COVID-19 - The Law Unmasked: A New Cluster of Regulations: An Overview on Compliance and Enforcement Powers for Businesses and Gatherings

In our third article in the series 'The Law Unmasked', Earl Deng, Isabel Tam and Ted Chan provide a comprehensive overview of the recently implemented regulations for businesses and gatherings.

Two new regulations were introduced and came into effect within the space of 48 hours, the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation, Cap. 599F ("**Business and Premises Regulation**") and the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation, Cap. 599G ("**Group Gathering Regulation**").

The aim and purpose of the new regulations are to impose greater social distancing by targeting specific business or social activities which promote social interaction (i.e. food and beverage, entertainment and amusement etc.) and the congregation of people in public places. Whilst simple in theory and seemingly innocuous, its execution is fraught with difficulties from both compliance and enforcement perspectives. In this primer we examine the key provisions in the new regulations, their implications on daily life and businesses and whether such powers are necessary. This article was first published on 31 March 2020 and was updated on 27 April 2020.

RESTRICTIONS ON GROUP GATHERINGS

Q1: What is the prohibition in the Group Gathering Regulation?

Section 3 of the Group Gathering Regulation provides that *"No group gathering may take place in any public place during a specified period"*. Section 6 imposes criminal liability for:

(1) Persons participating in and organizing such gatherings; and

(2) Persons owning/controlling/operating the place of such gatherings who knowingly allow the taking place of such gatherings.

The wording does not seem to us sufficiently precise to be capable of a construction that imposes a strict liability offence and therefore the presumption of *mens rea* applies[1] and criminal liability may arise only if there is evidence of:

- actual participation and a common intention/ joint-enterprise between more than 4 persons in the gathering (i.e. conduct, a pre-arrangement, an agreement to gather with more than 4 persons); or
- willful blindness to a prohibited gathering taking place by the manager/proprietor/operator of the place.[2]

Q2: What is the meaning of "group gathering"?

Section 2 defines a "group gathering" as *"a gathering of more than 4 persons"* but does not specify how 4 persons together may be classified as a "group". In the Public Order Ordinance, Cap. 245 ("**POO**"), the definition of "*public gathering*" there denotes the *common purpose* amongst the participants for attendance of that meeting or procession.[3] Bearing in mind the purpose of the regulation, we are of the view that a similar common purpose of common intention test would apply albeit not restricted to meetings and processions but for any and all purposes If so, a group gathering in a public place may become unlawful where,

- a group of 4 persons decide to join other groups/ individuals,
- multiple groups of 4 persons converge, or
- a large number of persons meet by dividing into smaller groups of 4,
- **and** such groups were participating in the same activity or were there for the same purpose.

There is no requirement in our view, to know each other beforehand or to take preparatory steps to be criminally liable.

As to what extent of participation, in Singapore where similar restrictive laws have been enacted to regulate public meetings and processions, the High Court there has

[1] *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142
[2] *R v Cheng Ching Kwong* [1986] HKC 109
[3] Section 2, Public Order Ordinance, Cap. 245

held that there must be evidence of "sufficient participation in their common intention" though there need not be "physical participation" to establish a common intention or purpose.[4]

Q3: What is the meaning of a "public place"?

Under section 2, a "public place" means *"a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or otherwise.*" This definition is again similar to that under the POO[5].

In assessing whether an area is "public place", a key question is whether a person who has access to it does so *as a member of the public or a member of a section of the public.* This is to be distinguished from accessing private premises restricted to the lawful occupiers and their invitees or licensees. The first two are clear examples of a public place whereas the third is not:

(1) Parks, shopping malls, or retail shops would be prohibited, as long as these places are open for business inviting members of the public to enter[6] (even if certain parts of the premises are closed[7]);

(2) Private properties in which the public or a section of the public has a general entitlement or permission to enter a place. It would not matter whether payment is required in order to enter. Classic examples are restaurants or clubs;[8]

(3) An office unit or the common corridor of a commercial building even though the general public can access such areas, they would not usually do so without invitation or license from the proprietor[9].

