HONG KONG BAR ASSOCIATION'S COMMENTS
ON THE DRAFT REVISED PRACTICE DIRECTION 4.1

1. The Hong Kong Bar Association ("the HKBA")'s comments on the draft of the revised Practice Direction 4.1 ("DRPD4.1") are as follows. References to paragraph numbers are to the paragraph numbers in the DRPD4.1.

Section B: Applications for Leave to Appeal

2. **§7**: As to the format of the written statement, the Judiciary may consider whether it is appropriate and necessary to impose requirements on line spacing and width of margin or, alternatively, as in the recent Practice Direction regarding printed cases in the Court of Final Appeal, limit the length of the written statement by word count instead.

3. **§9**: Under O.59, r.2B(3), if the court below refuses to give leave to appeal, a renewed application must be made within 14 days from the date of the refusal. It is possible that the written reasons for decision or the transcript of that hearing may not be available by the end of 14 day deadline when the applicant is obliged to take out the application and submit the application bundle. The Judiciary may consider to include a provision that, in such event, the written reasons for decision or the transcript of that hearing shall be submitted to the Court of Appeal once it is available.

4. **§12**: Regarding the length and format of the statement in opposition, the HKBA make the same comments as those stated in relation to §7 above.

5. **§14**: In view of §17, the Judiciary may consider making it clear that the

statement for costs shall be prepared on the basis that no oral hearing will take place.

6. **§16**:

(a) Under this paragraph, if the Court of Appeal directs a hearing, the date of hearing will be fixed in the first instance without consultation with counsel's diaries; and a request to re-fix the hearing date in consultation with counsel's diaries will only be entertained in exceptional circumstances; and that the fact that a counsel has been involved in the past in not per se a good ground in the light of the nature of the application and the filing of written statements which can be prepared by that counsel.

(b) However, if the Court of Appeal sees the need to direct an oral hearing, it will likely be due to the fact that there are questions arising out of the written statements. It appears that counsel settling the written statements will and should be in the best position to assist the Court of Appeal at the oral hearing.

(c) Hence, the Judiciary is invited to consider the following alternative: if a party wishes the Court to fix the hearing date in consultation with counsel's diaries in case the Court directs an oral hearing, he should say so in the application (or opposition). If the Court directs an oral hearing, and if the party has given such an indication in the application (or opposition), that party should be given the chance to provide available dates of counsel before the hearing date is fixed even though the Court will not necessarily fix the hearing date accordingly.

(d) Further, it may be pertinent to include a provision similar to §10 of the existing PD4.1 ie "Where an application for leave to appeal is made, no date for hearing will be given by the Court. Only if the

Court directs that the application be heard at an oral hearing will a date of hearing be given."

7. Other comments (I):

(a) Under O.59, r.2A(8), where the Court of Appeal determines the application on the basis of written submissions only, it may, if it considers that the application is totally without merit, make an order that no party may request the determination to be reconsidered at an oral hearing inter partes.

(b) While it appears that, in practice, this power is very often exercised, there will be cases where the Court of Appeal does not make such an order. In such event, the party aggrieved by the determination may within 7 days request the Court of Appeal to reconsider the determination at an oral hearing inter parties.

(c) In such scenario, under the existing PD4.1, §11, the party aggrieved by the determination must within the time specified serve written submissions as to why the leave should or should not be granted but such written submissions will not be necessary where only the previous written submission are relied on.

(d) It appears that the DRPD4.1 does not contain any similar provision to cater for such scenario. The Judiciary may consider to include a provision similar to the existing PD4.1, §11, with additional requirements (on the length, format and content of the written submissions).

8. Other comments (II):

(a) Although it appears that in practice, leave applications will be considered by 2 Justices of Appeal, it is possible that such applications may be determined by a Single Justice of Appeal.

(b) Under O.59, r.2C(1), if the leave application is determined (with or without a hearing) by a Single Justice of Appeal, a party aggrieved by the determination may, within 7 days from the date of refusal, make a fresh application to the Court of Appeal; and under O.59, r.2C(2), that party is entitled to have the fresh application determined by the Court of Appeal consisting of 2 Justices of Appeal.

(c) In such scenario, under the existing PD4.1, §14, the party aggrieved by the determination must within the time specified serve written submissions as to why the leave should or should not be granted but such written submissions will not be necessary where only the previous written submission are relied on.

(d) It appears that the DRPD4.1 does not contain any similar provision to cater for such scenario. The Judiciary may consider to include a provision similar to the existing PD4.1, §14, with additional requirements (on the length, format and content of the written submissions).

Section D: Urgent Appeals and urgent interlocutory applications

9. **§30**:

(a) This paragraph may require clarification or elaboration.

(b) An application for urgent listing of an appeal/application is invariably made by the applicant by taking out such an application, which shall be served to the opposite party. Such an application is most unlikely to be a joint application by both parties.

(c) It is not entirely clear what *ex parte* applications (which will attract the duty of full and frank disclosure) are envisaged. Presumably, they may include exceptional cases such as a refusal by a Judge to grant a Mareva injunction.

(d) It appears that the purpose of this paragraph is to ensure that all relevant information will be placed by both parties before the Court. However, as such applications are considered to be urgent by the applicant, it may not be feasible or practicable to discuss the matter with the opposite party, let alone to reach an agreement in this respect, before making the application.

