基本法二十三條關注組意見書
上訴反對取締的特殊程序和安排
關於處置被取締組織的資產

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1. 基本法二十三條關注組(“簡稱關注組”)並不接受政府當局提出有關反對取締的特殊上訴程序（簡稱“上訴程序”）及有關處理被取締組織資產安排的建議（簡稱”資產安排”）。關注組認為此兩項條文均是不必要的，亦超出基本法二十三條規定的範圍和不符合《基本法》所保障的基本自由。關注組促請立法會不要支持通過有關建議。

2. 以下是關注組在本文第一段的前提下提出的意見：

I. 上訴程序

第 8D 條

3. 第(3)款

有關舉證責任的條文：由於上訴程序屬於刑事或類似刑事的性質，條文必須清晰訂明舉證責任須與所指稱罪行的嚴重程度相稱，即法庭需在無合理疑點，或高於相對可能性的衡量，才能信納有關證據。

4. 第(6)款

法庭可接納按照法律通常不被接納的證據。為確保證據的可靠性，應沿用現行《證據條例》（香港法例第 8 章）所確立的模式，引入符合此條例第 47(1)(a)及(b)條的附帶條款。

5. 上訴程序應賦予法庭與《證據條例》第 49 條在衡量證據份量方面相同的酌情權，以確保司法公正。 有關第 47 及 49 條的詳細條文，見附錄甲。

6. 第(7)款

上訴機制僅適用於牽涉法律問題的規定不合情理，應予廢除。當局並沒有就此限制提出可靠和合理的理由。當一個人的權利可能會被嚴重削弱時，這人可向法庭提出上訴的基本權利絕不應受到規限。

第 8E 條

7. 建議中的條文賦予保安局局長權力為上訴程序設限，但保安局局長實際上是檢控官，因此，由她/他制定上訴程序是違反自然公義和法治的原則。

8. 政府應成立一個包括律師和學者的獨立組織，擔任行政長官顧問，就制定有關的上訴規則提供意見。

9. 第(3)款

建議的上訴程序容許聆訊在上訴人或其法律代表缺席的情況下進行，並可向上訴人或其法律代表隱瞞證據，有違基本法及自然公義的原則。

10. 正如一些英國及其他地方的著名法律專家多次提出，政府當局是錯誤引用英國或加拿大的入境法例或反恐規例。無論如何，現時的法律對於保障資料，以維護公眾利益，已有足夠的法律保障。

11. 政府當局一直堅稱必須由特定的代訟人代表上訴人出庭（我們強烈反對此點，因這違反《基本法》第三十五條）。如果政府一意孤行，我們認為這位特定的代訟人應是由大律師公會提名的大律師，以確保其中立性，以及其能力能足以應付此類嚴重控罪。

II. 資產安排

12. 充公或接管被取締組織的資產並不合理。我們現行法律的一個基本原則是，除非能證明資產是犯罪得益，否則不會被充公或接管。

13. 再者，沿用《公司條例》（第 32 章）第 XIIIA 部的機制並不恰當。據我們了解，有關的程序從沒行使過。該程序並未照顧債權人不能在限定短時間內證明債項的情況。《公司條例》第 290 條訂明，債權人可要求法庭作出頒令，宣布某公司的解散為無效，以讓債權人可追討該公司解散後兩年內的債項。但由於該條例的第 360D 條已明確列明第 290 條並不適用，因而可能令到那些與被取締組織並無關連的債權人，不能獲得應得的補償。

14. 根據第 XIIIA 部被取締的組織，未能與被剔除的非註冊公司一般，可按照《公司條例》的第 X 部進行清盤，從而避過了第 360C 條不公平的安排。

15. 另一問題是附表 2 第 3 條所指的“其它類別的組織”的定義並不清晰，這很可能包括合夥公司。若屬此情況，按照第 3 條(2)款，合夥公司便可能按照《公司條例》第 X 部當作非註冊公司被清盤，繞過了《合夥條例》（第 38 章）所訂明的清盤程序。此兩者的主要分別是合夥人即使在合夥已解散後，仍須償還該合夥組織未解散前所欠下的債項，但倘該組織被視為根據《公司條例》所指的公司，合夥人本身便可能毋須償還有關債務。.

