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29 August 2014

Ms Sharon Chung
Clerk to Panel on Development
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Ms Chung,

**Motion on the agenda item
“Pilot Scheme for Arbitration on Land Premium”
passed at the meeting on 16 July 2014**

Thank you for your e-mail of 17 July 2014 to our Bureau, requesting our written response to the motion on “Pilot Scheme for Arbitration on Land Premium” passed at the meeting on 16 July 2014. The Government’s response is set out at **Annex**.

Yours sincerely,

(W W Chong)
for Secretary for Development

c.c.

Department of Justice
Lands Department

(Attn: Miss Joyce Chan)
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**The Government's Response to the Motion on
"Pilot Scheme for Arbitration on Land Premium"
Passed at the Meeting of the Legislative Council
Panel on Development on 16 July 2014**

The Government briefed the Legislative Council Panel on Development on the Pilot Scheme for Arbitration on Land Premium ("the Pilot Scheme") on 16 July 2014. The Panel passed a motion: *"That this Panel is opposed to the Government's proposal on the implementation of the 'Pilot Scheme for Arbitration on Land Premium', so as to prevent the growth of corruption"*. The Government's response to the motion is set out below.

Arbitration as a Means of Dispute Resolution

2. Arbitration is a commonly used means of dispute resolution with statutory backing in Hong Kong. All arbitral proceedings in Hong Kong are governed by the Arbitration Ordinance (Cap. 609), which reforms the arbitration law of Hong Kong on the basis of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL Model Law") and has come into effect since June 2011.

3. Arbitration is widely adopted both locally and internationally to resolve disputes of different fields with arbitrators from various professions. Disputes subject to arbitration are frequently sensitive in nature, including those with high stake in monetary value. The use of arbitration in Hong Kong as a proper and well-recognized dispute resolution means in various fields thus far, including cases involving substantial monetary interests, has not given rise to concerns over corruption.

4. Nevertheless, we consider it appropriate to take extra care to ensure that corruption prevention measures are incorporated into the design of an arbitration mechanism for land premium.

Safeguards against Corruption under the Pilot Scheme

5. In formulating the implementation framework for the Pilot Scheme, the Government is mindful of possible concerns over the risk of corruption. As set out in the Government's paper discussed by the Panel on Development on 16

July 2014¹, a number of anti-corruption measures will be incorporated. Such measures are summarized as follows:

- (a) the Arbitral Tribunal will consist of three arbitrators instead of a sole arbitrator, with a legally qualified arbitrator being the Chairman;
- (b) all three arbitrators will be mutually agreed and appointed by both the Government and the Applicant for lease modification/land exchange; thus the Government will have a say in the choice of each arbitrator;
- (c) the arbitrators will be required to make a written declaration on a standard form as to their independence and impartiality; and in so doing disclose any matters that might be relevant in this regard, and confirm their on-going duty of disclosure during the arbitration process. Once signed and attached to the Arbitration Agreement signed between the Government and the Applicant, the arbitrators will be made party to the Arbitration Agreement and subject to all provisions therein as to the proper conduct of the arbitral proceedings; and
- (d) anti-collusion provisions will be included in the Arbitration Agreement, such as those specifying no unauthorised discussion with the parties on the case and requiring the arbitrators to report any communication with the parties concerned outside the arbitral proceedings.

Sanctions and/or Remedies Available

6. The above measures in the Pilot Scheme should provide effective safeguards against corruption. In the event that any arbitrator has misconducted himself acting on cases under the Pilot Scheme, sanctions and/or remedies, as detailed in the ensuing paragraphs, are available to both the Government and the Applicant.

Provisions to challenge the arbitral award made under the Arbitration Ordinance

7. The Arbitration Ordinance limits court interference in the arbitration of a dispute, and sets out an exhaustive list of instances in which a court can

¹ Vide LC Paper No. CB(1)1794/13-14(01).

intervene in the arbitral process. Section 12 of the Arbitration Ordinance gives effect to Article 5 of the UNCITRAL Model Law which provides that in the matters governed by this Law, no court shall intervene except where so provided in this Law. An arbitral award made by an arbitral tribunal may be set aside by the Court of First Instance if it upholds a challenge made against an arbitrator of the tribunal. Pursuant to section 25(2) of the Arbitration Ordinance, an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties.

8. Apart from the above, the Court of First Instance may set aside an arbitral award on the grounds as set out in section 81(1) of the Arbitration Ordinance. Under section 81(1) of the Arbitration Ordinance, an arbitral award may be set aside only if:

- (a) a party to the arbitration agreement making the application to set aside the arbitral award was under some incapacity;
- (b) the arbitration agreement is not valid under the law to which the parties have subjected it;
- (c) the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- (d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to the arbitration, or contains decisions on matters beyond the scope of the submission to the arbitration; or
- (e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

9. In addition, the Arbitration Agreement under the Pilot Scheme will provide expressly for the application of sections 4 and 7 of Schedule 2 to the Arbitration Ordinance under which a party may apply to the Court of First Instance challenging an arbitral award on the grounds of serious irregularity affecting the tribunal, the arbitral proceedings or the award (see section 99(d) of the Arbitration Ordinance). Therefore, the Arbitration Ordinance has provided

avenues for both the Government and the Applicant to challenge an arbitral award if there is misconduct on the part of any arbitrator which constitutes serious irregularity affecting the tribunal, the arbitral proceedings or the award.

