Court of Final Appeal and the Chief Judge of the High Court; (8) To receive and handle complaints from Hong Kong residents; ---------- " and "When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the HKSAR must, in accordance with law, swear to uphold the Basic Law of the HKSAR of the People's Republic of China (PRC) and swear allegiance to the HKSAR of the PRC"), **there are basis the Legislative Council and the Administration review the Ordinance** (a second source of law in the HKSAR), which stipulates that "decision of the Appeal Committee ('AC') shall be final and not itself subject to appeal" and contravenes to Articles 87 of the Basic Law (which stipulates that "In criminal or civil proceedings in the HKSAR, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained ----- ") and as a result. legal rights to appeal cannot be protected if mistakes are made in the decision of the

AC and rectify mistakes made in the legislation of clause 18(3) of the HKCFA Bill (1995), which also stipulates that "decision of the AC shall be final and not itself subject to appeal" and was not properly scrutinized after the deliberations at meetings of the Bills Committee, that the legislators were being rushed and was not thoroughly debated in the Legislative Council before passage of the Bill. which then received its third reading and became law when it was signed and promulgated by the former governor Chris PATTEN.

Second, pursuant to **Articles 88, 89 and 92 of the Basic Law and section 18(1) & 2B of the Ordinance,**

"'Judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal professions and eminent persons from other sectors.', 'A judge of a court of the HKSAR may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice ('CJ') of the Court of Final Appeal and consisting of not fewer than three local judges. The CJ of the Court of Final Appeal of the HKSAR may be investigated only for inability to discharge his or her inabilities, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of a tribunal and in accordance with the procedures prescribed in this Law' and '**Judges** and other members **of the Judiciary of the HKSAR shall be chosen on the basis of their judicial and professional qualities** and may be recruited from other common law jurisdictions'"; and

"'There shall be and Appeal Committee ('AC') consisting of - (a) the CJ and 2 PJ nominated by the CJ; or (b) 3 PJ nominated by the CJ' and 'Where a sufficient number of permanent judges ('PJ') is not available for any cause to sit on the Appeal Committee to hear and determine any application, the CJ shall nominate a non-permanent Hong Kong judge ('NPJ') to sit in place of a PJ'" **and**

according to the 'Final Appeal Judge List' in the homepage of the Judiciary on the internet, "there are **one CJ** (Hon. Mr. Justice Andrew Li), **three PJ** (Hon Mr. Justices Bokhary, Chan and Ribeiro) **twelve NPJ and eight judges from other common law jurisdictions."**

Therefore, there should be **sufficient number of Final Appeal judges in the Court of Final Appeal** ('CFA'). who **are *competent to hear and determine appeal against decision of the AC.***

Accordingly, **it lacks reasonable ground the Administration says in paragraph 11 of the**

Submission in Sept. 2001 that
"If there were to be further appeal from the decision of the AC, this must be scrutinized by the full court of the CFA as there is no other appropriate body which has the standing, authority and expertise to review the AC's decision. In this regard, the three members of the AC could not sit on the CFA, having regard to the principles of natural justice, and NPJ would have to be appointed in their place. Therefore, the CFA would comprise four NPJ and only one judge out of the CJ and three PJ (i.e. the judge out of the four who did not sit on the AC). This represents a fundamental departure in the composition of the CFA from the existing position and what is envisaged in the Ordinance as to be its usual composition."

Third, Ms. Janet SHUM, who wrote the reply letters of 15.01.01 & 23.01.01 (titled "*Request for leave to appeal out of time*" and "*Complaint about court decision*") for Secretary general of Legislative Council Secretary, has told me that
"the **Legislative Council have received many complaints on the Ordinance from people of Hong Kong".**
(see P.4 of my letter of 25.09.01 addressed to the Panel)

Moreover, I have read from the newspaper **Ms. Suen Wai-tsang** (孫惠珍),whose application for leave to appeal against judgment of the Court of Appeal in CACY 271/1998 & 610/1999 *[Suen Wai-tsang (孫惠珍) v. Fair View Park Property Management Ltd.* (元朗錦秀花園管理公司)] was denied by the AC, **has written letters to the Administration and National People's Congress of PRC to remove Final Appeal judges,** who unfairly and unjustly dismissed her application for leave to appeal.

Accordingly, there is **no basis the Administration says in paragraph 8 of the Submission in Sept. 2001** that

"Apart from the request from the member of public in the case mentioned in paragraph 2, the existing arrangement for the determination of application for leave by the AC has worked well."

