

**Bills Committee on  
Civil Justice (Miscellaneous Amendments) Bill 2007**

**Response to Issues Raised in  
the Assistant Legal Adviser's Letter of 21 May 2007  
Re: Long Title, Parts 2 and 4 of the Bill**

**Purpose**

This paper sets out the Judiciary's response to the issues raised in the Enclosure to the Assistant Legal Adviser ("ALA")'s letter of 21 May 2007. It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law can only be made in actual cases that come before the courts after hearing argument.

**A. Long Title of the Bill**

*Terms of reference of the Steering Committee on Civil Justice Reform ("Steering Committee") and its proposals in relation to the different Parts, particularly Parts 10, 11 and 12, of the Bill (para. 3 of ALA's list of questions).*

2. When the Steering Committee was first set up in March 2004, its terms of reference were, "to oversee the implementation of the recommendations of the Final Report on Civil Justice Reform relating to the Judiciary". In September 2006, the Chief Justice expanded the terms of reference of the Steering Committee to cover the application of the recommendations in the Final Report on Civil Justice Reform ("Final Report") to the District Court ("DC") and the Lands Tribunal, as follows -

"To oversee the implementation of the recommendations of the Final Report relating to the Judiciary, and the application of such recommendations to the DC and the Lands Tribunal."

3. The long title of the Bill states that the amendments are (i) to implement some of the recommendations made in the Final Report and (ii) to implement several recommendations proposed by the Steering Committee. As to (i), the relevant recommendations in the Final Report to which the

amendments relate are set out in the respective parts of the Bill (See Parts 2 to 9). As to (ii), the Steering Committee has made several recommendations, having taken into account the developments since the publication of the Final Report, and the responses to the *Consultation Paper on Proposed legislative Amendments for the Implementation of the Civil Justice Reform* (“Consultation Paper”) published in April 2006.

4. Specifically, paragraph 2.4 of the Consultation Paper relates to the Steering Committee’s proposal to introduce amendments for costs orders against non-parties (Part 10 of the Bill) and para. 3.7 relates to the Lands Tribunal (Part 12 of the Bill). In line with the objectives in paragraph 1.7 of the Consultation Paper, i.e. “it was considered appropriate for the two levels of Court to have the same set of procedures consequent on the CJR”, the amendments in Part 11 of the Bill seek to align the practice of the DC with that of the Court of First Instance (“CFI”) in relation to the execution of instruments.

#### **B. Part 2 - Costs-only Proceedings**

*The effect of the proposed subsections 52B(3)(b) and (c) of the High Court Ordinance (“HCO”) (Cap. 4) appears to be a departure from Recommendation 9 of the Final Report, hence falls outside the scope of the long title of the Bill (Paras. 4 and 7 of ALA’s list of questions).*

5. There is no departure from Recommendation 9. The proposed subsections 52B(3)(b) and (c) of HCO are intended to make it clear that Courts’ discretion on costs of and incidental to the “costs-only proceedings” themselves is no different from other proceedings. Please refer to the paper ref. **CJRB 2/2007** for the Bills Committee meeting on 30 May 2007, at which the Judiciary Administration agreed to liaise with the Law Draftsman to review the drafting of the proposed section 52(B)(3)(b) and (c) to better reflect the policy intent.

*Whether the proposed section 52B(3) would empower the Court to re-open the question of who (including a non-party) should pay the costs of the dispute, and whether such provisions have been included in the consultation exercise (Para. 8 of ALA’s list of questions).*

6. The question of who should pay the costs of the dispute should have been agreed upon by the parties before commencing the costs-only proceedings (see proposed section 53B(1)). The proposed section 52B(3) would not empower the Court to re-open this question. The proposed section 52B(3)(a) was included in the Consultation Paper. The reason for the inclusion of the proposed section 52B(3)(b) and (c) is set out in para. 5 above. The proposed section 52B(3)(c) is included having regard to the proposal in Part 10 of the Bill which was set out in paragraph 2.4(b) of the Consultation Paper.

***Under the proposed section 52B, can the parties to the dispute agree that a non-party to the dispute/agreement is to bear the costs of the dispute and commence costs-only proceedings (Para. 9 of ALA's list of questions)?***

7. Under the proposed section 52B, so long as the conditions in section 52B(1) are met, either party to the agreement may commence costs-only proceedings.

