# *立法會*
# *Legislative Council*

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LC Paper No. CB(2)1326/08-09
(These minutes have been seen by the Administration)

**Panel on Administration of Justice and Legal Services**

**Minutes of meeting**
**held on Monday, 23 February 2009, at 4:30 pm**
**in Conference Room A of the Legislative Council Building**

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| **Members present** | : | Dr Hon Margaret NG (Chairman)<br>Hon Albert HO Chun-yan (Deputy Chairman)<br>Hon James TO Kun-sun<br>Hon LAU Kong-wah, JP<br>Hon Miriam LAU Kin-yee, GBS, JP<br>Hon Audrey EU Yuet-mee, SC, JP<br>Dr Hon Priscilla LEUNG Mei-fun<br>Hon Paul TSE Wai-chun |
| **Member attending** | : | Hon CHAN Kin-por, JP |
| **Public Officers attending** | : | Item IV<br><br>Department of Justice<br><br>Mr Frank POON<br>Deputy Solicitor General<br><br>Ms Kitty FUNG<br>Senior Government Counsel<br><br>Item V<br><br>Department of Justice<br><br>Mr Frank POON<br>Deputy Solicitor General<br><br>Miss Amy CHAN<br>Senior Government Counsel |

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| **Attendance by invitation** | : | Item IV<br><br>Hong Kong Bar Association<br><br>Mr Raymond LEUNG<br><br>Ms Yvonne CHIU<br><br>The Law Society of Hong Kong<br><br>Mr Ludwig NG<br>Chairman of the Working Party on Recovery Agents<br><br>Ms Joyce WONG<br>Director of Practitioners Affairs<br><br>Item V<br><br>Hong Kong Bar Association<br><br>Mr Russell Coleman, SC |
| **Clerk in attendance** | : | Miss Flora TAI<br>Chief Council Secretary (2)3 |
| **Staff in attendance** | : | Mr KAU Kin-wah<br>Assistant Legal Adviser 6<br><br>Ms Amy YU<br>Senior Council Secretary (2)3<br><br>Mrs Fonny TSANG<br>Legislative Assistant (2)3 |

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**I. Confirmation of minutes of meeting**
[LC Paper No. CB(2)837/08-09]

The minutes of the meeting held on 16 December 2008 were confirmed.

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## II. Information papers issued since last meeting

2. Members noted that the following papers had been issued since the last meeting -

(a) Judiciary Administration's response on "Interest on Judgment Debts" raised at the Panel meeting on 24 November 2008 [LC Paper No. CB(2)677/08-09(01)];

(b) Administration's response on "Mode of Trial" raised at the Panel meeting on 13 January 2009 [LC Paper No. CB(2)756/08-09(01)];

(c) Judiciary Administration's paper on "Application for leave to appeal to the Court of Final Appeal" [LC Paper No. CB(2)796/08-09(01)];

(d) Administration's paper on "Subsidiary Legislation relating to "Privileges and Immunities Conferred on Consular Posts" [LC Paper No. CB(2)841/08-09(01)]; and

(e) Judiciary Administration's paper on issues relating to the implementation of the Civil Justice Reform [LC Paper No. CB(2)895/08-09(01)].

3. Regarding the paper referred to in paragraph 2(b) above, the Chairman suggested and members agreed to include the subject "Mode of trial" in the Panel's list of outstanding items for discussion.

## III. Items for discussion at the next meeting

[LC Paper Nos. CB(2)899/08-09(01) - (03)]

4. In accordance with the list of items tentatively scheduled for discussion in the current session [LC Paper No. CB(2)899/08-09(01)], members agreed to discuss the following items at the next regular meeting scheduled for 30 March 2009 –

(a) Five-yearly review of the criteria for assessing the financial eligibility of legal aid applicants; and

(b) Pilot Scheme on Mediation of Legally Aided Matrimonial Cases.

