SUGGESTED TOPICS FOR DISCUSSION FOR THE CIVIL JUSTICE REFORMS

I. COMMENCEMENT OF PROCEEDINGS

1. In many commercial cases, a draft of the Statement of Claim is served with the letter before action. We believe a new Rule should be introduced making the Letter Before Action, with a Draft Statement of Claim and witness proof, or in personal injuries cases a medical report, should be served. This should be the triggering of the proceedings for the purposes of exercising the discretion in costs.

2. In the Personal Injuries List the procedures introduced do not work in Hong Kong as the Insurers do not want to settle claims at the beginning at all, as they hope the claims will go away. It will only work if it is coupled with a Part 36 Offer.

   In very few cases are there constructive responses at this stage.

3. Many cases when commenced for interlocutory relief, settle shortly afterwards, e.g. injunctions, interim payments, applications for security for costs etc.

   So the actual commencement of proceedings provides a useful medium of dispute resolution in itself.

II. THE NEED FOR SPECIAL RULES FOR SHELF COMPANIES OR BVI COMPANIES WHO COMMENCE PROCEEDINGS OR OUR DEFENDANTS THERETO AND TOURISTS

1. Many businesses use BVI or shelf companies for transactions. One ship or one flat companies are common. If one looks at the capital outflows from Hong Kong in terms of overseas remittances, one can see that BVI and Bermuda probably account for 25%.

2. Many people are discouraged from litigating against such entities because they have no Hong Kong assets, and their directors or directing agents cannot be the subject of an order for costs personally. See Section 28 A of the High Court Ordinance. So if there was an effective sanction in Order 23 for bringing into court the costs of an action at an early stage, many would be litigants would commence proceedings now, in situations where solicitors are in effect saying "Do not waste your time".

3. There ought to be special rules for Hong Kong tourists who are injured here. We have a huge number of tourists passing through Hong Kong, and unless they approach the Legal Aid Department, they fail at first base, as they are asked to provide security for costs being foreign residents. Often they are not working as result of their injuries, and their should be a simple procedure to avoid an application for security stopping a valid action in its tracks.

4. **Interface between Arbitration and High Court Proceedings.**

The interface between actions in the High Court and Arbitration proceedings is cumbersome as there is no mechanism to prevent duality of proceedings and civil liability contribution is fraught with limitations, as there is a restrictive definition of "same damage". Arbitration is now becoming so expensive and formalized, their justification for separate sets of proceedings is now reduced.

III. FUNDING OF PROCEEDINGS – ACCESS TO THE JUDICIAL SYSTEM

1. **Front loading of costs deters litigants from using the courts.** Many firms of solicitors have in the past operated on the basis that they take little on account to get an action started, and then either allow clients to pay as they go along, or to await the results of taxation and get paid then.

2. **Do not assume the costs of Litigation in Hong Kong are high.**

The Judiciary must recognise that in order to retain good lawyers in practice in Hong Kong they have to be remunerated appropriately. This is fundamental in our view, as people will lose faith in the administration of justice if they perceive the lawyers are poor and poorly paid. If sensible rates are not maintained, then we will have no choice but to tell new entrants there is no prospect of earning a good (as opposed to

an extravagant living) by practising litigation. This will ensure that the brightest potential entrants to the law will seek other kinds of work.

3. We have undertaken surveys in the past for the Civil Justice Reform Commission in a number of jurisdictions, **to supply costs comparisons in average cases, as a percentage of damages recovered**. In the latter type of comparison, Hong Kong does surprisingly well with figures as low as 25% in the case of the Legal Aid Department, and 30-35 % in other cases. We do not believe the current schedules - Appendix 8 represent the taxation picture over the last 20 years or so.

4. We believe that the Legal Aid system in Hong Kong is excellent and it should be expanded especially the Supplementary Legal Aid Scheme which is self funding as another aspect of Legal Aid Litigation.

5. **This is especially good level for a dual language system.**

6. There ought to be target or block figures for certain cases, which the Master could fix after consultation with the professions. This would aid transparency for clients and prevent abuse. Certainly the cumbersome taxation system is expensive, and the results are entirely inconsistent, and costs more than the barrister's fees in some cases.

PRO BONO SCHEME

7. We applaud the Bar initiative on the Pro Bono Scheme and the setting up of a resource centre at the Judiciary. However these schemes need to be funded, as the Bar Pro Bono Scheme is being funded by the Bar. There should be assistance from Government for this.

"GREEN FORM SCHEME"

8. The Law Society should perhaps consider introducing a "Green Form Scheme", whereby a would be litigant could seek an hour's consultation at a fixed fee for the applicant — say $500. The Law Society should fund the balance of say $2,000 say, again with Government's assistance. This should take the pressure off the Resource Centre in the High Court, and take away any lurking suspicion that the Court was involved in the preparation of the case.