Lastly, pursuant to **Articles 80, 83, 84 & 85 of the Basic Law,**
'"The courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region.', 'The structure, powers and functions of the courts of HKSAR at all levels shall be prescribed by law', 'The court of the HKSAR shall adjudicate case in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and

may refer to precedents of other common law jurisdictions' and 'The courts of the HKSAR shall exercise judicial power independently, free from any interference. -------- '" Also, according to '**Role of the Judiciary**' and '**CFA**' as referred to Ch. **8** ***The Legal and Judicial System*** of ***'Hong Kong's New Constitutional Order - The Resumption of Chinese Sovereignty and the Basic Law'*** (written by Prof. Yashi Ghai and published by Hong Kong University Press in 1999),

"THE LEGAL & JUDICIAL SYSTEM

The Role of the Judiciary

The **judiciary is defined as the 'courts of the HKSAR at all levels'** (*Article 80 of the Basic Law*). **The essential role of the judiciary** (in conjunction with the National People's Congress (NPCSC) and the Basic Law Committee) **is to maintain the principles and parameters of the Basic Law.** This involves not only ensuring the boundaries and mechanisms that preserve the two systems through the doctrine 'One Country Two Systems' but also the broad (and sometimes, the specific) provisions that constitute the 'system' in Hong Kong. In addition, the courts have to **dispense justice in accordance with the law, safeguard the rights and freedoms of Hong Kong's residents,** provide remedies for unlawful acts of the government, and ensure the **fairness and predictability** that underpin most systems of private economy.

The general principle is that courts continue to perform the roles they had before the transfer of sovereignty. They have jurisdiction over all cases in accordance with 'the legal system and principles' in force before the transfer of sovereignty. The **HKSAR courts exercise the powers of final jurisdiction** (*Article 19 of the Basic Law*), which implies that the mainland courts have no role in the region. The HKSAR courts will play an important role in the interpretation of the Basic Law, although the final powers in this respect lie with the NPCSC (*Article 158 of the Basic Law*). **Access to courts is protected,** especially for proceedings against the acts of the executive authorities and their personnel, and, for these and other matters, the courts will be able to provide 'judicial remedies' (*Article 35 of the Basic Law*) - presumably common law and statutory remedies available under the previous system. Other safeguards which are associated with protection by courts are secured - jury trials (*Article 86 of the BasicLaw*), the presumption of innocence and **other rights previously enjoyed by parties to** civil and criminal proceedings, including speedy trial (*Article 87 of the Basic Law*). Moreover, there are two respects in which the courts will enjoy an even higher status than previously - the powers to review laws and policies for conformity with the Basic

Law (judicial review) and the vesting in them of 'judicial power of the region' (*Article 80 of the Basic Law*).

The Court of Final Appeal ('CFA')

---------- **A new court, the CFA, replaces the Privy Council (on 30 June 1997).**

The **Privy Council**, which the CFA replaces, has jurisdiction over appeals from British colonies, but a number of former colonies continue to provide for appeals to it. The members of the Privy Council are usually Lords of Appeal in Ordinary (i.e. members of the House of Lords in its judicial capacity), but distinguished judges from Commonwealth countries also sit sometimes. Technically the Privy Council 'advises' the Queen (or the head of state when not the Queen), but in practice it is for all practical purposes a court and operates as such when hearing appeals from Hong Kong, it acted as a Hong Kong court.
Appeals to the Privy Council law from the Court of Appeal. Appeals were by right only in civil cases if the matter in dispute was worth at least $500,000. Otherwise the leave of the Court of Appeal or the Privy Council was necessary; leave was granted only if the question involved was of great general or public importance.

The Basic Law provides few details on the structure, composition, or jurisdiction of the CFA, other than the Chief Justice of the CFA must be a Chinese citizen who is a permanent resident of the HKSAR without the right of abode abroad (*Article 90 of the Basic Law*). Its jurisdiction would be established by analogy with that of the Privy Council. The final interpretation of the Basic Law is not with the Court of Final Appeal but the standing Committee of the National People's Congress (NPCSC). However, the Basic Law does envisage two types of members, permanent and *ad hoc*, the latter under *Article 82 of the Basic Law* the court 'may as required invite judges from other common law jurisdictions to sit on the CFA'. This provision reflects the agreement in the Joint Declaration, when China was extremely conciliatory, dropping its original proposal that the CFA should sit in Beijing and agreeing to overseas judges. It was realized that judges of the highest calibre would be necessary to replace the Privy Council, and that the **presence of overseas judges would assure the business community as well as enable Hong Kong to keep up with developments in the common law.** It was also considered by some people that the **participation of eminent overseas judges would enhance the court's prospects of independence.**

