CJRB 1/2007

Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Summary of Responses to Consultation Draft of the Civil Justice (Miscellaneous Amendments) Bill

Serial No.	Summary of Comments on Consultation Draft Bill	Steering Committee's Consideration
Part 2 – Costs-only Proceedings **Civil Justice Reform Final Report Recommendation(s) :** 9 **Relevant Practice and Procedures in Common Law Jurisdictions** - Civil Procedure Rules of England and Wales ("CPR") 44.12A		
1.	Housing, Planning and Lands Bureau Re proposed amendments to, *inter alia*, s.8 of the Lands Tribunal Ordinance ("LTO") (Cap. 17) to make it clear that the Lands Tribunal ("LT") will not hear costs-only proceedings even if such proceedings arise out of a dispute which is within the jurisdiction of the LT. At present, the LT is empowered under various Ordinances to deal with claims for certain professional fees.	For the avoidance of doubt, it should be provided in s.8 of LTO that "*Except as provided by any other Ordinance"*, the LT should not have power to entertain costs only proceedings even though the settled dispute might have been within the jurisdiction of LT. See Clause 30 - proposed new section 8(12)(f) to the LTO.
2.	The Hong Kong Bar Association Suggests that jurisdictional limits are included to avoid confusion as to the Court the parties should apply to for a determination of costs only.	The District Court ("DC")'s jurisdictional limit for such proceedings is set at $1 million. No need to spell out the jurisdiction of the Court of First Instance ("CFI") because CFI has unlimited jurisdiction. However, CFI is empowered to transfer these proceedings to the DC and vice-versa. CFI and DC can tax these proceedings on either the HC or DC scale as the Court deems fit. See clause 3 – new sections 52C and 52D of High Court Ordinance ("HCO") (Cap. 4); and Clause 5 – new sections 53A(4), 53B and 53C of District Court Ordinance ("DCO") (Cap. 336).

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3.	Deacons The suggested addition of section 52B of the HCO and section 53A of the DCO is fine.	Noted. No change required.
4.	The Hong Kong Bar Association In respect of the proposed paragraph (1)(f) of the Schedule to Small Claims Tribunal Ordinance ("SCTO") (Cap. 338), the Bar queries why the Small Claims Tribunal ("SCT") should not have jurisdiction to determine costs only proceedings where the costs in question are within the jurisdictional limit of the SCT. The costs involved in commencing costs only proceedings in the DC is likely to be out of proportion to the amount at stake.	SCT does not have the expertise to do taxation.
Part 3 – Pleadings **Civil Justice Reform Final Report Recommendation(s) :** 25 **Relevant Practice and Procedures in Common Law Jurisdictions :** CPR 37.3		
5.	The Law Society of Hong Kong (i) The section [30] as currently drafted leaves out the requirement (part of the common law in the case of liquidated claims) that to take advantage of the defence the defendant must pay into court the sum allegedly tendered. This provision must be added. (ii) There does not seem to be any difference intended between "*the amount due"* and "*an amount sufficient to satisfy the claim"*, and it would be better to replace the two sub-paragraphs with "…*offered to the claimant an amount sufficient to satisfy the claim"*, which would adequately cover both permutations.	Add a provision to the effect that the defendant has no later than at the time of serving his defence paid the sum offered into court and notified the claimant of that payment in. See Clause 8 – new section 30(2). The reference to "*the amount due*" is intended for liquidated claim, whilst "*an amount sufficient to satisfy the claim*" is intended for unliquidated claim.
6.	N. Millar of Littlewoods Solicitors (i) Any defence of a tender should only count where the offer tendered has actually been accompanied by the sum offered.	Same comment as item 5(i) above.