9. Litigants in person, make cost effective use of lawyers and courts difficult. Whilst they should not be actively discouraged, it must be a more useful and economic use of our systems, if they are steered in the direction of lawyers. Our experience is that often litigants in person feel the judge is biased in favour of the legally represented party, and upon a qualitative level, they feel they would have fared better if a professional had prepared and presented the case. Parties against litigants in person face grave problems in service of documents, getting the litigant in person to deal with Check Lists or understanding Pre Trial Reviews. Also

represented parties often feel the judge leans to the litigant in person at the hearing, and this is undesirable.

10. Even Audrey Eu S.C. who runs classes for would be litigants, feels that many more should be steered towards lawyers.

11. Litigants in person often have additional grievances and personal problems, and there should be a more effective filter to screen out vexatious litigants. This is a particular problem in the Final Court of Appeal. Many litigants in person cannot accept offers as they do not obtain appropriate advice.

12. Further we believe, that as we have some of the finest lawyers in Asia, in the finest Legal System in Asia more use of them should be encouraged by Government, not less.

IV. CONTINGENT FEES

We believe that contingent fees only make the process more difficult, in that less cases are litigated, as lawyers only take on the "sure winners". This system cuts access to justice.

V. OTHER "HALF WAY HOUSES"

1. In England since ..... 1995 a number of schemes have been introduced whereby solicitors and barristers effectively turn to insurers to shoulder the risk. This requires very high reporting levels, and diverts the lawyers away from their main tasks in litigation. Further it produces other complications about disclosure to insurers, evaluation of the success ratio etc.

2. We believe that Interim Awards should carry awards of costs along the way, under Order 62 Rule 4, and this would mitigate some of the difficulties in financing litigation.

VI. COSTS

1. We believe that the costs system should be simplified, so that there is a "standard basis", and a "higher basis" which can be used for conduct issues, trustees and beneficiaries etc., and more importantly for Part 36 Offers.

2. **Costs should be more readily awarded in cases where the litigation is conducted** on an oppressive basis, e.g. the Wharf Company Litigation - where Godfrey J as he was then would not award costs on a higher basis, as he viewed our current system of costs one in which the law had opted for "providing the bread but not the butter".

3. So that if say a Plaintiff issues proceedings for say $5 million, and then says under PART 36 type offer, he says that he will take $4 million. Then if the Defendant does not take that offer, he will be liable to pay on an indemnity basis all the costs of the action, if at trial the Plaintiff is say awarded $4.2 million.

4. We believe there should be a level playing field for litigants and the Legal Aid Ordinance may have to be amended in this respect under Section 16C of Cap 91, there can be no enforcement of orders made against the Director, even if made in the Final Court of Appeal.

VII. INTERIM PAYMENTS

1. Most if not all parties who issue proceedings actually do so to obtain money or obtain a summary determination of their rights. Protocols, front loading of costs all militate against Summary Determination.

2. We believe that in all personal injury cases, the right to an Interim Payment should be automatic, save in frivolous cases, or where the defendant is not insured or insured through MIB or ECAS. Many distressed Plaintiffs could get back to leading their own lives, and be more effectively rehabilitated, if they received a standard 1/3rd say on account of their damages.

VIII. SUMMARY JUDGEMENT

Order 14 these days is almost impossible to obtain. Cases with defences which are just slightly more probable than "moonshine", are allowed. We believe that cases where the defence is poor, i.e. less than a 30% chance of succeeding, then, the court should award judgement. Rights of appeal should be preserved. Litigants in that class of case, say at about the 30% level, should be allowed to opt for either full payment in as a condition of leave to defend, or take his chance in having Summary Judgement obtained against him. This would enable litigants to have a secured judgement, rather then an empty one at the end of the day. The payment in should also cover an element of costs, say 50% again to save a litigant at the end of the taxation exercise finding he cannot obtain his costs.

IX. INJUNCTIONS

1. In Hong Kong injunctions have become more difficult and therefore more expensive to obtain. High thresholds of proof are required at the application stage, which is often impossible. This is especially so in IP cases or where threatened conduct has not resulted in the evidence being available for the damage yet.

2. In our view the thresholds of proof should be reduced, and Plaintiffs be ordered to provide fortified security according to the level of proof, as the price to pay for obtaining a draconian order. Also the court is always reluctant to award mandatory injunctions to enforce terms of contracts.

Again we believe this remedy should be more widely available in cases where a party does not comply with his contractual obligations in an attempt to "greenmail" the other party into paying unwarranted sums for due performance.

X. PLEADINGS

1. There should be a provision for opting for Short Form pleadings and a Rule introduced under Order 18 Rule 12 for that. Many cases in the past have been allowed to proceed on a theoretical basis — Wharf v. Eric Cumine Associates. A declaration of truth for the veracity and belief in the case would be useful. However it is difficult to see how a client can be punished in costs or otherwise, if he says "My lawyer told me I had a good case", suggest both sign.

Nicholas Pirie
Barrister-at-Law
Garden Chambers
Hong Kong