The Hong Kong government was anxious to establish the CFA well before the transfer of sovereignty in order to ensure continuity (but also undoubtedly so as to influence decisions on

its structure and jurisdiction). Discussions began in Joint Liaison Group (**JLG**), which is **set up for the purpose of consultations between China and Britain on the implementation of the Joint Declaration and 'matters relating to the smooth transfer of government in 1997'** (*article 5 of Basic Law and Annex II of the Joint Declaration*)) in 1987 but it was only in September 1991 that an agreement was reached. It provided that the CFA would consist of five judges - the Chief Justice and three permanent members of the court, and an additional judge appointed ad hoc from one of two lists, of Hong Kong retired or serving judges, and oversea judges from common law jurisdictions. The agreement came under severe criticism from both branches of the legal profession (with which there was no effective prior consultation) which issued a joint public statement that the agreement was inconsistent with the Joint Declaration and the Basic Law (13 October 1991) as under it, it would be perfectly possible that no overseas judge would sit on a case, the autonomy of the CFA to decide on overseas judges would be undermined, and the independence of the members would not be adequately secured. There was also considerable public disquiet, particularly among politicians. The agreement could only be implemented through an ordinance, enacted by a legislature in which the government had lost its automatic majority after the September elections (which for the first time provided for a direct constituency elections). In December the Legislative Council rejected the agreement.

However, **in 1994 the government revived the proposals and prepared a draft bill.** The Bar Council maintained its opposition but the majority of the members of the Law Society changed their earlier opinion and supported the bill (even though most of them took the view that it was not entirely consistent with the Joint Declaration and Basic Law). The government carried out one of its most intensive campaigns and lobbying. However, it agreed to some changes in the draft to accommodate several points raised by the Preliminary Working Committee (demonstrating that the government was more concerned to placate the PRC than the people of Hong Kong). The government argued that the bill was consistent with the Joint Declaration and the Basic Law and issued a legal opinion of the UK government in support. But the government relied less on legal arguments than on the necessity to have a court functioning before the transfer of power - 'to avoid a legal vacuum' - using the hoary claim that it was 'difficult to overestimate the **contribution of a respected, efficient and impartial common law system to the overall success of Hong Kong as an international commercial, financial, and service centre'**, any erosion of which 'such as by the avoidable creation of a judicial vacuum, is likely to upset the delicate balance which maintains **business and investor confidence in Hong Kong in the run-up to 1997 and beyond.' The bill was passed after a tense debate in the Legislative Council and signed into law in August 1995.**

The Hong Kong Court of Final Appeal Ordinance (No.79 of 1995) is a curious law for though it was justified as necessary to establish the new appellate system as soon as possible, it did not come into effect until after the transfer of sovereignty Moreover, curiously, the terminology is relevant only to pre-transfer constitutional system, with references to the Governor and the UK government. The appointment of judges would therefore be made only after the HKSAR had been established, in accordance with the Basic Law. They would be appointed by the Chief Executive on the recommendation of an independent commission - the **Judicial Officers Recommendation Commission** - composed of local judges, persons from the legal profession and eminent persons from other sectors (*Article 88 of the Basic Law*). PJ (a minimum of three). may be appointed from the previous Supreme Court or from persons who had served on it in the past, or from legal practitioners with at least 10 years experience in Hong Kong (*s. 12(1) & (2) of the HKCFA Ordinance*), thus ruling out appointments from outside Hong Kong which were demanded by the Bar Council. The restriction of judges to those in Hong Kong would also seem to contravene *Article 92 of the Basic Law* which allows the HKSAR to recruit judges from other common law jurisdictions. NPJ may be drawn from past members of the Court or past or present members of the Court of Appeal or legal practitioners with at least ten years experience in Hong Kong; they need not be ordinarily resident in Hong Kong (*s.12(3) of the HKCFA Ordinance*). The list of overseas judges will be drawn from judges or retired judges of courts of unlimited jurisdiction of either civil or criminal jurisdiction, who had no previous judicial appointment in Hong Kong and are non-residents (*s.12(4) of the HKCFA Ordinance*). Both lists, whose membership is not to exceed 30, were to be drawn up by the Governor on the recommendation of the Judicial Officers Recommendation Commission; their appointments are for three years. Which of them is asked to make the fifth member in a case would depend on the CJ (*s.16 of the HKCFA Ordinance*). So far every substantive case heard by the CFA has had a distinguished overseas judge on it (of which there eight in 1998, drawn from the UK, Australia and New Zealand).