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4 See *Chee Soon Juan & Ors v Public Prosecutor* [2012] SGHC 109 (21 May 2012) at §§66 – 67. In that case, the conviction against a "citizen journalist" was overturned because notwithstanding he shouted one slogan together with the participants, there was evidence that he was covering all the political rallies (lawful or otherwise) and posting such matters into his blog and did not sufficiently participate on the facts.

5 There is also a definition in Section 3, Interpretation and General Clauses Ordinance, Cap. 1 which includes any public street, or pier or public garden, theatre, place of public entertainment or place of general resort to which admission is obtained by payment or the public is permitted to have access.

6 *Wong Yiu Wan v Others* [2002] 1 HKLRD 547

7 *HKSAR v Pearce* [2005] 4 HKC 105

8 *HKSAR v Wong Yiu Wah & Ors* [2002] 1 HKC 527

9 R v Lam Shing Chow [1985] 1 HKC 162

Ambiguity arises in respect of workplaces, in conjunction with the specific exemption which allows group gatherings for the purpose of work (see Q4 below).

- Private conferences with clients are likely to be excluded from the definition of a prohibited gathering;
- A private seminar at a venue which is generally leased for public use, would be distinguished from one held at a private office, and might fall within the definition of "public place". See also the closure of lecture halls at Q11.

Q4: Are there any exemptions?

Several categories of group gatherings are exempted from the prohibition, most prominently those for the purposes of work and those of persons living in the same household. The full list of exemptions are in Schedule 1 of the Group Gathering Regulation.

Annual General Meetings ("**AGMs**"), held by companies in pursuant to section 610 of the Companies Ordinance, Cap. 622, and also incorporated owners under Schedule 3(1) of the Building Management Ordinance, Cap. 344 would fall under the express exemption in Schedule 1 Paragraph 11. Extraordinary General Meetings in whatsoever form may not be exempted as there is no statutory requirement for the holding of such. Companies should consult their legal counsel as to the permissible forms of meetings which could be held under their Articles of Association, including *inter alia* the venue in question, the numbers of participants, and whether it can be done virtually.

The Government has the power under section 4 to permit a public gathering in narrow circumstances of necessity and exceptional circumstances in the public interest.

Q5: Which enforcement authority is in charge of enforcement and what are their powers?

The Group Gathering Regulation is unprecedented and grants wide powers to undefined officers, and will raise difficulties for those seeking to comply with lawful demands made under the Regulation.

The Identity of the Authorised Officers

Section 14 does not provide for any specific form or procedure for authorization, nor any requirement for public notification/gazetting; cf. the procedure for determining the "specified period" of the prohibition under section 4. However, in a press release, the Government has announced that all government officials who have enforcement roles and also those who manage public venues would be empowered to enforce the regulation.[10]

In the absence of a list or a form of identification enabling the public to know if an official is authorized under the Group Gathering Regulation, and clarification whether off-duty persons retain such powers (and how a member of the public can identify off-duty officers), it might be queried whether the power meets the "prescribed by law" requirement to justify interference with fundamental rights.

The Extended Power to Stop

Like the power to inspect identity cards,[11] section 9 confers powers of authorized officers to stop and demand personal details against persons they have reasonable belief of an offence under the regulation being committed. The powers are more extensive however, and can include disclosure of personal details such as current address, contact telephone number and date of birth. Both the failure to comply without reasonable excuse, or supplying false information would incur criminal liability.

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[10] https://news.mingpao.com/pns/要聞/article/20200329/s00001/1585420205133/禁聚集惹打壓集會質疑-執法人員憂被指違憲 - This in effect means conferring stop and search and powers of arrest to not only to police officers, but unless clarified, can include the customs and excise, traffic wardens, immigration, anti-corruption, correctional services, hawker control, health inspectors and those who are managing public venues including parks, cultural venues.

[11] Registration of Persons Ordinance, Cap. 177.

The Extended Power to Search

Section 11 authorises such officers at a reasonable time to enter into and inspect a place considered necessary and to require production of any document or article or to furnish any information and also to seize such items that appears to be evidence of an offence under the regulations.