5. Members also agreed that the discussion on the item "Review of the jurisdiction of the Office of the Ombudsman", originally scheduled for March 2009, be deferred to the regular meeting in April 2009.

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**IV. Recovery agents**
[LC Paper Nos. CB(2)899/08-09(04) and (05)]

Briefing by the Administration

6. Deputy Solicitor General (DSG) briefed members on the recent developments in the measures taken by the Administration to address the problems caused by recovery agents (RAs) in respect of public education, law enforcement through investigation and prosecution and possible legislation, details of which were set out in the Administration's paper [LC Paper No. CB(2)899/08-09(04)]. DSG informed members that apart from the arrest of the 21 persons stated in paragraph 4 of the Administration's paper, another person had been arrested recently in connection with the illegal activities of RAs. The trial of the two persons charged with offences including maintenance and champerty would take place at the District Court in May 2009. The Administration would review the need for legislation pending the outcome of prosecution actions.

Views of the legal profession

*The Law Society of Hong Kong (the Law Society)*

7. Mr Ludwig NG, Chairman of the Working Party on Recovery Agents of the Law Society, said that while there had been progress over the past year in the areas of public education and prosecution, it seemed that the activities of RAs were still rampant. He pointed out that accident victims continued to receive touting leaflets from RAs at the offices of relevant Government departments such as the Labour Department and public hospitals notwithstanding the enhanced measures taken to counter the activities of RAs in such premises. He informed members that the Law Society was considering launching a publicity campaign to increase public awareness of the risks of engaging RAs. The Law Society would continue to provide information they had received from clients on RAs to the Department of Justice (DoJ) for follow-up actions.

*The Hong Kong Bar Association (the Bar Association)*

8. Mr Raymond LEUNG of the Bar Association urged the Administration to start immediately reviewing the need for legislation in respect of RAs rather than waiting for the outcome of the prosecutions in May 2009. Referring to the Secretary for Justice's reply to the written question on the operation of RAs raised at the Council meeting on 15 June 2005, wherein it was stated that up to June 2005 there had been no case in which sufficient evidence of an offence by a RA had been produced to DoJ to warrant a prosecution, Mr LEUNG considered that the Administration should review the past cases to identify the difficulties encountered by the Police and DoJ in instituting prosecutions and to examine the extent to which legislation could help address such difficulties. Mr LEUNG further said that during past discussions on the subject, members and the two professional bodies had expressed support for the expansion of the Supplementary Legal Aid Scheme (SLAS) to curb the demand for the services of RAs, and enquired about the progress in this regard.

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Discussions

*Possible legislation against RAs*

9. In response to the Chairman's query on the content and objective of possible legislation relating to RAs, DSG said that in a judgment delivered in February 2007 (FACV9&10/2006), the Court of Final Appeal (CFA) had expounded the legal development of and the current approach to the common law offences of maintenance and champerty. It was pointed out in the judgment that various public interest considerations had resulted in the gradual shrinkage in the scope of the offences of maintenance and champerty. The upcoming trial in May 2009 would shed further light on the court's interpretation of the requisite elements of these common law offences. If introduction of legislation was deemed necessary, the Administration would have regard to these judgments in formulating the elements and scope of the relevant offences.

10. The Chairman recalled that when the subject was discussed a few years ago, the Administration had indicated that it would consider whether legislation should be introduced to regulate RAs. Members had then expressed reservation about such legislative approach, as regulating the operation of RAs was tantamount to legalizing them.

11. DSG responded that initially the Administration had indeed considered introducing legislation to regulate the activities of RAs. However, having made reference to the experience in the United Kingdom where legislation had been introduced to regulate the activities of RAs, the Administration came to the view that regulating the operation of RAs might not be an effective means to achieve the aim of protecting the interest of the public against abuse by RAs. In reviewing the need to legislate against RAs, the current approach adopted by the Administration was to define more clearly the elements of the common law offences of maintenance and champerty with reference to the relevant case law, including the important judgment given by CFA in February 2007 (FACV9&10/2006) and the upcoming trial in May 2009, with a view to reviewing whether the elements of the common law offences had posed any difficulties to the Police/DoJ in their investigation/prosecution work.