In only one instance is there is an appeal as of right to the Court of Final Appeal - in **civil matters** where the disputed question involves $1,000,000 or more (raised from the Privy Council rules of $500,000) (*s.22(1)(a) of the HKCFA Ordinance*). In other **civil matters leave has to be obtained from either the Court of Appeal or the CFA if in its view the 'question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to the Court'** (*s.22(1)(b) of the HKCFA Ordinance*). All criminal appeals are by leave of either the CFA or the lower court --------- **Only the PJ decide on applications for leave** (*s.18 of the HKCFA Ordinance*). **Under the previous system the Court of Appeal** and the Privy Council gave leave respectively (in the years

1990-94, there **were 73 applications, of which only 22 were allowed), and it is feared that the narrow terms of the ordinance may mean that there would not be enough work for the CFA.**

So what have the British and Hong Kong governments gained through securing the passage of the Ordinance, in return for giving up the flexibility inherent in Article 82 of the Basic Law? **The principal gain as seen by them is that the ordinance would avoid a 'legal or judicial vacuum', and thus maintain the rule of law and reassure the business community (somewhat it is always the business community rather than the general public for whose benefit the UK and Chinese governments want to promote the rule of law).** It is doubtful if these 'gains' are of any great significance, especially if one considers the price paid for them (not only in terms of flexibility of the composition of the CFA). For the avoidance of the 'vacuum' is less the result of the passage of the Ordinance than of the **agreement between the UK and China of 9 June 1995 under which the UK accepted the eight points of the Political Affairs Sub-Group of the Preliminary Working Committee (PWC),** particularly in relation to the appointment of the judges of the CFA. The Basic Law provisions for the appointment of the CFA judges are that they are to be appointed by the Chief Executive on the recommendation of an independent commission (Article 88 of the Basic Law) and the CJ has additionally to be endorsed by the Legislative Council (*Article 90 of the Basic Law*). This attempt at independent appointment of the judges is undermined by the recommendations of the **PWC** which provide for a key role for the Chief Executive designate in appointments to the CFA. It was subsequently agreed that he would appoint members of the Judicial Officers Recommendation Commission designate and would chair the first session of the commission at which the CJ would be appointed. Thereafter the CJ would chair the commission which would proceed to appoint other judges. The nomination of the CJ would be endorsed by the Provisional Legislature. The appointments of judges of the CFA and the Chief Judge of the High Court were confirmed in the Reunification Ordinance after these steps were followed."

Moreover, **after reading all the reasons to review and amend the Ordinance as said in my proposal letters of 22.09.01, 15.09.01, 4.09.01, 20.08.01, 1.08.01, 4.07.01, 27.06.01, 18.06.01 & 11.04.01 addressed to the Administration and the Panel,** it is reasonable to come to a conclusion that **<u>the basis to amend the Ordinance are strong and solid.</u>**

Main reasons for amending the Ordinance include:

1. As said in my letter of **22.09.01,**

   "It lacks sound reasons for the newly set-up Hong Kong Court of Final Appeal with much less experience than Judicial Committee of Privy Council in

handing down sound and well-reasoned judgment has a provision of ordinance stating that "***the decision of the Appeal Committee and not itself subject to appeal*****". Pursuant to this provision of the ordinance, mistakes made in the judgments of the Appeal Committee cannot be rectified and further petitions seeking a leave (or second application for leave to appeal to CFA)."**

2. As said in my letter of **22.09.01,**

"In the other jurisdictions such as United Kingdom & Australia, which have much longer history of common law tradition than the HKSAR, **second application for leave to appeal to the top court is permitted."**

(see Judgment of *Buttes Gas v. Hammer* (H.L.(E.) [1992] A.C. 888;
Judgment of *Vasquez & O'Neil v. The Queen* [1994] 1 W.L.R. 1304, P.C.; and
Judgment of *Cachie v. St. George Bank Ltd.* [1993] 68 ALJR 124, HC of Australia)