Powers of seizure granted are extremely wide, covering *"any document or article in the person's possession"* subject to inspection *"found in the place that appears to the officer to be evidence of the offence"*. Other powers of search are also wide, including: compulsory production of items; furnishing of information in relation to activity in the public place; inspection of a document or article; and requiring the suspect to positively render assistance to the officer or provide information in his or her possession.

This new statutory language suggests that an authorized officer can conduct a warrantless search against a mobile phone and require a suspect to furnish *inter alia* the password, contrary to the pre-existing powers of stop and search under section 50(6) of the Police Force Ordinance, Cap. 232 which was considered in *Sham Wing Kan v Commissioner of Police* [2020] HKCA 186. *Sham* held that a police officer cannot search the contents of a mobile phone of an arrested person without a warrant unless it is not reasonably practicable to obtain a warrant before doing so.

In order for a police officer to conduct a warrantless search, the Court has formulated the following safeguards:

(a) first, the police must have a reasonable suspicion that the person arrested (and subject to the search) has committed an offence;

(b) secondly, the scope and purpose of the search must be truly incidental to the arrest in question. In other words, the police officer must have a reasonable basis for having to conduct the search immediately as being necessary:

(1) for the investigation of offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or

(2) for the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene);

(c) whilst a police officer would need to access the phone generally for cursory filtering examination, he should limit the scope of the detailed examination of its digital contents to relevant items by reference to the criteria in the preceding paragraph; and

(d) to provide a further safeguard by way of documentation of the purpose and scope of the warrantless search, a police officer should make an adequate written record of the same as soon as practicable after the performance of the search. A copy of the written record should be supplied forthwith to the arrested person unless doing so would jeopardise the ongoing process of criminal investigation.

It should not be overlooked that, in the appeal of Sham, it was common ground between all parties that even where a warrant has been issued by a magistrate, an arrested person cannot be lawfully compelled to provide the password. This is based on the very fundamental right to silence enjoyed by all arrested persons.

In light of *Sham*, it is arguable that such extensive powers under the Group Gathering Regulation are entirely unnecessary – existing police powers already entitle police officers with extensive powers to conduct warrantless searches. In addition, the duty imposed against suspects to positively assist in criminal investigations is problematic: it displaces the right to silence, [12] and substantially interferes with privacy rights.

A remarkable feature of the Court of Appeal's judgment in *Sham* is its strong emphasis that the scope and purpose of the search must be truly incidental to the arrest in question. Regardless of whether a search of the mobile phone is armed by a warrant, an arrested person is entitled to apply to the Court to restrict the scope of

[12] The present situation can be distinguished from a "pre-existing fact" which can require compelled disclosure of documents which may incriminate a person but does not engage the right against self-incrimination because the officer in question here must make reasonable enquiries and then is entitled only to act upon a reasonable suspicion, and in order to do that may have to interrogate a suspect, *c.f. Attorney General's Reference No 7 of 2000* [2001] 1 WLR 1879, *AA v Securities and Futures Commission (No. 2)* [2019] 2 HKLRD 16 at §§250 – 260.

the search so that it is restricted to the offence and circumstances relevant to the investigation. The extent of such restriction would ultimately depend on the circumstances of individual cases, and therefore legal advice should be obtained if you are considering this course of action.

Furthermore, schedule 2 of the Group Gathering Regulation provides for a regime of fixed penalty notice. Such regimes are commonly used in dealing with less serious behaviours such as littering and illegal parking. The purpose is to minimize the public resources for investigation and to prescribe a procedure to enforce the laws without leaving the offenders any criminal convictions. The extensive powers of the authorized officers are therefore inconsistent with the purpose behind the regime of fixed penalty notice, and in our view plainly unnecessary to further the statutory purpose.

Bearing in mind all the above, when confronted with a situation of a demand from a person purported to be an authorized officer, one may:

- exercise sensible caution and request for a warrant card and/or official identification before complying with any request;
- require the authorized officer to explain why he has formed his reasonable suspicion;
- seek clarifications as to the scope of the search and furnishing of information required by the officer in question without giving away any access password generally or providing any biometric access;
- ask for a written record as soon as possible after any warrantless search on the mobile phone; and
- consider the option of asserting a right to legal representation and compliance in the company of legal representation.