12. Mr Paul TSE shared Mr Raymond LEUNG's view that the Administration should embark on the review of the need for legislation immediately rather than awaiting the outcome of the prosecution actions in May 2009. In his view, the review should cover whether the existing approach to the offences of maintenance and champerty in common law was adequate in remedying the mischief in connection with the illegal activities of RAs. DSG undertook to commence the preliminary research work on the review.

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*Law enforcement*

13. In response to Mr Raymond LEUNG's comment that so far only two persons had been charged with offences relating to maintenance and champerty, DSG explained that the Police had encountered difficulties in gathering evidence during investigations. In some cases, the victims had declined to assist in the investigations. He added that apart from the two charged persons, the Police were conducting investigations of certain suspected cases in connection with the other arrested persons. To his understanding, the Police's investigation work had focused in particular on the operation of certain RAs. Prosecution action would be initiated once there was sufficient evidence to do so.

14. The Deputy Chairman asked whether and if so how the arrest of persons in connection with the illegal activities of RAs would affect the on-going proceedings of their clients. DSG said that so far all the cases being investigated, including the two charged persons whose trial would take place in May 2009, involved victims whose claims had been completed and who had suffered substantial loss of their damages to RAs. Should there be any cases involving on-going proceedings in future, the Administration would liaise with the Law Society to provide any necessary assistance to the victims concerned as appropriate. Mr Ludwig NG remarked that the victims affected would probably request to change their lawyers if the responsible persons of the RAs they patronized had been arrested, even if the lawyers who had been handling their claims denied any association with the RAs concerned.

15. The Deputy Chairman further sought confirmation on whether persons who engaged the services of RAs had committed any offences. DSG replied in the negative. DSG further explained that as the common law offences of maintenance and champerty were directed against persons who assisted another party's proceedings for profits, normally only persons connected with the operation of RAs would be charged.

*Other related issues*

16. Mr Paul TSE said that the issue of RAs should be discussed not only from the perspective of protecting the interests of lawyers, but also from the wider context of the need to safeguard the public's legal rights. He considered that while it was plainly in the public interest to combat against the misleading and fraudulent practices of RAs, members should also examine the reasons for the prevalence of RAs which indicated that they were meeting an unsatisfied demand for legal services. DSG agreed that the issue of RAs should be studied in the broader context of the demand for and supply of legal and related services in Hong Kong, a subject currently being studied by the Panel.

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17. Referring to the background brief prepared by the Legislative Council (LegCo) Secretariat [LC Paper No. CB(2)899/08-09(05)], the Chairman said that the Panel had followed up the subject for many years and had also discussed the issue raised by Mr Paul TSE as to whether RAs were meeting an unsatisfied demand for legal services. She stressed that the Panel was not a forum for protecting the interests of legal practitioners and that actions against RAs were based on the following legal and public interest considerations -

(a) maintenance and champerty were common law offences in Hong Kong. The two legal professional bodies had both pointed out that the practice of RAs was a criminal offence in Hong Kong;

(b) many non-government organizations had reflected to the Panel the dishonest means used by RAs which had damaged the interests of accident victims, for instance, arranging to loan money to the accident victims at exorbitant interest rate; and

(c) the court had expressed disapproval of activities of RAs in various judgments.

18. Mr Ludwig NG said that based on his experience, many victims of illegal activities of RAs were from the grass-roots who were in fact eligible for legal aid, but had been misled by RAs into engaging their services. They ended up losing a large portion of their damages paid as fees to the RAs. To his knowledge, the cases pending trial in May 2009 were of such a nature.