3. As said in my letter of **22.09.01,**

"That the **jurisdiction of the House of Lords (U.K.) as to points of facts and law to grant leave to appeal, being similar to special leave in civil cases granted by Judicial Committee of Privy Council** in respect of **'the practice of the Judicial Committee of the Privy Council to grant leave to appeal unless the case raises either a far-reaching question of law or matters of dominant public importance ---------- '** and
the **judgment of** *Johnson v. Gore Wood & Co.* **handed down by House of Lords (U.K.) on 14 December 2000,** which ***overturn decision of the Court of Appeal dismissing the action as an abuse of process of the court,*** **strongly suggests that leave to appeal to the CFA in the other jurisdictions can be granted for action mechanically dismissed by Court of Appeal** on the ground of '***res judicata***' **(complex point of law and facts involved in the case,** which is therefore ***a matter of general or public importance*****).**

4. As said in my letter of **22.09.01,**

"The existing appellate system is inadequate in promoting justice and change to the system is therefore necessary.

A good example is my application for leave to appeal to the CFA was **not** heard fairly and justly by the AC(PJ are Hon Mr. Justices Ching, Litton and Bokhary) and was denied mainly on the ground of '***there is no room for any argument based on questions of abuse of process of court short of res judicata, the parties and the cause of action being precisely the same in each other***' as referred to **Determination of the AC**

in FAM V 30/1999 dated 19.01.00 **is not a sound, fair, just and well-reasoned judgment,** being ***inconsistent with matters of fact of the case and contradictory to common law cases enclosed in the submissions*.**"

5. As said in my letter of **22.09.01,**
"It is **Against the principle of justice** that,
in the Hong Kong Court of Final Appeal, there is no basis to re-open the leave application.
A good example is **a second application for leave to appeal to CFA,** which was ***re-listed in the light of the mistakes made in the Determination of the AC in FAM V 30/1999 dated 19.01.00,*** **was dismissed by the AC** (CJ Mr. Justice Andrew Li, and PJ Mr. Justices Litton and Bokhary) **on 28 July 2000 on the grounds that there is no basis to re-open the leave application.**"

6. As said in my letter of **15.09.01,**
"According to ***s.2 JUDGMENTS AS GIVING RISE TO ESTOPPELS IN SUBSEQUENT PROCEEDINGS*** of ***Chapter 38 JUDGMENTS*** adapted from **PHIPSON ON EVIDENCE** (15th edition),
***[*<u>**All judgments are impeachable on certain grounds**</u>
A judgment will **not** provide the foundation for an estoppel **if it can be successfully assailed on one of the following grounds:**

a) <u>**Not final**</u>
Finality does not depend on whether a decision can be appealed. A decision is final if it '***is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction***'
(*D.S.V. Silo-und Verwaltungsgesellschaft mb H. v. Senar (Owners), The Sennar (No.2)* [1985] 1 W.L.R. 490, HL, per Lord Diplock)
--------- A decision will not be final if it was reversed on appeal, ------ The rule that a judgment is open to challenge unless final is of importance principally in other proceedings on different substantive questions between the same parties. It also has the important practical effect that the failure of an interlocutory application is no bar to its renewal. Thus, the fact that an application for summary judgment has failed does not mean that the plaintiff is forever barred from renewing his application, at any rate if further material is put before the court.
(*Wagstaff v. Jacobowitz* [1884] W.N. 17)

An extreme example of this principle at work occurred in *Buttes Gas & Oil Co. v. Hammer* [1982] A.C. 888, HL where the ***House of Lords in 1975 refused leave to appeal against a decision of the Court of Appeal, but in 1980 granted leave to appeal out of time from the very same decision, there having been another decision of the Court of Appeal on an issue between the same parties where leave to appeal was granted.*** **----------]"**

7. As said in my letter of **15.09.01 & 22.09.01,**
"As applicant for leave to appeal to CFA, I have **filed and served submissions** in line with the **principle of abuse of process of the court** explained in ***Ch. 38 Judgments*** (adapted from ***PHIPSON ON EVIDENCE.*** 15th edition) and judgments of *Bradford & Bingley Society v. Seddon* (C.A.) [1999] 1 W.L.R. 1482 and *Johnson v. Gore Wood & Co.* handed down by House of Lords (U.K.) on 14 December 2000. However, **in the absence of the facts and the relevant authorities being reviewed in** lucid detail, my application was refused by the AC and the **filing of Notice of Motion for leave to appeal (out of time) on 11th November 2000 was also refused."**

8. As said in my letter of **20.08.01,**
"The **legislation of clause 18(3) of the HKCFA Bill (1995) is similar to the legislation of clause 7 of the Intellectual Property (Miscellaneous Amendments) Bill 2000** in respect of **both Bills are Governments Bills, both clauses were not scrutinized by the Bills Committee and were not considered in the** '*Report of the Bills Committee to study the HKCFA Bill dated 13 July 1995*' and '*Report of the Bills Committee on Intellectual Property (Miscellaneous Amendments) Bill 2000 dated 22 June 2000'*.