RESTRICTIONS ON CATERING BUSINESSES

Q6: How will my Catering Business or Bar be affected?

Catering Businesses face operational restrictions, as do bars and premises selling liquor. Pursuant to powers under section 6 of the Business and Premises Regulation that begin at 6:00 p.m. on 28 March 2020 (Saturday), all Catering Businesses are

directed to: half the seating capacity for customers consuming food and beverage in such premises; have a 1.5 metre distance between table arrangements with maximum 4 persons per table; require all persons to wear a mask except when consuming food, screen the temperature of all persons entering and leaving, and provide hand sanitisers ("**Catering Directions**").

Owners and staff of Catering Businesses should ensure that their business complies with all the Catering Directions (as to what constitutes a Catering Business, see Q8 below). Clear written instructions and the relevant equipment should be given to the staff to carry out each of the Catering Directions. Copies of those written instructions should be retained, in order to show compliance if the need arises.

If any of the Catering Directions cannot be complied with (eg. due to inability to procure certain equipment in time), the business should be closed until the owners and staff are confident the Directions can be adhered to.

Some of the Catering Directions will require cooperation of customers, eg. the requirement to wear a mask and to have no more than 4 persons at the table. Clear signs should be put up reminding customers of those restrictions, and staff ought to be alert to any customers who have not so adhered, and advise them to adhere to the relevant restriction. If the customer refuses to comply, the business is justified in refusing to serve the customer or to request the customer to vacate the premises.

On 3 April 2020, further directions were gazetted ("**Liquor Directions**"), also under section 6 of the Business and Premises Regulation, to require the closure of bars and premises selling liquor ("**Liquor Businesses**").

Q7: What other restrictions does the Government have the power to impose on Catering Businesses in the future?

The Secretary for Food and Health also has the power to direct the closing of premises or to restrict to the opening hours of the business, or to order a Catering Business to cease selling or supplying food or drink for the consumption on the premises of the business.[13] So far, there are directions for wholesale closure of bars, but no directions for the wholesale closure of restaurants.

[13] Sections 3 and 6 of the Business and Premises Regulation

Q8: What counts as a Catering Business? What counts as a Liquor Business that must be closed?

All businesses which provide catering, ie. the supply of food or drink, should consider themselves subject to the Catering Directions. The most obvious examples are restaurants, bars and cafes.

The Business and Premises Regulation itself does not contain a definition of "catering business". Reference may be made to the Preserves in Food Regulation (issued under the Public Health and Municipal Services Ordinance), which suggests the width of enterprises covered. The Preserves in Food Regulation defines "catering business" as "includ[ing] the business or undertaking of an inn, public house, hotel, restaurant, cafe, tea-shop, buffet, coffee-stall or any place of refreshment open to the public, or of a club, boarding house, apartment house, refreshment contractor, school feeding centre, staff dining room or canteen".

Businesses which provide multiple services, of which one is catering, such as karaoke venues, also need to abide by the Catering Directions.[14]

As to Liquor Businesses which must be closed under the Liquor Directions, two types of business are caught. The first category is intended to close down bars and pubs: any premises that is *exclusively or mainly* used for the sale or supply of intoxicating liquors for consumption in that premises must be closed. The second category is intended to close down the "bar-area" within restaurants, hotels or cafes: where a catering business sells or supplies food or drink for consumption on its premises, any part of the premises that is *exclusively or mainly* used for the sale or supply of intoxicating liquors for consumption in that part must be closed.

There is no prohibition on the sale of alcohol where it is not the primary source of business – for example, restaurants may continue to serve wine where it accompanies a meal. Grey areas arise in respect of bars which offer bar snacks. The assessment of whether a premise is *exclusively or mainly* used for the sale or supply of liquor for consumption in the premises will necessarily be a factual assessment. There is also no prohibition on businesses selling alcohol for off-site consumption,

[14] https://www.news.gov.hk/chi/2020/03/20200328/20200328_163230_965.html

although this may well lead to circumvention by having "take-away" drinks right outside the restaurant.

Q9: Who will be penalized for non-compliance with the Directions?