19. The Deputy Chairman shared the Chairman's view on the need to combat the activities of RAs, considering that maintenance and champerty were criminal offences in Hong Kong and having regard to the malpractices of RAs. He further said that the issue of RAs was also related to the broader issue of conditional and contingency fee arrangements. Under the present system, lawyers were not allowed to enter into a conditional or contingency fee arrangement to act in legal proceedings in Hong Kong. In his view, this had to some extent impeded the public's right to access to justice, in particular for those who could not afford the high legal costs and had no recourse to legal aid. Like the expansion of SLAS, allowing some form of conditional fee arrangement might go in some way towards reducing the demand for the services of RAs. The Chairman informed members that relevant issues pertaining to Report on Conditional Fees published by the Law Reform Commission in July 2007 was tentatively scheduled for discussion by the Panel at the beginning of the next legislative session.

20. Mr Paul TSE said that there was conflict of interest between lawyers and RAs as the activities of RAs would impact on the business of lawyers. He reiterated his view that members should avoid giving the impression that they were only concerned with protecting the interest of lawyers, given that not all RAs resorted to dishonest means. Moreover, RAs also appeared to be satisfying an unmet demand for legal services by the public. Noting that in recent years there were media reports on

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certain high profile legal proceedings being funded by third parties, he enquired whether DoJ would initiate investigations into such cases. DSG responded that it would be difficult for DoJ to initiate actions on individual cases solely on the basis of media reports. Should DoJ receive complaints on such cases, it would refer them to the Police for investigation.

21. Mr TSE further said that in recent years, Hong Kong had witnessed a significant increase in judicial review litigations, many of which touched upon matters of general public concern. Some people who did not stand to benefit from a judicial review litigation might nonetheless want to fund the litigation in the interest of justice. Mr TSE enquired about the legal position of such funders of litigation and the considerations which were judicially recognized as sufficient to justify the support of litigation by a third party without incurring liability for maintenance or champerty. DSG responded that it would not be appropriate for him to comment on the standing of third party funders for legal proceedings. He reiterated that in the judgment given by CFA in 2007 (FACV9&10/2006), the court had given an exposition of the principles it would have regard to in considering whether an arrangement constituted maintenance or champerty. The question of whether there was an unmet demand for legal services, which impacted on the right to access to justice, might well be one of the public policy considerations in determining whether a case warranted exclusion from the scope of maintenance and champerty. DSG further reiterated that the Administration would study carefully the principles enunciated by the court in the CFA judgment as well as the upcoming trial in May 2009 when reviewing the need to introduce legislation against the activities of RAs.

22. Mr Paul TSE said that it appeared that some law firms had participated in activities of RAs or were shareholders of RAs. He enquired about the position of the Law Society on the participation of lawyers in the operation of RAs, and whether any disciplinary proceedings had been instituted by the Law Society in this regard.

23. Mr Ludwig NG said that the Law Society considered the participation of lawyers behind RAs highly objectionable. To his understanding, the Conduct Section of the Law Society, which was responsible for investigating alleged misconduct of solicitors, had been investigating some law firms in connection with possible engagement in activities of RAs. He was aware that the Conduct Section had encountered difficulties in collecting evidence, which was not surprising given that lawyers participating in activities of RAs would likely take precautionary measures to cover up their illegal activities. He further pointed out that disciplinary proceedings involved a protracted process which often took four to five years to complete.

24. Mr CHAN Kin-po said that in recent years, there was a marked increase in the sums claimed for damages involving work injuries and traffic accidents particularly in cases where the services of RAs were engaged. When assisting employees injured at work and victims of traffic accidents in claiming damages, RAs often abet the injured to exaggerate the degree of injuries sustained so as to claim for a higher amount of compensation. Such act would not only bring losses to insurance companies, but

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would also harm the interests of insurance policyholders in the end because of increase in insurance premium. He further said that for accident victims who had engaged the services of RAs, their claim process was often unnecessarily prolonged and they might end up paying substantial service fees to RAs. While pleased to see that the Administration was facing the issue of RAs squarely, he urged the Administration to expedite its legislative work against RAs and step up public education to warn the public, in particular the grass-roots, against RAs. DSG assured members that the Administration would continue its efforts in enhancing public awareness of the risks of engaging RAs.