16. 無論如何，取締的行動不應始於所有挑戰取締決定的法律程序都已完成以前。

由此，第 1 條(2)款及第(3)條(2)款所用的 “可”字，將引致更多不明確和不必要的法律訴訟。

17. 另外，從保障第三者利益的角度來看，必須訂立適當程序，在一個組織正式解散*前*完成所有清盤程序，從而可確保第三者的利益在組織正式解散前可獲合理的保障。

日期：二零零三年六月十九日

資深大律師湯家驊

47. 傳聞證據的可接納性

(1) 在民事法律程序中，不得以任何證據屬傳聞為理由而摒除該證據，但在以下條件均獲符合的情況下，則屬例外——

(*a*) 將予援引的該證據是用以針對某一方的，而該一方反對該證據獲接納；及

(*b*) 法庭在顧及該個案的情況下，信納該證據的摒除並不損害秉行公正的原則。

(2) 法庭——

(*a*) (如屬在陪審團席前進行的民事法律程序) 可在有關法律程序開始時並在陪審團不在場的情況下；

(*b*) (如屬任何其他民事法律程序) 可在有關法律程序完結時，

裁定是否以任何證據屬傳聞為理由而摒除該證據。

(3) 如任何證據在沒有本條的情況下仍會屬可接納的證據，則本部並不影響該證據的可接納性。

(4) 如任何證據在沒有本條的情況下仍會屬可接納的證據，則儘管該證據憑藉本條亦屬可接納的證據，第 48 至 51 條的條文並不適用於該證據。

(由 1999 年第 2 號第 2 條代替)

[比照 1995 c. 38 s. 1(1), (3) & (4) U.K.]

47A. 擬援引傳聞證據的通知

(1) 法院規則可訂立條文——

(*a*) 指明第 (2) 款所適用的傳聞證據；及

(*b*) 規定在第 (2) 款適用的情況下，該款所施加的責任須以何種方式履行 (包括履行該責任的時限)。

(2) 除第 (3) 款另有規定外及在不抵觸第 (4) 款的條文下，在民事法律程序中擬援引屬第 (1)(*a*) 款指明的傳聞證據的一方，須向該法律程序中的另一方或其他各方——

(*a*) 發出載有該事實的通知；及

(*b*) (在接獲請求時) 提供該證據的詳情或與該證據有關的詳情，

而所須發出的通知或提供的詳情，須限於為使上述另一方或其他各方能處理任何因該證據屬傳聞而引起的事宜並且在有關情況下屬合理及切實可行者。

(3) 第 (2) 款的規定，可藉各方的協議摒除，而無論在任何情況下，須獲發給通知的人均可免除任何人履行發出該通知的責任。

47. Admissibility of hearsay evidence

(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay unless—

(*a*) a party against whom the evidence is to be adduced objects to the admission of the evidence; and

(*b*) the court is satisfied, having regard to the circumstances of the case, that the exclusion of the evidence is not prejudicial to the interests of justice.

(2) The court may determine whether or not to exclude evidence on the ground that it is hearsay—

(*a*) in the case of civil proceedings before a jury, at the beginning of the proceedings and in the absence of the jury;

(*b*) in the case of any other civil proceedings, at the conclusion of the proceedings.

(3) Nothing in this Part shall affect the admissibility of evidence admissible apart from this section.

(4) The provisions of sections 48 to 51 shall not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

(Replaced 2 of 1999 s. 2)

[cf. 1995 c. 38 s. 1(1), (3) & (4) U.K.]

47A. Notice of proposal to adduce hearsay evidence

(1) Provision may be made by rules of court—

(*a*) specifying hearsay evidence in relation to which subsection (2) shall apply; and

(*b*) as to the manner in which (including the time within which) the duties imposed by that subsection shall be complied with in the cases where it does apply.

(2) A party proposing to adduce in civil proceedings hearsay evidence which falls within subsection (1)(*a*) shall, subject to subsections (3) and (4), give to the other party or parties to the proceedings—

(*a*) such notice, if any, of that fact; and

(*b*) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(3) Subsection (2) may be excluded by agreement of the parties, and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) 沒有遵從第(2)款的規定，或沒有遵從根據第(1)(*b*)款訂立的規則，並不影響有關證據的可接納性，但法庭——

(*a*) 於考慮行使其在法律程序的過程方面及訟費方面的權力時，可顧及沒有遵從規定或規則此一事；及

(*b*) 可將沒有遵從規定或規則此一事，作為對按照第49條而給予有關證據的分量有負面影響的事宜而予以顧及。

(由1999年第2號第2條增補)

[比照1995 c. 38 s. 2 U.K.]

8. 傳召證人就傳聞陳述進行盤問等權力

法院規則可規定凡民事法律程序的一方援引由某人作出的任何陳述的傳聞證據，而並不傳召該人作證人，則——

(*a*) 該法律程序的其他任何一方在法庭許可下，可傳召該人作證人，並可就該陳述盤問他，猶如他已被首述一方傳召作證人一樣，並猶如該傳聞陳述是他的主問證據一樣；

(*b*) 該法律程序的任何一方可提出其他證據，以打擊或支持該傳聞陳述的可靠性，或打擊或支持該等其他證據的可靠性。

(由1999年第2號第2條代替)

[比照1995 c. 38 s. 3 U.K.]