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	(ii) Where a claim is made for a monetary sum, whether liquidated or unliquidated, once proceedings have been commenced, the defendant should not be able to avail itself of a defence of (subsequent to the issued proceedings) tender, but only be able to rely upon an actual payment into court.	The amendments already provide for this.
Part 4 – Interim Remedies and Mareva Injunctions in Aid of Foreign Proceeding **Civil Justice Reform Final Report Recommendation(s) :** 45 to 48 **Relevant Practice and Procedures in Common Law Jurisdictions** - Civil Jurisdiction and Judgments Act 1982 s.25(1) - Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997 No. 302)		
7.	<u>The Hong Kong Bar Association</u> (i) The Bar notes there is a potential source of dispute arising from the use of the word "capable" in the proposed new section 21M(1)(b), as this provision goes to the existence of jurisdiction. It would be preferrable for the threshold which an applicant must reach in order to establish jurisdiction to be clearly stated. (ii) The Bar agrees with the proposal in HCO s.21M(2). (iii) The Bar agrees with the wording "unjust or inconvenient" in HCO s. 21M(4). (iv) The Bar agrees with this proposed amendment to HCO s.21M(5) so as to give clear authority for the amendment of the RHC for the proper exercise of the jurisdiction to grant interim remedies in aid of foreign proceedings.	Re item (i), in considering whether there is existence of jurisdiction or not, the Court is likely to take into account, for example, whether the judgment debtor was present in the foreign country; the debtor counterclaimed in the foreign court; the debtor submitted to the jurisdiction of the foreign court; or if the debtor had previously agreed to submit to the jurisdiction of the foreign court (for example, by an exclusive jurisdiction clause in a contract). The court may also interpret "capable of giving rise to a judgment which is capable of being enforced in Hong Kong under any Ordinance or at common law" in accordance with the Foreign Judgments (Reciprocal Enforcement) Ordinance, Cap, 319, applicable international conventions, principles of conflict of laws and common law, with the assistance if necessary of expert reports on foreign law.

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	(v) Whilst agreeing with the general form of the proposed HCO ss.21M and 21N, the Bar considers that there would be merit in seeking at the time of the introduction of the new amendments for there to be in existence guidelines in relation to the proper exercise of the Court's discretion. (vi) The Bar considers it of particular importance that all reasonable protection should be given to third parties given notice of interim orders, since it would be invidious if a third party (such as a bank) were to find itself in a position of having to comply with an order of a Hong Kong Court whilst that at the same time being required to comply with a potentially conflicting, inconsistent or overlapping order from a court in the jurisdiction seized of the substantive proceedings.	Re item (v) - Guidelines for proper exercise of the Court's discretion can be left to case law. Re item (vi) – This point is noted and will likely be considered by the Court in considering whether or not to grant relief under this provision.
8.	<u>Deacons</u> We support the suggestion that the power to make interim remedies in aid of foreign proceedings should only be exercised by the HC because other courts may not have the requisite expertise.	Noted. No change required.
9.	<u>Hong Kong International Arbitration Centre ("HKIAC")</u> (i) The suggested amendments to Section 2GC of the Arbitration Ordinance ("AO") (Cap. 341) do not take account of Section 2GG of the AO. The intention of the present Section 2GG was to allow orders or directions of an arbitral tribunal made in any place outside Hong Kong to be enforced without limitation and it is noted that the draft of Section 2GC(1A) restricts enforcement to arbitration proceedings where the award would be capable of being enforced in Hong Kong under the AO or any other Ordinance.	The proposed Section 2GC(1A) refers to, inter-alia, "… *an arbitral award (whether interim or final) which may be enforced in Hong Kong <u>under this Ordinance</u> or any other Ordinance*." The reference to "*this Ordinance*", i.e. the AO, includes section 2GG of the AO.

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	(ii) A Committee of the HKIAC has recommended a full scale redrafting of the AO and a draft Bill is being prepared by a Working Group chaired by the Solicitor General. HKIAC is of the view that any appropriate amendments to the AO should be dealt with by the Working Group so that they mesh with the other provisions of the draft Arbitration Bill being prepared by the Working Group and take into account the recommendations in the CJR Final Report.	There is no need to await the Arbitration Bill Working Group's recommendations (which appear to be some time away) before implementing s.2GC(1A). The amendments proposed in respect of the relevant provisions of the AO would not prejudice/pre-empt the proposals that the Department of Justice ("DoJ") Working Group may make with regard to interim measures in aid of foreign arbitral proceedings.
Part 5 – Vexatious Litigants **Civil Justice Reform Final Report Recommendation(s) :** 67 and 68 **Relevant Practice and Procedures in Common Law Jurisdictions** - Section 42 of the Supreme Court Act 1981 in England and Wales		
10.	<u>The Law Society of Hong Kong</u> The proposed new section 27 appears satisfactory, but the definition of "affected person" may accidentally introduce a preliminary issue of locus on such applications, requiring a decision as to whether the proceedings are in fact vexatious before it can be decided whether the applicant has standing. It would be better if the text made clear that ***allegedly*** vexatious proceedings were enough to found locus.	Proof that legal proceedings were "vexatious" is an essential element under this section. There is no reason for the court to grant a s.27 order based on allegations.
11.	<u>N. Millar of Littlewoods Solicitors</u> Section 27(3) would have the effect that unless a time limit is specified at the time of making an order specified in sub-section (2), such an order shall remain in force indefinitely. It would be better for the limitation to be restricted to a declared period of time or, failing that, to perhaps be for an indefinite period but subject to mandatory reviews, at which the person the subject of the order could be heard as to its continuance or otherwise.	The Court has power to limit the duration of the order or to impose terms and conditions. If the vexatious litigant is dissatisfied, he can appeal.