Criminal liability for non-compliance with the Directions is only imposed on the "person responsible for carrying on a catering business". The Business and Premises Regulation specifically states that this includes the owner, proprietor and manager of the business. This list is non-exhaustive, and other persons with requisite level of responsibility could be included. Staff with managerial duties should consider themselves potentially liable for infractions of the Directions. The maximum penalty upon conviction is a fine of $50,000 and imprisonment for 6 months. Notably, customers are not directly subjected to criminal liability under these directions, although in the course of their patronage at restaurants or bars, they may be caught by the prohibition on gathering in groups of more than four, as businesses open to the public are regarded as "public places".

Q10: I operate a takeaway restaurant. Is my establishment subject to the same restrictions?

Takeaway establishments are unaffected by the Catering Directions and the Liquor Directions. The Catering Directions are all restrictions in respect of "Catering Premises" only, which is described in the Directions as "any premises on which food or drink is sold or supplied *for consumption on the premises*". The Liquor Directions likewise only target premises where liquor is for consumption in the premises.

CLOSURE OF AFFECTED PREMISES

Q11: What are the Affected Premises that are ordered to be closed?

The following Premises were ordered on 27 March 2020 to be closed:

- Amusement game centre[15]

[15] See the definition of an amusement game centre set out in the Amusement Game Centres Ordinance, Cap. 435

- Bathhouse[16]
- Fitness centres, mostly commonly including gyms. This covers premises providing exercise machines or equipment for use, or providing instruction/assistance on improving physical fitness, including bodybuilding; dancing; yoga, pilates or body stretching; and martial arts.[17] The Regulation does not distinguish between fitness centres which are accessible to all as opposed to those restricted to certain clients only. Therefore, gyms in private residential premises are included.
- Place of amusement, including a billiard establishment, a public bowling-alley, and a public skating rink.[18]
- Place of public entertainment, meaning a place or vessel capable of accommodating the public, in or on which (i) a public entertainment is carried on, and (ii) to which the general public is admitted with or without payment.[19] Public entertainment means any of the following activities: (a) stage performances and musical, dramatic or theatrical entertainment; (b) a cinematograph or laser projection display (ie. cinemas); (c) a circus; (d) a lecture or story-telling; (e) an exhibition of pictures, photographs, books, manuscripts or other documents or other things; (f) a sporting exhibition or contest; (g) a bazaar; (h) an amusement ride; and (i) a dance party.[20] Certain places might not fall within the meaning of "place of public entertainment", but might instead fall within the meaning of "public place", and the owners and operators of such places should be aware of and adhere to the new restrictions on group gatherings in public places (see Q3).
- Premises (commonly known as party room) that are maintained or intended to be maintained for hire for holding social gatherings. The Regulation does not distinguish between party rooms which are accessible to all as opposed to those restricted to certain clients only. Therefore, party rooms in the clubhouse facilities of private residential premises would be included.

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[16] See the definition of bathhouse set out in the Commercial Bathhouses Regulation, Cap. 132I

[17] Business and Premises Regulation Schedule 2 Part 2

[18] Business and Premises Regulation Schedule 2 Part 2

[19] Business and Premises Regulation Schedule 2 Part 2 and the Places of Public Entertainment Ordinance section 2. The word "admitted" is construed in an active sense and as requiring that, for a place to be a place of public entertainment, the person presenting or carrying on the public entertainment must be able to control admission to the place where the entertainment is being presented or carried on: *T v Commissioner of Police* (2014) 17 HKCFAR 593

[20] Places of Public Entertainment Ordinance Schedule 1

Subsequently, a cluster arisng in a karaoke venue and a confirmed case of a beautician,[21] also draw scrutiny to the risk from other types of premises and the need to widen the net of closures. Further types of premises were ordered to be closed in early April, including karaoke venues, mahjong parlours, massage parlours and beauty parlours. The addition of these further types of premises appeared to target network-type infections. Whilst concerns as to the first batch of closures originated primarily out of the consideration that those venues (which included party rooms and cinemas) usually create large gatherings of people, the subsequent April closures targeted venues with potential chains of transmission where a customer might infect a service provider (e.g. a beautician or masseuse) who might then go on to pass the infection to another customer and so on and so forth, resulting in network-type infections even in the absence of large gatherings in those premises.