25. Referring to Annex D to the Administration's paper showing the content of a poster displayed at the office of the Traffic Accident Victims Assistance (TAVA) Section of the Social Welfare Department to warn the public of the risks of engaging RAs, the Chairman suggested that plainer language be used to ensure that the general public could readily comprehend the content of the poster on the spot. DSG agreed to convey the Chairman's view to the TAVA office.

26. In summing up, the Chairman said that the Panel would continue to monitor the progress of actions taken by the Administration to counter the activities of RAs. She also requested the Administration to update members on latest developments on the subject in due course.

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## V. Arbitration Bill

[LC Paper Nos. CB(2)899/08-09(06) and (07)]

27. DSG briefed members on the progress of the proposed reform of the law of arbitration, details of which were set out in the Administration's paper [LC Paper No. CB(2)899/08-09(06)]. DoJ published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill (the Consultation Paper) on 31 December 2007, proposing the creation of a unitary regime of arbitration on the basis of the Model Law on International Commercial Arbitration (the Model Law) adopted by the United Nations Commission on International Trade Law for all types of arbitrations, thereby abolishing the distinction between domestic and international arbitrations under the current Arbitration Ordinance (Cap. 341). The consultation ended on 30 June 2008. In respect of the responses on the Consultation Paper, DSG said that over 40 responses had been received, with general support among the respondents for the proposed unitary regime of arbitration. DoJ would revise the draft Bill having regard to the deliberations of the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (the Working Group) as well as views submitted in response to the Consultation Paper. It was DoJ's intention to introduce the Bill into LegCo in June 2009.

28. Mr Russell Coleman, Chairman of the Bar Association, said that the Bar Association was strongly in favour of the introduction of a unitary scheme of arbitrations as proposed in the Consultation Paper.

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Discussions

*Proceedings to be heard in open court unless otherwise ordered - Clause 16 of the draft Bill*

29. In response to the Chairman's enquiry on Clause 16 of the draft Bill, DSG said that many respondents took the view that as confidentiality was a key aspect of arbitrations, the presumption of confidentiality in arbitral proceedings should take precedence and suggested that Clause 16 of the draft Bill should be amended to provide that court proceedings involving arbitration should be heard otherwise than in open court, unless on the application of any party or on the court's initiatives in any particular case, the court was satisfied that the proceedings ought to be heard in open court.

30. The Chairman said that in finalizing the relevant provisions, the Administration should have regard to the fundamental principle of openness of court proceedings. Ms Audrey EU and the Deputy Chairman also considered that court proceedings involving arbitration, like other court proceedings, should generally be heard in open court, unless there were strong grounds justifying otherwise. Noting from the Annex to the Administration's paper that many respondents to the Consultation Paper were users of arbitrations, the Chairman enquired about the number of respondents who had expressed the view that court proceedings under the draft Bill should be heard otherwise than in open court and whether such view came mostly from users of arbitrations. DSG said that the Administration recognized that openness of court proceedings was a fundamental principle. He added that a number of submissions on Clause 16 from respondents were from the legal and arbitration profession, including the Bar Association and the Hong Kong Institute of Arbitrators, who held the view that it would be more appropriate to start off by providing that court proceedings involving arbitration should be heard otherwise than in open court, given that privacy and confidentiality were the fundamental bases of parties' choice to arbitrate. It was also considered that such arrangement could help attract more parties to conduct arbitrations in Hong Kong. DSG added that the Administration would have regard to all the views received as well as the deliberations of the Working Group before making the policy decision on the issue.