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12.	The Hong Kong Bar Association Subject to the views expressed below on the right to appeal or review by the applicant, the Bar agrees that it is necessary to have statutory backing in dealing with the problems associated with vexatious litigants and agrees with this proposed amendment (to section 27) in principle. In respect of HCO s.27(5), the Bar is concerned as regards the lack of a right to appeal or review by a person who is refused leave to institute proceedings. Since a refusal of an application under this section would have the effect of taking away the applicant's right to bring any proceedings, the Bar suggests that, if there is no right to appeal, there should at least be a right to seek leave to appeal against the decision made by a single judge.	See Clause 13 - New section 27A(2) added to allow for the right of appeal if leave is granted by the CFI.
13.	Deacons Amendments to section 27 are welcomed. Although the provisions are basically the same as the old section 27 of HCO, the revised "format" makes them much clearer.	Noted. No change required.
Part 6 – Discovery **Civil Justice Reform Final Report Recommendation(s) :** 75 and 77 **Relevant Practice and Procedures in Common Law Jurisdictions** - CPR 31.16 and 31.17 - Sections 33 and 34 of the Supreme Court Act 1981 - Sections 52 and 53 of the County Courts Act 1984		
14.	Deacons (i) The difference between s.41 and s.41A is the test of relevancy. In s.41A, the documents required to be disclosed must be "directly" relevant. S.41 only requires the documents to be relevant which seems to suggest that the scope for pre-action discovery for PI claims is wider. Suggest that all types of cases should be dealt with under s.41A.	(i) Agreed that a common test of "directly relevant" should be adopted for all applications for pre-action disclosure. Proposed section 41A in Consultation Draft Bill deleted. See Clause 14 – Existing section 41 to be amended to cover all types of claims and adding "directly" before "relevant".

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	(ii) In section 42(2) of the HCO, it is unclear whether the Court is empowered to make an order against a person who is not a party to the proceedings. By comparison, section 47B of the DCO is clearer in this regard. We suggest that s.42(2) be amended by adding "against a person who is not a party to the proceedings" before "providing for" in section 42(2) of the HCO.	(ii) The wording of the present section 42(2) seems clear to mean that the order is to be made against a person who is not a party to the proceedings, but no objection to making an express provision to this. The Steering Committee would liaise with the DoJ for the requisite Committee Stage Amendments.
Part 7 – Wasted Costs **Civil Justice Reform Final Report Recommendation(s) :** 94 to 97 **Relevant Practice and Procedures in Common Law Jurisdictions** - Section 51 of the English Supreme Court Act 1981 in England and Wales		
15.	<u>Cheung Kam-chuen</u> (i) The terms "improper or unreasonable act/omission, undue delay or misconduct..." can be widely interpreted. In particular, what amounts to "misconduct" or "omission" can be ambiguous.	(i) Interpretation of "improper or unreasonable act/ omission" can be left to case law. There is already a useful body of case law that will no doubt assist the courts in this context. Para 547 of the Final Report has quoted some cases on such interpretation. The section is not intended to punish proper and fearless conduct.
	(ii) Arguably, wasted costs order is a double-edged sword; it may bring more disadvantages than advantages and does not offer sufficient protection to clients in the long term. That is the reason why in the past counsel were immune from liability in litigation because immunity could enable them to conduct cases fearlessly and to put forward arguments boldly for the best interest of their clients and for the public interest.	(ii) As a matter of policy, there is no reason for not adopting the Recommendation of the Final Report which has gone through wide consultation.