***Whether the principles in para. 62/2/6 the White Book and the relevant case law in relation to the court's discretionary power on costs apply to the proposed section 52B(3) of HCO (para. 10 of ALA's list of questions)?***

8. The court's discretion on costs under the proposed section 53B(3) will be exercised judicially, having regard to established principles and case laws as may be relevant to the circumstances of the individual case. However, that does not rule out the possibility of the development of further operative principles and case law on a case-by-case basis after hearing the arguments in court.

***In order to enable the court to exercise the discretion to determine the question of who should pay the costs of the dispute, will the parties (including whoever the non-party is) be required to produce evidence? (para. 11 of ALA's list of questions)***

9. As mentioned in para. 6 above, the parties to a dispute should have agreed on the question of who should pay the costs *of the dispute* before commencing the costs-only proceedings.

***Whether there is any difference in the court's treatment of an application to set aside (i) an agreement reached by the parties before the commencement of costs-only proceedings under the proposed Part 2 of Bill; and (ii) an agreement of the parties as contained in a consent order under Order 42 rule 5A (para. 12 of ALA's list of questions).***

10. It appears that the situation of (i) would arise if the agreement is challenged, in which case the court may dismiss the originating summons for the costs-only proceedings. It appears that the situation of (ii) would arise if the consent order is challenged, in which case, the relevant party will have to take out the necessary application (including a fresh action) to set aside the consent order. The consent order remains valid until set aside.

***Are subsections (3)(a), (b) and (c) of the proposed section 52B(3) conjunctive or disjunctive (para. 13 of ALA's list of questions)?***

11. Disjunctive. The CFI may make one or more of the orders as described in subsections (3)(a), (b) and (c) of the proposed section 52B(3), or dismiss the application.

***Whether the CFI has power to make an order on terms under the proposed section 52C of HCO, which provides that the CFI may order the transfer of costs-only proceedings commenced in CFI to the DC at any stage of the proceedings (para. 14 of ALA's list of questions).***

12. Subject to section 44A of the District Court Ordinance ("DCO") (Cap. 336), which provides that the CFI may make an order for costs prior to the transfer and of the transfer of proceedings from the CFI to the DC, there is no power for the CFI to order a transfer under the proposed s.52C of HCO on terms.

***Background to clause 4 which seeks to repeal section 44A(6) of DCO (para. 15 of ALA's list of questions).***

13. The present section 44A(6) can only make sense in applying to proceedings that have started in the CFI but which are transferred to the DC. After all, the whole of section 44A deals with transferred proceedings. It does not make sense to read that provision independently of the rest of the

section so as apply, for example, to proceedings in the CFI which are within the DC's jurisdiction but which have not been transferred. The intention of section 44A(6) must be that where proceedings within the jurisdiction of the DC are commenced in the CFI and where those proceedings are then transferred to the DC, the DC should award costs on the DC scale unless the proceedings had been brought by the leave of the CFI or if the CFI has ordered otherwise (or if section 44A(5) applies). With the deletion of section 44A(6), this is the same position when one reads the rest of section 44A.

*If, for example, a plaintiff brings an action against a defendant for a contractual claim involving complex legal issues for \$250,000 and chooses to issue proceedings in CFI, he eventually succeeds in his claim but has incurred costs of \$1,200,000. Please explain whether there is any difference in the outcome with respect to costs under the existing section 44A(6) of DCO and the Bill (para. 16 of ALA's list of questions).*

14. The new s.52D of the HCO would govern. Section 44A(6) is not relevant as that provision only applies to transferred proceedings.

**C. Part 4 - Interim remedies and Mareva injunctions in aid of proceedings outside Hong Kong**

*The proposed section 21M empowers CFI to appoint a receiver or grant "other interim relief". Under the proposed section 21M(7), "interim relief" includes an interlocutory injunction referred to in section 21L(3). What kinds of interim relief other than interlocutory injunction may be granted by CFI under the proposed section 21M (para. 18 of ALA's list of question).*

15. Examples of other interim relief available can be found in Order 29 of the Rules of the High Court ("RHC") (Cap. 4A).

*Why different powers are given to CFI (i) under the present section 21L of HCO which provides only receivership or interlocutory injunction in relation to substantive Hong Kong proceedings; and (ii) under the proposed section 21M, which provides receivership, interlocutory*

***injunction or other interim relief in the absence of substantive proceedings in Hong Kong (para. 19 of ALA's list of question).***

16. There is no difference between the two provisions. (i) For substantive proceedings in Hong Kong, apart from receivership and interlocutory injunction under section 21L, other types of interim relief in Order 29 of the RHC are available. (ii) As regard the proposed section 21M, it is considered that an express reference to “*other interim relief*” is necessary for clarity as to the CFI’s power in relation to proceedings outside Hong Kong.

