

Consultation Paper on the Proposed Subsidiary Legislation and  
President’s Directions for the Competition Tribunal

**Submission of the Hong Kong Bar Association**

Introduction

1. The Hong Kong Bar Association (“**HKBA**”) makes this Submission in respect of the Judiciary’s Consultation Paper on the Proposed Subsidiary Legislation and President’s Directions for the Competition Tribunal.
2. The proposed Competition Tribunal Rules are the proposed subsidiary legislation to be enacted s 158 of the Competition Ordinance (Cap 619) that are to serve, together with the practice and procedure of the Court of First Instance as modified under s 144 of the Competition Ordinance, as the procedural rules of the Competition Tribunal.
3. Amendments have been proposed to the Rules of the High Court (“**RHC**”) to provide for procedures for proceedings transferred between the Competition Tribunal and the Court of First Instance, as well as the procedures for applications to the Court of Appeal.
4. The proposed President’s Directions of the Competition Tribunal are to be made by the President of the Competition Tribunal pursuant to s 136(3) of the Competition Ordinance as to the arrangement of the business of the Tribunal. According to the Consultation Paper, the President’s Directions are not to have statutory force but are intended to set out matters of detailed procedure and provide guidance to parties and the public.

Competition Tribunal Rules (“**CTR**”)

5. Rule 4 of the CTR provides in r 4(1) that the RHC apply to all proceedings of the Competition Tribunal “except to the extent that any provision of the RHC (a) is expressly excluded by these Rules; or (b) is not consistent with the Ordinance or these Rules”. The HKBA considers that apart from these scenarios of exclusion or

exception, there is the possibility that a rule or provision in the RHC is simply irrelevant to the subject matter or operation of either the Competition Ordinance or the CTR. Such a provision does not apply because, even with any necessary modifications, it has no relevant application to the proceedings and business of the Tribunal.

6. Rule 6 of the CTR refers to non-compliance with “any rule of practice that is in force”. The HKBA considers that there is a need to clarify the meaning and scope of this expression. It is not readily understood whether this refers exclusively to the President’s Directions or also to a rule of practice under the common law or pursuant to other source of prescription.
  
7. Rule 25(1) of the CTR, which concerns the right of audience before the Competition Tribunal, purports to permit a party to be represented by a counsel or solicitor having a right of audience before the Court of First Instance in its civil jurisdiction or “any *other* person allowed with the leave of the Tribunal to appear on the party’s behalf” (emphasis supplied). The HKBA is seriously concerned that although this provision may have followed the wording of r 26 of the Lands Tribunal Rules (Cap 17 sub leg A), its purported empowerment of the Tribunal to grant leave to “any person” other than a counsel or solicitor having a right of audience before the Court of First Instance in its civil jurisdiction to appear on the party’s behalf will enable overseas counsel to seek leave of the Tribunal to appear on behalf of a party without obtaining ad hoc admission in Hong Kong from the Chief Judge of the High Court under s 27(4) of the Legal Practitioners Ordinance (Cap 159) or give the impression that overseas counsel can do so. Paragraph 37 of *President’s Direction No 1* does not dispel this concern since it is simply concerned with “[legal] representatives with a right of audience before the Tribunal”. The HKBA therefore suggests that r 25 of the CTR be modified to add a proviso to make it clear that “any other person allowed” would mean that if such a person is counsel or advocate from an overseas jurisdiction and not having the general right of audience before the Court of First Instance in its civil jurisdiction, he or she would require ad hoc admission under s 27(4) of the Legal Practitioners Ordinance.

8. Rule 32 of the CTR is concerned with the confidential treatment of information. President's Direction No 2 is drafted to provide guidance in greater detail for applications for confidential treatment of information in a document. This President's Direction sets out different types of such applications and specifies the procedure for each type. One type of application catered for in the President's Direction is an application for confidential treatment of an originating document (paras 11 to 13). The HKBA finds the drafting of r 32(1) of the CTR could be improved to make it clear that an originating document may also be the subject matter of an application for confidential treatment, albeit that the relevant application ought to be made before filing. The present draft of "[a] party who has filed a document (other than an originating document), or intends to file or use a document in connection with proceedings before the Tribunal, may apply for ..." could give the impression that originating documents are excluded from being the subject matter of such applications.
9. Rule 91 is headed "Response by defendant". For consistency with the text of the rule, it should instead be "Defence by defendant".

#### President's Directions

10. In respect of *President's Direction No 1*, para 17, the HKBA suggests replacing "mindless interlocutory disputes" with "unreasonable interlocutory disputes".
11. In respect of *President's Direction No 1*, paras 8, 40 and 43, the HKBA asks that consideration be given to clarify whether the case summary to be lodged in para 40 is to be published under para 8 as an individual document in distinction from the notice of proceedings to be published pursuant to para 43.
12. In respect of *President's Direction No 1*, paras 44 to 50, which concerns interventions, the HKBA suggests that consideration may be given to whether an intervener or putative intervener should also be required to lodge a case summary and whether an intervention in respect of which leave is given should be the subject of a notice published by the Registrar.

13. The HKBA suggests that consideration be given as to whether it is necessary to include in *President's Direction No 1* provisions concerning the procedure for making a reference by the Competition Tribunal of an alleged contravention of the Competition Ordinance to the Competition Commission for investigation, as well as any procedure matters following such a reference.

Dated 4th October 2014.

Hong Kong Bar Association