Sanctions under the Prevention of Bribery Ordinance ("POBO") (Cap. 201)

10. As mentioned under paragraph 5(c) above, the arbitrators will be required to make a written declaration as to their independence and impartiality. The arbitrators will be required to declare, among others, that they have not solicited or accepted, and undertake that they will not so solicit or accept, any advantage as defined under the POBO in connection with that arbitration case in question.

11. We will also state explicitly in the Arbitration Agreement and/or the written declaration that an arbitrator appointed by the Government and the Applicant under the Pilot Scheme is an agent in the context of section 9 of the POBO so as to make it clear that arbitrators appointed under the Pilot Scheme may be subject to sanctions under the POBO should they breach the provisions therein.

Civil liability

12. An arbitrator misconducting himself is liable to civil claims taken by the Government or the Applicant for damages by virtue of the fact that he has breached the Arbitration Agreement and/or the written declaration.

Sanctions imposed by the arbitrators' respective professional bodies

13. The arbitrators being themselves professionals in their respective fields are liable to sanctions imposed by their respective professional bodies. Apart from the President of the Arbitral Tribunal who must be a legal professional, the other two members will be valuation professionals. Specifically, these two valuation professionals should:

- (a) be Registered Professional Surveyors under the Surveyors Registration Ordinance (Cap. 417); and
- (b) have qualified for a minimum of seven years as a member of a professional body of surveyors the membership of which is accepted

for the purpose of registration under the Surveyors Registration Ordinance; and

(c) have at least 10 years of experience in land matters and valuation.²

14. The two surveyor-arbitrators are selected and appointed having regard to the fact that they are valuation professionals who have at least 10 years of experience in land matters and valuation, including sufficient experience in such matters in Hong Kong; and that the subject to be arbitrated by the Arbitral Tribunal is confined to the amount of premium payable for lease modification/land exchange. The two surveyor-arbitrators when acting in their capacity of arbitrators and performing and discharging their duties and responsibilities in the course of the arbitration under the Pilot Scheme are expected to apply their professional knowledge and judgment in surveying.

15. Against the said circumstances and background, and in the case of surveyor-arbitrators who are registered under the Surveyors Registration Ordinance, we consider that the conduct of the two surveyor-arbitrators when performing their duties in the arbitration under the Pilot Scheme can be regarded as having fallen within the meaning of "in any professional respect" in section 20(1)(a) of the Surveyors Registration Ordinance³, and thus sanctions under the Surveyors Registration Ordinance⁴ would apply.

² Candidates who fulfil (b) and (c) above but not (a) are still be eligible for appointment provided that their 10-year experience in land matters and valuation include sufficient experience in such matters in Hong Kong.

³ Section 20(1)(a) of the Surveyors Registration Ordinance provides that a registered professional surveyor commits a disciplinary offence if he (a) commits misconduct or neglect in any professional respect.

⁴ Sanctions include those under section 23(1) of the Surveyors Registration Ordinance which provides that where an inquiry committee finds that a registered professional surveyor committed a disciplinary offence, on confirmation by a review committee of the finding, or on the variation of the finding or any proposed order based on the recommendation of the review committee, the inquiry committee may make any one or more of the following orders -

- (a) order the Registrar to remove the name of the registered professional surveyor from the register;
- (b) order the Registrar to remove the name of the registered professional surveyor from the register for such period as the inquiry committee may think fit;
- (c) reprimand the registered professional surveyor in writing and order the Registrar to record the reprimand on the register;
- (d) order that an order made under this section be suspended, subject to such conditions as the inquiry committee may think fit, for a period not exceeding 2 years;
- (e) order that the Board shall not accept an application from the registered professional surveyor for registration as a registered professional surveyor either for a fixed period or until the registered professional surveyor satisfies the Board that he should be registered;
- (f) order that the Chairman admonish the registered professional surveyor orally;

Conclusion

16. When formulating the implementation framework of the Pilot Scheme, the Government has paid particular attention and taken extra care to incorporate measures to safeguard against the risk of corruption. In the event of misconduct of any arbitrator, sanctions and/or remedies are available to protect the Government's interest. When devising the corruption prevention measures, we have sought the professional advice of the Independent Commission Against Corruption ("ICAC") and its advice has been taken into account in the formulation of the implementation framework. After the Pilot Scheme has commenced, we will continue to engage ICAC to advise on detailed procedures and improvement measures.

17. In view of the successful application of arbitration as a dispute resolution mechanism in other fields, and the extra precautions taken in formulating the implementation framework of the Pilot Scheme to safeguard against the risk of corruption, the Government considers it prudent to proceed with the Pilot Scheme, so as to gain experience on its operation as a mechanism for resolution disputes on land premium. It is only through the Pilot Scheme that we can assess the effectiveness and suitability of arbitration on land premium. The Pilot Scheme will run for an initial period of two years during which the Government may fine-tune the implementation framework as appropriate. At the end of the trial period, the Government will review the Pilot Scheme, and decide whether and, if so, how it may continue and be applied on a broader scale after the Government has the benefit of relevant experience.

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- (g) order the registered professional surveyor to pay all or part of the costs of any of the Registrar, the Board or the inquiry committee arising from the case if, but only if, the inquiry committee is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.