***Under the proposed section 21M, (i) whether the principles governing the grant of interlocutory injunction in the American Cynamid case apply; and (ii) if so, how will the court in Hong Kong apply the American Cynamid tests of “a serious question to be tried” and “a real prospect of success” where the applicable law in those cases will be foreign law (para. 21 of ALA's list of question).***

17. As to (i), as set out in the Bills Committee Paper ref. CJRB 2/2007 for the meeting on 30 May 2007, the court’s discretion in respect of interim relief is unfettered. The court will exercise the discretion judicially, having regard to established principles and case laws as may be relevant to the circumstances of individual cases.

18. As to (ii), foreign law is proved by evidence. If no evidence of foreign law is adduced by the parties, the courts in Hong Kong will assume that the foreign law is the same as Hong Kong law and will apply Hong Kong law.

***Since the Hong Kong court has no jurisdiction in relation to the subject matter of the foreign proceedings, how can the Hong Kong court ensure the plaintiff’s compliance with the duty of full and frank disclosure as laid down in the American Cynamid case (para. 22 of ALA's list of questions)?***

19. The duty of full and frank disclosure is upon the plaintiff. It is for the defendant to raise objection in this respect if such is the defendant’s case.

*Will the applicant under the proposed sections 21L(3) and 21M of HCO be required to show before the Hong Kong court that there are no or insufficient assets within the jurisdiction where the proceedings are or to be commenced to satisfy his claim (para. 23 of ALA's list of question)?*

20. The sufficiency or otherwise of assets within a foreign jurisdiction X may be a factor in the exercise of the Court's discretion whether or not to grant relief in aid of proceedings in X. But as in all exercise of the Court's discretion, all the relevant circumstances would have to be taken into account.

*Whether there is any reciprocal arrangement between Hong Kong and other country(ies)/place(s) by which a party may apply for an interlocutory injunction in that country/place in relation to proceedings commenced or about to be commenced in Hong Kong and where the court in that country/place does not have jurisdiction over the subject matter of those proceedings (para. 24 of ALA's list of questions).*

21. According to the Department of Justice, there is no such reciprocal arrangement.

*Information (with copy of the relevant legislation) about the experience of other jurisdictions where similar forms of interlocutory relief in aid of foreign proceedings are available (para. 25 of ALA's list of questions).*

22. In the United Kingdom, the court's power to grant interim relief in aid of foreign proceedings was initially introduced by section 25 of the *Civil Jurisdiction and Judgments Act 1982* in respect of proceedings pending before the courts of contracting countries to the 1968 Brussels and 1988 Lugano Conventions. *The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997* extended such power to non-convention countries. The relevant UK provisions are at **Annex**.

**Annex**

*Civil Jurisdiction and Judgments Act 1982*

## PART IV

## MISCELLANEOUS PROVISIONS

*Provisions relating to jurisdiction*

- 25.—(1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where—
- (a) proceedings have been or are to be commenced in a Contracting State other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction; and
- (b) they are or will be proceedings whose subject-matter is within the scope of the 1968 Convention as determined by Article 1 (whether or not the Convention has effect in relation to the proceedings).
- Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings.

The Civil Jurisdiction and Judgments Act 1982  
(Interim Relief) Order 1997

<i>Made</i>	<i>12th February 1997</i>
<i>Laid before Parliament</i>	<i>24th February 1997</i>
<i>Coming into force</i>	<i>1st April 1997</i>

At the Court at Buckingham Palace, the 12th day of February 1997

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, in exercise of the power conferred on Her by section 25(3) of the Civil Jurisdiction and Judgments Act 1982(a), is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 and shall come into force on 1st April 1997.
2. The High Court in England and Wales or Northern Ireland shall have power to grant interim relief under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 in relation to proceedings of the following descriptions, namely—
  - (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano Contracting State;
  - (b) proceedings whose subject-matter is not within the scope of the 1968 Convention as determined by Article 1 thereof.

*N. H. Nicholls*  
Clerk of the Privy Council

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order enlarges the power of the High Court in England and Wales or Northern Ireland to grant interim relief in aid of legal proceedings in other countries. At present such relief can only be granted where the principal proceedings are taking place in a country which is a party to the 1968 Brussels Convention or the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and where the proceedings are within the scope of those Conventions. This Order removes those two limitations from the Courts' powers.