9. 與衡量傳聞證據有關的考慮

(1) 在評估民事法律程序中某項傳聞證據的分量(如有的話)時，法庭須顧及任何能據以合理推斷該證據的可靠程度或不可靠程度的有關情況。

(2) 就第(1)款而言，法庭可尤其顧及以下各項——

(*a*) 設若要由援引有關證據的一方在援引該證據時交出作出原陳述的人為證人會否屬合理和切實可行；

(*b*) 原陳述是否在所述事宜發生或存在的同時作出；

(*c*) 該證據是否涉及多重傳聞；

(4) A failure to comply with subsection (2), or with rules under subsection (1)(*b*), shall not affect the admissibility of the evidence but may be taken into account by the court—

(*a*) in considering the exercise of its powers with respect to the course of proceedings and costs; and

(*b*) as a matter adversely affecting the weight to be given to the evidence in accordance with section 49.

(Added 2 of 1999 s. 2)

[cf. 1995 c. 38 s. 2 U.K.]

48. Power to call witness for cross-examination on hearsay statement, etc.

Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness—

(*a*) any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief;

(*b*) any party to the proceedings may call additional evidence to attack or support the reliability of the hearsay statement or to attack or support the reliability of that additional evidence.

(Replaced 2 of 1999 s. 2)

[cf. 1995 c. 38 s. 3 U.K.]

49. Considerations relevant to weighing of hearsay evidence

(1) In estimating the weight, if any, to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) For the purposes of subsection (1), regard may be had, in particular, to the following—

(*a*) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(*b*) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(*c*) whether the evidence involves multiple hearsay;

(*d*) 所涉人士是否有任何動機將事實隱瞞或作失實陳述；
(*e*) 原陳述是否經過編選，或是否聯同他人作出或是為某特別目的而作出的；
(*f*) 援引有關傳聞證據的情況，是否使人聯想到有人企圖妨礙該證據的分量的適當評估；
(*g*) 該一方援引的證據是否與其以往援引的任何證據相符。

(由 1999 年第 2 號第 2 條代替)
[比照 1995 c. 38 s. 4 U.K.]

50. 作證資格及可信性

(1) 傳聞證據在下述情況下，或在已顯示包含 (*a*) 段所述陳述的範圍內，或在其將由 (*b*) 段所述陳述加以證明的範圍內，不得在民事法律程序中獲得接納——

(*a*) 已顯示該證據包含一項陳述，而作出陳述的人在作出該項陳述時是沒有資格作證人的；或
(*b*) 該證據將由一項陳述加以證明，而作出陳述的人在作出該項陳述時是沒有資格作證人的。

(2) 除第 (3) 款另有規定外，凡在民事法律程序中援引傳聞證據而作出原陳述或作出藉以證明另一陳述的任何陳述的人並沒有被傳召作證人，則——

(*a*) 在該人被傳召作證人的情況下本可接納為打擊或支持該人作為證人的可信性的證據，可在該法律程序中為該目的而獲得接納；及
(*b*) 傾向於證明該人曾在作出上述陳述之前或之後作出與該陳述不相符的其他陳述的任何證據，可為顯示該人自相矛盾此一目的而獲得接納。

(3) 如在第 (2) 款所提述的人被傳召作證人而該人在接受盤問過程時否認某事的情況下，進行盤問的一方是不能夠就該事援引證據的，則不得根據該款就該事提供證據。

(4) 在第 (1) 款中，"沒有資格作證人" (not competent as a witness) 指任何人在心智或身體方面無行為能力，或對事物缺乏了解，以致該人在民事法律程序中沒有資格作證人。

(由 1999 年第 2 號第 2 條代替)
[比照 1995 c. 38 s. 5 U.K.]

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(*d*) whether any person involved had any motive to conceal or misrepresent matters;
(*e*) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
(*f*) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight;
(*g*) whether or not the evidence adduced by the party is consistent with any evidence previously adduced by the party.

(Replaced 2 of 1999 s. 2)
[cf. 1995 c. 38 s. 4 U.K.]

50. Competence and credibility

(1) Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is—

(*a*) shown to consist of; or
(*b*) to be proved by means of,

a statement made by a person who at the time he made the statement was not competent as a witness.

(2) Subject to subsection (3), where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness—

(*a*) evidence which if he had been so called would be admissible for the purpose of attacking or supporting his credibility as a witness is admissible for that purpose in the proceedings; and
(*b*) evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he had contradicted himself.

(3) Evidence shall not be given under subsection (2) of any matter of which, if the maker referred to in that subsection had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(4) In subsection (1), "not competent as a witness" (沒有資格作證人) means suffering from such mental or physical incapacity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings.

(Replaced 2 of 1999 s. 2)
[cf. 1995 c. 38 s. 5 U.K.]

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