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16.	The Hong Kong Bar Association (i) Wasted costs orders are meant to compensate and not provide a windfall. This principle would be better recognized if the word "wholly" was inserted between the words "party" and "as" in the proposed HCO s.52A(5) and the corresponding provision in the DCO. (ii) To ensure that wasted costs orders are not easily abused or wrongly used, the extension of the wasted costs order jurisdiction to barristers together with the empowerment of judges to make such orders on their own motion should be accompanied by the provision of an unqualified right of appeal against such orders as a safeguard. (iii) s.52A to be amended to make provision for public funds to meet the legal representative's costs in successfully defended wasted costs order (iv) A legal representative, who shows that he is barred by legal professional privilege from defending himself properly on a wasted cost order [,should have the benefit of the doubt]: *Medcalf v. Mardell*	Items (i) and (iv) are unnecessary. The Court in exercising its power to grant wasted costs orders will take into account all relevant considerations and circumstances. It is well understood that a wasted costs order will not lightly be made. As regards item (ii), it would be made clear in the Rules that wasted costs orders should be subject to an unqualified right of appeal to the Court of Appeal. As to item (iii), currently there is no such fund for the wasted costs provisions which apply to solicitors. The Steering Committee is however not in a position to take a view as the proposal involves the use of public funds and should therefore be a matter for the Administration to decide. Accordingly, insofar as the draft legislation for the CJR is concerned, the Steering Committee will not incorporate an amendment to take this factor into account.
Part 8 – Leave to Appeal **Civil Justice Reform Final Report Recommendation(s) :** 110 to 113 and 115 **Relevant Practice and Procedures in Common Law Jurisdictions** - CPR 52.3 - CPR Practice Direction 52		
17.	The Law Society of Hong Kong We agree with the proposed threshold requirement in the proposed s.14AA of the HCO. However, for the sake of clarity and consistency, the test for the imposition of conditions (to the grant of leave to appeal an interlocutory order) should reflect the wording of the original Recommendation 111; namely,	The test for imposition of conditions in the Bill is wider than the wording in the Final Report and should remain.

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	such conditions "*designed to ensure the fair and efficient disposal of the appeal*".	
18.	The Hong Kong Bar Association The proposed s.14AA(4) of the HCO specifies the criteria for granting leave to appeal to the Court of Appeal. Two alternative criteria are to be specified. The Bar has no objection to these criteria as understood in the relevant case law - Ma Bik Yung v Ko Chuen (unreported, 8 September 1999, HCMP 4303/1999), and the guidance of Lord Woolf MR in Smith v Cosworth Casting Processes Ltd [1997] 1 WLR 1538, CA (Eng) at 1538F-H. The Bar is of the view that provided that the leave to appeal requirement prescribed under the proposed HCO s.14AA(1) remains subject to the exceptions prescribed under the proposed O.59 r.21, the proposed insertion of HCO s.34B(4)(aa) is acceptable.	Noted. No change required.
19.	Deacons The requirement of leave to appeal for interlocutory judgment or order is new to HK but not to other jurisdictions. In UK, the requirement has been in place prior to the Woolf Reforms. We agree that for better case management, the requirement of leave should be adopted. On the threshold test for granting leave, section 14AA(4) provides that the appeal has to have "a reasonable prospect of success". It would be helpful to give some illustrations or examples on how the test can be satisfied.	Definition of "reasonable prospect of success" should be left to case law.
Part 9 – Appeals **Civil Justice Reform Final Report Recommendation(s) :** 120		
20.	The Hong Kong Bar Association While the Bar considers to be acceptable the objective to be achieved by the proposed insertion of HCO s.34B(4)(ab), the amendments seek to erode the fundamental right to a public hearing by making relatively subtle	The proposed amendments do not seek to "erode the fundamental right to a public hearing", but to implement Recommendation 120 of the Final Report. The Steering Committee does not

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	amendments to a provision whose purpose is to specify the situations in which a Court of Appeal consisting of two Justices of Appeal is duly constituted. For the reasons stated above, the Bar finds the proposed amendment to HCO s.34B(4)(a), (ab), (b), (c) and (e), as presently drafted, to be unacceptable.	therefore accept the Bar's premise in this regard. The issues of oral hearing and the right to a fair and public hearing in appellate proceedings have been discussed in the CJR Final Report (see paras. 68, 72-78). The proposed amendments allowing interlocutory and leave applications to be dealt with on paper without a hearing are in line with the overall objectives of the CJR – - increase cost-effective of practice and procedure - promote reasonable proportion and procedural economy in conduct of the whole proceedings - ensure resources of court distributed fairly.
Part 10 – Costs Against Non-party **Relevant Practice and Procedures in Common Law Jurisdictions** - Section 51 of the Supreme Court Act 1981 in England and Wales		
21.	<u>Economic Development and Labour Bureau (Labour)</u> From time to time, non-parties are approached by legal representatives of the litigants for specific information for the purpose of employees' compensation or personal injury proceedings. These individuals are mostly not legally represented and, as a non-party, would not be able to tell if the information sought is necessary to the proceedings or not. Under the threat of possible costs orders against them, these non-parties might be coerced to cooperate. Measures should be taken to safeguard the interests of non-parties.	The rules will be amended to provide safeguards to the interests of non-parties, so that before issuing a costs-order against a non-party, that non-party must join the proceedings as a party, and afforded a hearing before the Court.
22.	<u>The Law Society of Hong Kong</u> As far as we are aware, this was not considered by the Chief Justice's Working Party in its Final Report. It is questionable whether this issue should properly be included in the *Consultation*	The proposed amendments were considered desirable in the course of the Steering Committee's deliberations, and hence put forward for Consultation.