31. Mr Russell Coleman said that the Bar Association considered it appropriate to start off by providing that court proceedings under the proposed Bill should be heard otherwise than in open court, as the starting position in arbitration proceedings was one of privacy and confidentiality. He further said that broadly speaking there were two levels where the court might be requested to intervene in arbitration proceedings. The first level was where the court was essentially stepping into the shoes of the arbitral tribunal because the tribunal was unable or where there was no tribunal to take a particular step. In such situations, the relevant court proceedings would ordinarily be expected to remain private. On the other hand, if the matter went beyond the Court of First Instance, the proceedings might then, as in family law cases, be heard in open court. He reiterated that as the starting point, court proceedings involving arbitration should be heard in private unless there were good reasons for doing otherwise.

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32. Responding to the Chairman's enquiry on the scope of court intervention under the draft Bill, DSG said that limiting judicial intervention in the arbitral process was an important principle underpinning the Model Law on which the draft Bill was based. Under the Model Law, no court should intervene except as provided in the Law itself. The same approach was adopted in the draft Bill which envisaged court involvement in the limited circumstances specified therein, including challenge and termination of the mandate of an arbitrator, jurisdiction of the arbitral tribunal and setting aside of an arbitral award. The Model Law also empowered the court to appoint an arbitrator in the absence of agreement by the parties. However, under the draft Bill, this function of the court would be performed by the Hong Kong International Arbitration Centre rather than the court. In addition, certain provisions under the existing Ordinance relating to court intervention and assistance (e.g. determination of a preliminary point of law by the court) which applied only to domestic arbitrations had also been retained as opt-in provisions under the draft Bill.

33. The Chairman said that in view of the limited role of the court envisaged under the draft Bill, she did not consider it necessary or justified to provide that court proceedings involving arbitration should be heard otherwise than in open court. She pointed out that while arbitration was a private consensual method of dispute resolution, the court was a public institution for the administration of justice. When the court was asked to intervene to determine the question of whether an arbitral award should be set aside, the court was not merely resolving a private dispute but also adjudicating on issues involving legal principles. She stressed that the fundamental principle of open justice should not be discarded lightly for the sake of attracting more arbitration business.

*Publication of arbitral awards*

34. Ms Audrey EU said that with the increasing use of arbitration for resolution of disputes, consideration should be given to making arbitral awards available for public reference after having obliterated the personal and sensitive data therein. Such information would provide valuable reference on procedural and substantive issues that arose during arbitration proceedings. The prior rulings of arbitrators might also serve as persuasive precedents in future arbitration proceedings.

35. DSG said that one of the key advantages of arbitration was that it offered a confidential forum for resolution of disputes. Given its private nature, an arbitral award made by an arbitral tribunal was a private matter between the parties and would not made available to the public unless with the consent of the parties concerned. He added that neither the existing law nor the draft Bill had specified any requirement that arbitral awards should be made publicly available. As regards judgments of court proceedings involving arbitration, they would generally be made available to the public just like other judgments of the court.

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36. Mr Russell Coleman said that the Bar Association would strongly suggest that arbitral awards should not be made available to the public because they were the products of a private process of dispute resolution agreed to between the parties who had chosen to refer the dispute to arbitration rather than to the court. In so far as the decisions made by the court on matters related to arbitration were concerned, the appropriate blacking out and anonymization of parties' names and important details could be made to allow the presentation of relevant legal principles to be made public for the reference of arbitrators and the general public.

37. Ms Audrey EU said that she appreciated that privacy was the essence to arbitration and there might well be sensitive matters raised in arbitral awards which the parties would like to keep private. On the other hand, she considered that it would be a great loss to the development of arbitration jurisprudence if arbitral awards were kept completely outside the public domain. She urged the Administration, the legal professional bodies and the arbitration organizations to explore whether the legal or guiding principles in arbitration decisions could be made available to the public in some form for research purpose and reference of the arbitration profession.

38. Mr Russell Coleman said that Ms EU's suggestion could be pursued. He pointed out that internationally there were reports of arbitral awards which were essentially limited to the principles emanating from the cases which were of wider interest than merely to the parties themselves, without offending the principle of privacy and confidentiality inherent in arbitral awards. To his understanding, the publication of such reports was usually based on an arrangement between publishing houses and individual practitioners in the arbitration field.