Q12: Who will be penalized for the Affected Premises remaining open?

Criminal liability for non-compliance is only imposed on the manager of the Affected Premises. The maximum penalty upon conviction is a fine of $50,000 and imprisonment for 6 months.[22] Similar to the Catering Directions and Liquor Directions, customers are not subjected to criminal liability for attending premises which are supposed to be closed, although they may be caught by the prohibition on gathering in more than groups of four, as businesses open to the public are regarded as "public places".

Q13: How will the Business and Premises Regulation be enforced? What rights and obligations do I have in the course of enforcement action?

The Secretary for Food and Health has the power to appoint a public officer to be an inspector to enforce the Business and Premises Regulation ("**Inspector**"). You are entitled to ask for written proof of appointment when a person purports to be an Inspector carrying out his or her inspection powers under the Business and Premises Regulation.[23]

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21 https://www.scmp.com/news/hong-kong/health-environment/article/3077887/coronavirus-hong-kong-government-adds-karaoke

22 In *HKSAR v Chui Shu Shing* (2017) 20 HKCFAR 333, the court relevantly held (in the context of the Hotel and Guesthouse Accommodation Ordinance) that the term "manage" should not be read so broadly that it caught conduct of a purely functional character which was not a manifestation of managerial authority.

23 Business and Premises Regulation, section 11

The Business and Premises Regulation empowers Inspectors with a broad range of powers, these include:

- **Entry into premises without warrant**, at any reasonable time as the Inspector considers necessary;
- **Requiring the manager produce documents or articles of the business**, where they relate to the operation or management of the premises or to any other activity in respect of the premises;
- **Requiring any person to provide information**, which the Inspector considers necessary;[24]
- Some of concerns regarding the extensive powers of enforcement under the Group Gathering Regulation discussed in Q5 above, also arise in relation to the Business and Premises Regulation.

It is an offence to, without reasonable excuse, obstruct an Inspector in performing a function of his or her inspection powers. It is also an offence to, without reasonable excuse, refuse the Inspector's request to produce documents or to provide information. The maximum penalty upon conviction is a fine of $10,000.[25]

Q14: Finally, how long are these restrictions in place for?

The directions under the Group Gathering Regulation were originally scheduled to end by 12 April 2020 (Sunday) at 00:00 after the period of 14 days has expired.

The directions under the Business and Premises Regulation were originally scheduled to end on 11 April 2020 (Saturday) at 6:00 p.m, again after 14 days had expired.

However, both sets of directions have been repeatedly extended (and in the case of Business and Premises Regulation, expanded in scope) at 14-day intervals. The Regulations provide for directions to be valid for only 2 weeks upon issuance and

[24] Business and Premises Regulation, section 12
[25] Business and Premises Regulation, section 13

thereby creating a fortnightly "review" effect. The latest directions (at time of publication) are due to expire in the first week of May 2020.

Final Observations

These are tough and difficult times for everyone, and no doubt we should all work together to control the current situation with COVID-19. Whilst the imposition of certain restrictions are understandably required, valid concerns arise out of the unprecedented expansion of the executive power that is liable to be abused. The enforcement and extension of these Regulations ought to be closely monitored.

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Earl Deng

Earl Deng was called in 2008 and has a developed a broad and busy civil law practice which encompasses both complex advisory and advocacy work in the fields of commercial, contractual (including labour and employment law matters), chancery and intellectual property disputes and is known as a specialist advocate for public and administrative law matters, and minority rights. Learn more about Earl's practice.

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Isabel Tam was called in 2013, and her practice has an emphasis in the areas of public law, family law, commercial law, regulatory matters and building management. Alongside an MA in competition law and spending a period seconded to the Competition Commission means Isabel is also well equipped to deal with competition law related matters. Obtain more details on Isabel's practice.

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Ted Chan was called in 2019 and has quickly developed a broad civil and criminal practice. Ted is also a CEDR accredited mediator and has been involved in mediations concerning a wide variety of disputes including matrimonial, nuisance, building management and contracts to name a few. Ted accepts instructions in all of Chambers' main practice areas. Access Ted's biography.