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	Paper. The repeal of s.52A(2) would be a significant development and should not be done without proper consideration of the merits for and against. There are some forceful arguments to be made for exposing *certain* non-parties to a liability for costs if they can be shown to have funded and controlled litigation in Hong Kong and for their own purposes (for example, they are not "*pure funders*"). However, this issue justifies further consideration.	There was general support from respondents who had commented on this proposal.
23.	W S Clarke The proposed repeal of section 52A(2) of the HCO seems to be intended to adopt for Hong Kong the position in some other common law jurisdictions where the court has a broad power to order costs against non-parties. The question is whether the simple repeal of HCO 52A(2) will be effective in removing the uncertainty and bringing the law of Hong Kong into line with that of similar jurisdictions. Consideration might be given to replacing s 52A(2) with an express discretion in the court to order costs against non-parties where it is in the interests of justice to do so. Not only would such a provision assist in achieving the apparent objective, it would be useful to court users in stating clearly what the law is.	Accepted that express provision is required for costs against non parties, instead of simple deletion of s.52A(2) of HCO. See Clauses 27, 28 and 33 – New ss.52A(2) of HCO, 53(2) of DCO and 12(2) of LTO.
24.	Deacons We support the suggested repeal of paragraph 2 of Section 52A of the HCO as it will be less difficult to apply for a costs order against a non-party who, however, is the real party to the proceedings. For the avoidance of doubt, we suggest that s.52A of the HCO be amended by adding "(including any party who is not a party to such proceedings)" after "by whom".	Same comments as serial no. 23 above.

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Part 12 – Lands Tribunal **Relevant Practice and Procedures in Common Law Jurisdictions** - As per Parts 7 and 10 above in relation to proposed amendments to section 12 on (i) wasted costs and (ii) costs against a non-party		
25.	The Hong Kong Bar Association The Bar commented in April 2005 [in the context of the LT Review] that the proposed amendment to LTO s.10 was unnecessary. Section 10 in its present form is already flexible enough. As to the empowering of the LT generally to adopt all practice and procedure of the CFI as it thinks fit, the Bar commented that the proposal was not clear enough and would do more harm than good, since the use of general language and the deletion of the list of matters in s.10(1) would be to pursue neatness at the expense of ease of understanding of the law and ease of access to the law by ordinary members of public and litigants in person.	In response to the Bar Association's comments on the proposed amendments to s.10(1) of the LTO in 2005, the Judiciary explained that paragraphs (a) to (i) under section 10 may appear to restrict the LT's powers to adopt the HC's practice and procedure to these specific matters only. The proposed deletion of paragraphs (a) to (i) would make it clear that the LT has the flexibility to adopt the HC practice and procedures generally. In its letter of 31.10.2005, the Bar relied that, "Having noted the clarifications in relation to section 10(1) as set out in your letter, the Bar Council now agrees to this proposed amendment." Pursuant to s.10(5)(a) of the LTO, the proceedings of the LT shall be conducted with as much informality as is consistent with attaining justice and for this purpose the President may give directions as to the manner and form in which proceedings shall be conducted. The LT is conscious of and has taken into account the needs of litigants in person. It is the practice of the LT to hold callover hearing on its own motion at which the LT may give directions as it may think fit for the purpose of expediting and disposing of the proceedings. This practice will continue
26.	The Hong Kong Bar Association The Consultation Paper indicates at page C6 that amendments along similar lines as those to the HCO will be incorporated into the LTO s.11. The present LTO s.11 permits in general	Agreed that there is no need to apply provisions on leave requirement for interlocutory appeals to the LT. Hence, no such amendment to the LTO in the Bill.

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	only appeals to the Court of Appeal on the ground that the determination or order of the LT is erroneous in point of law. The Bar is against introducing a leave requirement in addition to the existing provision, which already confines the scope of appeals.	

Judiciary Administration
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