39. Dr Priscilla LEUNG declared interest that she was an arbitrator of the China International Economic and Trade Arbitration Commission. Dr LEUNG shared with members that according to her experience in the publication of arbitral awards, they would not normally be published until at least two years after they were made. The awards would be published in an anonymized form. While sharing the view that it would be beneficial to have the guiding principles in important arbitral awards made available for public reference, she stressed that it was important to adhere to the international practice that the arbitral awards should only be made public with the consent of the parties concerned and that the names of the parties and other sensitive information should be withheld from the public, having regard to the private and confidential nature of arbitrations. She further said that in reforming the law of arbitration, Hong Kong should follow the relevant international practices as far as possible which would help enhance Hong Kong's competitiveness in the provision of arbitration services. Mr Paul TSE echoed similar views.

40. DSG said that the Administration agreed with Dr Priscilla LEUNG's view that the reform of the arbitration law should accord with international practices and development. Indeed, one of the guiding principles of the reform was to follow the Model Law, which reflected a worldwide consensus on important issues concerning international arbitration, as closely as possible. After the implementation of the proposed reform, Hong Kong would be seen as a Model law jurisdiction thereby

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attracting more business partners to choose Hong Kong as the place to conduct arbitral proceedings.

*Appointment of judges as arbitrators or umpires – Clause 32 of the draft Bill*

41. Noting from paragraph 4(c) of the Administration's paper that most of the respondents to the consultation exercise supported the alternative proposal in the Consultation Paper that judicial officers should not serve as arbitrators or umpires subject to two exceptions, Ms Audrey EU said that she shared the view that judges should as far as possible refrain from serving as arbitrators as it would impact on judicial resources. The Deputy Chairman concurred with Ms EU's view. In respect of the two proposed exceptions, the Deputy Chairman sought clarification on whether there was any existing statutory provision which required a judge to act as a sole arbitrator in arbitral proceedings. DSG responded that he was not aware of any such statutory provision as the law currently stood. DSG further explained that one of the two exceptions proposed in the Consultation Paper was that a judicial officer was required to act as an arbitrator in any particular arbitral proceedings for any constitutional reason although it had been suggested that the exception should be amended to refer to "any statutory requirement" rather than "any constitutional reason". This exception was intended to provide flexibility in the proposed Bill to cater for situations where a judge might be required to act as an arbitrator in arbitral proceedings involving matters of constitutional importance.

*Power of arbitrator to act as mediator – Clause 34 of the draft Bill*

42. Noting that Clause 34 of the draft Bill empowered an arbitrator to act as a mediator upon consent of all parties in writing after the commencement of arbitral proceedings, the Deputy Chairman expressed doubt on whether a person was able to perform effectively the two distinctive roles of arbitrator and mediator in the same case. The Deputy Chairman elaborated that while an arbitrator was required to maintain his impartiality at all times, a mediator might communicate with the parties separately and solicit confidential information from a party for purposes of settlement during the mediation proceedings. Such initiatives might affect the perception of impartiality of the arbitration process if the mediation proceedings subsequently terminated without reaching a settlement and the arbitrator-turned-mediator resumed his role as an arbitrator. The Deputy Chairman further pointed out that when the arbitral process resumed, in practical terms it would be very difficult for the arbitrator not to be influenced by the confidential information learned during the mediation proceedings. He considered that the Administration should take this into account in revising the draft Bill.

43. DSG said that allowing an arbitrator to serve also as a mediator in the same case was not something novel introduced by the draft Bill. The current Ordinance contained similar provisions empowering an arbitrator to act as a mediator, subject to the consent of all parties concerned.