It is therefore **a matter against public interest** if
the **Administration made Statement concerning the suspension and amendment of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000,** which *came into effect on 1 April 2001*, in the **Special Meeting of LegCo Panel on Committee & Industry on 12 April 2000** saying that --------- and **refuses to make Statement concerning the proposed amendment of the Ordinance,** which *came into effect on 1 July 1997*, **in the Meeting to be held in the Panel."**

9. As said in my letter of **1.08.01,**
"Exception to the general rule of legal policy that '*amendments to the law are not made retrospectively*" should be allowed when amendment of Ordinance is made by the legislative body and mistakes made in the decisions of the AC can therefore be

rectified because **it is a matter of public interest if the litigants are bound by the Ordinance,** which ***was not properly drafted by the Administration and was not scrutinized and debated before its passage through the Bills Committee with amendments being established by the LegCo's House Committee, Resumption of Debate on Second Reading and Third Reading in the Legislative Council and became law when it was signed and promulgated by former Governor Chris Patten and then gazetted as an ordinance*.**"**

10. As said in my letter of **1.08.01,**
"It is **a matter against interest of the HKSAR if the Administration amend only the Hong Kong Court of Final Appeal Ordinance (Cap 484) to provide for civil appeals to be brought directly from the Court of First Instance to the Court of Final Appeal** (which **is based on the well-established English law** - *Administration of Justice Act 1969* **and practices & procedures of the House of Lords and is a second source of law in the HKSAR)** and **refuse to amend the Ordinance** (which is **not based on the well-established English Law** - *Judicial Committee Act* **and practices & procedures of Judicial Committee of Privy Council and contravene to Article 87 of the Basic Law (the primary source of law in the HKSAR)."**

11. As said in my letter of **1.08.01,**
"The **Administration misled the public and the Legislative Councillors that there are no difference between the proposed legislation and the law governing Judicial Committee of the Privy Council in respect of *'clause 18(3) of the HKCFA Bill (1995)'*, *'Further Petition Seeking a Leave'*, *'Re-Hearing'*, *'Fresh Evidence'* and *'Rectifying Mistakes in Judgments and Orders'* and the early enactment of the HKCFA Bill (1995),** which is ***only partly based on the established practices and procedures of the Judicial Committee of the Privy Council,* will end the uncertainty about the form of the CFA to be set up in H.K. and help to maintain public and international confidence in the CFA and in our judicial system as a whole.**

The **details** are:

a) In the ***'PAPER ON HONG KONG COURT OF FINAL APPEAL BILL'*** (which **sets out the difference between the law governing the Judicial Committee of the Privy Council and the proposed legislation in respect of the HKCFA)** issued by Attorney General's Chambers on 3rd July 1995,
I cannot find any explanation on the difference between *Judicial Committee Acts 1833 to 1915*, the *Judicial Committee (General Appellate Jurisdiction) Rules Order, 1982* - **the law governing Judicial Committee of the Privy Council and clause**

18(3) of the HKCFA Bill (1995) where it states
'***the decision of the AC shall be final and not itself subject to appeal***'.
Also in the said '***PAPER ON HONG KONG COURT OF FINAL APPEAL BILL***', **I cannot find any reason provided by the Administration to explain why special features of the law governing the Judicial Committee of the Privy Council** such as ***'Further Petition Seeking a Leave', 'Re-Hearing', 'Fresh Evidence', 'Subpoena Witnesses'*** and ***'Rectifying Mistakes in Judgments and Orders'*** **are not included in the proposed legislation in respect of the HKCFA.**

Moreover in the **well-established English law governing Judicial Committee of the Privy Council** - the *Judicial Committee Acts 1833 to 1915* and *the Judicial Committee (General Appellate Jurisdiction) Rules Order, 1982*,
which was ***based upon by the Administration to put forward the proposed legislation in respect of the HKCFA,***
I cannot find any provision stating that '*the decision of the AC shall be final and not itself subject to appeal'*.

b) According to the **conclusion of the speech delivered by Attorney General** (who represent the Administration) **in Second Reading of the HKCFA Bill on 14 June 1995,** ***'the HKCFA Bill is based on the established practices and procedures of the Judicial Committee of the Privy Council'*.**