(e) The Judiciary is invited to consider the following alternative: At the time of making the application, the applicant shall state whether it has discussed with the opposite party on the relevant matters (such as whether there is indeed an urgency, how urgent the matter is, the estimated time for hearing, the proposed time table for filing submissions); if not, why not; if yes, whether there is an agreement on those matters (and if so, what the terms of the agreement are). In case there is no such discussion or agreement, the opposite party upon receiving the application shall forthwith provide the Court of Appeal with the relevant information from his side.

Section E: Interlocutory applications

10. **§§36-37**:

(a) These paragraphs may require clarification or elaboration.

(b) The Judiciary may consider including a provision similar to §10 of the existing PD4.1 concerning applications for leave to appeal such as "Where an interlocutory application is made, no date for hearing will be given by the Court. Only if the Court directs that the application be heard at an oral hearing will a date of hearing be given."

(c) If the applicant asks for an oral hearing, there is no reason why he cannot or should not make representations supporting such a request by letter at the same time when he makes the application.

(d) On the other hand, the respondent should be given 5 days from the service of the summons to make representations in this respect.

11. §38:

(a) Under this paragraph, the general time limit specified for lodging skeleton submissions and filing evidence is 7 days. That is perhaps too tight and stringent; 14 days may appear to be more reasonable, practicable and appropriate. It can be made clear that, save in exceptional circumstances, no extension of time will be granted; an application for extension of time must be made before the expiry of the time limit with good reasons; and in case skeleton submissions are not filed on time, the application may be considered to be either abandoned or unopposed.

(b) The Judiciary may consider imposing requirements on the length and format of the skeleton submissions for interlocutory applications. They are not covered by PD5.4 (which shall apply under §35). While it appears that Section G of the DRPD4.1 shall apply to both the substantive appeals and interlocutory applications before the Court of Appeal, some of the provisions do not seem to be appropriate for interlocutory applications.

Section G: Skeleton arguments and list of authorities

12. **§§60-61**:

(a) Under these paragraphs, the appellant shall lodge its skeleton arguments and list of authorities no later than 28 days before the appeal or application whereas the respondent shall do so no later than 14 days before the relevant date.

(b) Under O.59, r.7(1)(b), an appellant or a respondent may, without

leave, amend the notice of appeal or the respondent's notice by supplemental notice served not less than 3 weeks before the date fixed for the hearing of the appeal.

(c) Nevertheless, if an appellant is required to serve his skeleton submissions 28 days before the hearing of the appeal, it is possible that he may exercise his right to file a supplemental notice of appeal 21 days before the hearing only, which will be after he has already filed the skeleton submissions. In such event, it is possible and likely that the skeleton submissions will not cover matters raised in the supplementary notice, and the purpose of requiring the lodging of skeleton submissions 28 days in advance will be defeated or frustrated.

(d) The Judiciary may need to consider directions to cover such possible scenario: for instance, it may be provided that notwithstanding O.59, r.7(1)(b) an appellant is expected to file any supplementary notice of appeal if so desired as soon as possible, and where an appellant chooses to file a supplementary notice of appeal without leave pursuant to O.59, r.7(1)(b) after he has already filed the skeleton arguments as required by §60, a supplemental skeleton argument (together with any updates to the appeal bundles) must be filed and served together with the supplementary notice of appeal. However, in such event, and if the scale and impact of the amendment is such that the appeal is to be argued on a different basis from the grounds as set out in the original notice of appeal, occasioning serious delay and disruption to the proper preparation for the appeal by the Court and/or the other parties to the appeal, and/or the Court finds that there is insufficient time to digest the materials on the new grounds, the Court may consider adjourning the appeal with an order that the defaulting

party shall bear the costs thrown away. Even if the appeal is not adjourned, the Court may take such disruptive conduct into account in making its order for costs. In this regard, the Court may like to remind practitioners of what it said in *To Pui Kui v Ng Kwok Piu* [2014] 5 HKLRD 103 at §§13-18.

(e) Under O.59, r.7(1)(a), a notice of appeal or respondent's notice may be amended by or with the leave of the Court of Appeal or a single judge at any time. Hence, leave will be required if the appellant intends to amend the notice of appeal, or the respondent intends to amend the respondent's notice, later than 3 weeks before the date fixed for the hearing of the appeal. The Judiciary may consider giving directions on how such application for leave shall be made; and state clearly that, first, such application will not be entertained save on good and exceptional grounds, and second, even if the application is allowed, the appeal may be adjourned and/or there may be adverse costs consequences in cases where the amendment has the consequences as identified in (d) above.

13. **§66:** As to the requirements concerning the length and format of the skeleton arguments, the HKBA makes the same comments as those stated in relation to §7.

14. **§70**: The Judiciary may consider imposing a deadline for filing a supplemental list of authorities by either party.

<u>Other general comments</u>

15. In the existing PD4.1, there is a section D "Listing of Appeals" (§§17-20)

containing detailed provisions concerning different lists of civil appeals and fixing of hearing dates. These provisions no longer appear in the DRPD4.1. It is unclear whether this is a deliberate omission.

Hong Kong Bar Association

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