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44. Mr Russell Coleman said that from a practical point of view, most arbitrators would unlikely agree to act as a mediator and then change back to an arbitrator again if the mediation failed, given that the processes of the two alternative dispute resolution (ADR) methods were very different. It should also be noted that for matters requiring the consent of all parties in the context of an arbitration reference, it was necessary to secure the consent not only of both parties to the dispute, both also that of the arbitrator. Even if the parties concerned invited the arbitrator to serve also as a mediator, he could turn down the invitation if he considered it inappropriate to do so. If the arbitrator considered that the case was capable of reaching a mediated settlement, he could refer the dispute to a different person to be the mediator. In so doing, he would avoid the risk of his impartiality as an arbitrator being compromised by the mediation process in the event that the mediation failed to result in settlement and he had to resume the arbitration process.

45. The Chairman said that as both arbitration and mediation were private means of dispute resolution agreed between the parties, she was of the view that the Bill should not impose too many restrictions on an arbitrator acting as a mediator in the same case.

46. Ms Audrey EU considered that the Bill should not include any provision on arbitrator acting as mediator as the existence of such provision might give the public the perception that it was a desirable arrangement. The Chairman also expressed the view that legal intervention into any arbitral process should be kept to the minimum, unless there was a need to do so. She asked about the practical effect if the Bill did not include any provision in this regard. DSG responded that in the absence of any statutory provision, it would still be up to the parties concerned to decide whether their arbitrator should also act as the mediator, albeit there was no legislative backing for such an arrangement. The parties concerned could apply to the court for an order to treat any settlement arising out of the mediation process as an arbitration decision. DSG further said that, as pointed out by Mr Russell Coleman, in practice there were not many cases where an arbitrator would also agree to serve as a mediator. He added that Clause 34 of the draft Bill was actually a reproduction of section 2B of the current Arbitration Ordinance. Nevertheless, the Administration would take members' views into account in finalizing the relevant provisions of the Bill.

*Enforcement of awards of arbitral tribunal – Clause 85 of the draft Bill*

47. Mr Paul TSE enquired about the rationale for introducing the reciprocity requirement for the enforcement of arbitral awards under Clause 85(2) of the draft Bill. Noting from paragraph 4(e) of the Administration's paper that there were reservations in the submissions about the introduction of such a requirement, Mr TSE further enquired about the Administration's position in this regard.

48. In response, DSG explained that under the present statutory regime, an award made on the Mainland by a recognized Mainland arbitral authority (Mainland award) or an award made in a State or territory (other than China) which was a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral

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Awards 1958 (Convention award) could be enforced as provided for under the current Ordinance. Pursuant to section 2GG of the current Ordinance, an arbitral award which was neither a Mainland award nor a Convention award was enforceable at the discretion of the courts in Hong Kong without requiring proof of reciprocity. In accordance with the recommendation in the Report of the Committee on Hong Kong Arbitration Law issued in 2003, a new provision had been added under Clause 85(2) of the draft Bill to regulate the enforcement of an arbitral award made outside Hong Kong which was neither a Convention award nor a Mainland award. Clause 85(2) stated that no leave should be grant by the court unless the party seeking to enforce an arbitral award made outside Hong Kong could demonstrate that the court in the place where the award was made would act reciprocally in respect of arbitral awards made in Hong Kong. The adding of the new requirement was to ensure that the enforcement of arbitral awards made outside Hong Kong were all granted on the principle of reciprocity. However, the majority of the respondents to the Consultation Paper had expressed reservations about the introduction of the reciprocity requirement. They were in favour of retaining the existing arrangement under section 2GG of the current Ordinance which was considered to be more conducive to the objective of the reform in promoting Hong Kong as a regional centre for arbitration services. Having considered the responses on the Consultation Paper, the Working Group was inclined towards retaining the existing arrangement under section 2GG of the current Ordinance. Policy decision in this regard, however, had yet to be made.

## VI. Any other business

49. There being no other business, the meeting ended at 6:16 pm.

Council Business Division 2
Legislative Council Secretariat
15 April 2009