However, there is **no evidence that the Judicial Committee of Privy Council has the established practices and procedures** (which is based upon by the Administration to set up the CFA) **in accordance with a provision of English Law that,** '***the decision of the AC shall be final and not itself subject to appeal***'**.**

Accordingly there are **no basis the Administration drafted clause 18(3) of the HKCFA Bill (1995)** where it states ***'the decision of the AC shall be final and not itself subject to appeal'*.**

c) **The legislation of clause 18(3) of the HKCFA Bill (1995) is bad.**
The **said clause of the Bill (1995)**, which **was not included in the Legislative Council Brief on the Bill** issued by Administration Wing of the Chief Secretary's Office on 14.09.95,
in the agenda of the meetings of Bills Committee held on 22.06.95, 26.06.95, 27.06.95, 3.07.95, 4.07.95, 7.07.95, 10.07.95 & 12.07.95 and

in the agenda of the Resumption of Debate on Second Reading (which was moved on 14 June 1995) **and passage of the Bill through committee with amendments, has received its third reading became law when it was signed and promulgated by former Chris Patten and then gazetted as an ordinance."**

12. As said in my letter of **1.08.01,**

"The **Administration, which is empowered to *'draft and introduce bills, motions and subordinate legislation'*** (article 62 of the Basic Law), is in a position to amend the Ordinance because **under articles 8, 11 & 18 of the Basic Law, the Primary source of law in the HKSAR is the Basic Law** (which is not only a source of law in itself, but it also regulates other sources, as it is the supreme law and ***'no law enacted by the legislature and of the HKSAR will contravene this law'*****) and the second source of law in the HKSAR** is ***'the laws previously in force as provided in Article 8'***

(* Article 8 of the Basic Law defines 'the laws previously in force' **as the common law, rules of equity, ordinances, subordinate legislation and customary law)** and **under article 87 of the Basic Law and article 10 of the Bills of Rights** (*'the right to a fair trial without delay and the presumption of innocence are guaranteed'* and *'every one should be entitled to a fair and public hearing by a competent and independent and impartial tribunal by law'*), **the legal rights in civil matters are protected and effectively covered."**

13. As said in my letter of **1.08.01,**

"The **practices and procedures of the Hong Kong Court of Final Appeal are incompatible with the well-established practices and procedures of the Judicial Committee of the Privy Council** in respect of ***'Further Petition Seeking a Leave', 'Re-Hearing', 'Fresh Evidence'*** and ***'Rectifying Mistakes in Judgments and Orders'.***

There are **no reasonable grounds why the newly set-up HKCFA with much less experience than Judicial Committee of Privy Council in handing down sound and well-reasoned judgment has a provision of ordinance** stating that ***'the decision of the AC and not itself subject to appeal".*** Tragically, **pursuant to this provision of the ordinance, mistakes in judgments of the AC cannot be rectified and further petitions seeking a leave on the grounds of unfair trial is impossible.** Accordingly, because of the Ordinance - ***second source of law in the HKSAR,*** **which contravene to article 87 of the Basic Law** - ***primary source of law in the HKSAR,*** **the legal rights in civil matters cannot be protected and effectively covered.**

The distorted form of the Hong Kong Court of Final Appeal, which is ***not based on the well-established practices and procedures of the Judicial Committee of Privy Council.*** **has damaging effect on public and international confidence in the judicial system of the HKSAR.**

It is **a duty of the Administration** (which **is empowered by Basic Law to *'draft and introduce bills, motions and subordinate legislation')* to take action to remedy the situation*, otherwise the contribution of respected, efficient, effective and impartial common law, capable of upholding the rule of law and safeguarding the right and freedom of the individual in accordance with the Basic Law to the overall success of the HKSAR as an international, commercial, financial and service centre cannot be maintained.*"**

14. As stated in my letter of **1.07.01**,

"It is **a duty of the HKSAR government to maintain the contribution of respected, efficient, effective and impartial common law system, capable of upholding the rule of law and safeguarding the right and freedom of the individual in accordance with the Basic Law to the overall success of HKSAR as an international commercial, financial and service centre.**
Accordingly **it is a matter against interest of the HKSAR** if the **government amend only HKCFA Ordinance (Cap. 484) to provide for civil appeals to be brought directly from the Court of First Instance to the CFA** (which is ***based on the well established English Law - Administration of Justice Act 1969 and practices & procedures of the House of Lords and is a second source of law in the HKSAR*) and refuse to amend the Ordinance** (which is ***not based on the well-established English Law - Judicial Committee Act and practices & procedures of Judicial Committee of Privy Council and contravene to article 87 of the Basic Law - primary source of law in the HKSAR).***"*

15. As said in my letter of **1.07.01**,
"Even **6 years** after passage of the HKCFA Bill (1995), the **valid comment of Hon Martin LEE (李柱銘議員), Queen's Counsel and Members of the Bills Committee** saying that **'I have felt throughout the deliberations at every meeting of the Bills Committee, that we were being rushed.** There were times that the Administration, and this happened very frequently, had to prepare papers for Members and they did a very good job. ---------- They have been working very hard to give us papers. ---------- **We had no time to read them very often. We had to consider them**

immediately, and the most notice we had, I suppose, would be about 24 hours. We struggled very hard under a very diligent Chairman, Mr. Simon YIP, and I have to say, Mr. President, that **after these nine meetings I cannot feel confident, in spite of my legal training, that we have covered every possible point with the sort of attention that a Bill of this nature deserves.' <u>is useful to the amendment of Ordinance</u>."**

16. As said in my letter of **1.07.01,**
"As said in my letter of **11.04.01** addressed to the Secretary for Justice's Office, I have also told the Dept. of Justice that '**I strongly believed that, as a result of progress be made in the legislation and proper amendment of the Ordinance, the operation of the rule of law in the HKSAR can be improved, the quality of the rulings of the court can be assured, the wrongs in Determination of the AC of the CFA** (which show that ***the judges are unable to discharge the duties in accordance with the Basic Law to ensure that their rulings are consistent with matters of fact of the case and are not contradictory to common law cases enclosed in the submissions)*** **can be corrected and confidence in the integrity, credibility, and high reputation of the legal system, which underpins the stability and prosperity of HKSAR, can be maintained.'"**

17. As said in my letter of **18.06.01**,

"The **circumstances of case clearly meet the basic requirement for amending existing law as suggested by Prof. Peter Wesley-Smith in his book named** '*An Introduction to the Hong Kong Legal System'* - in the situation that **a problem has arisen in the existing law exposed by a judgment in the courts, a decision may be taken to draft a bill."**

18. As said in my letter of **11.04.01**,
"Fourth, the **unfortunate case** (which ***relates to the public policy that litigants should not generally be permitted to re-open a decision in an earlier case)*** would **hurt confidence in the integrity, credibility and high reputation of Hong Kong's legal system** in the circumstances that the **judges are unable to discharge the duties in accordance with the Basic Law to ensure that their decision is strictly consistent with matters of fact of the case and is not contradictory to Common Law cases enclosed in the submissions** and
pursuant to the Ordinance, the **obvious wrongs in the Determination of the AC of the CFAppeal in FAM V 30/1999 dated 19.01.00 cannot be corrected** and

the **wrong decision of the AC in FAM V 30/1999 dated 19.01.00**, which is *inconsistent with matters of fact of the case and contradictory to Common Law cases enclosed in the submissions,* is **final.**

According to **Exhibit No. 4** (titled "*My letter of **11.02.01** in response to the letter of 8.02.01 from Hon Legislative Councillor EU Yuet-mee*") attached, **it is clear that** the **rule of public policy that litigants should not generally be permitted to re-open a decision in an earlier case otherwise there will never be an end to litigation is not well-established. ---------- "**

Accordingly, **in view of the strong basis to amend the Ordinance, it lacks reasonable grounds the Administration says in paragraphs 7 and 14 of the Submission in September 2001** that

"The threshold for the AC to grant leave is to establish a 'reasonably arguable case'. In cases where even this reasonable threshold cannot be passed, there should be no reason for the whole matter to be heard by the CFA again. To require the CFA to, unnecessarily, review decisions made by other judges would result in delay in the hearing of other cases. It is a general legal policy principle that there should be a limit for a finality of legal proceedings. Providing another layer of appeal for case that are unlikely to be meritorious would contravene such principle and does not serve the public interest." and
"In conclusion, the Administration believes there is no sound reason for providing an appeal against the decision of the AC. The existing arrangement ensures that the applications for leave to are heard fairly by judges of high standing who sit at the apex of the court system and has worked well since its inception. It is therefore considered that the existing appellate structure is adequate in promoting justice and change to the system is neither necessary nor possible."

Yours faithfully,

Chan Siu Lun
(The Member of Public)