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Report of the Bills Committee on
Civil Justice (Miscellaneous Amendments) Bill 2007

Purpose

This paper reports on the deliberations of the Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007.

Background

2. As in many common law jurisdictions, the civil justice system of Hong Kong has to keep abreast with the needs and developments of modern times. With Hong Kong's economic development and social and technological advances, there has been over the years a sharp increase in the number and complexity of transactions, in particular commercial ones. Accordingly, there has been an increase in the scope and complexity of legislation. All these have put pressure on the civil justice system, generating large numbers of disputes and consequent civil proceedings and litigation over the past 20 years. Hong Kong's civil justice system, which has remained largely unchanged for several decades, has been criticized for not having kept up with the times.

3. In February 2000, the Chief Justice appointed the Working Party on Civil Justice Reform (CJR) (the Working Party) to review the rules and procedure of the High Court in civil proceedings and to recommend changes thereto, with a view to ensuring and improving access to justice at reasonable cost and speed. In November 2001, the Working Party published the Interim Report and Consultative Paper on the CJR containing various recommendations on changes to the civil justice system for seven months of consultation. The Working Party submitted its recommendations to the Chief Justice in the Final Report on the CJR (the Final Report) in March 2004. The Chief Justice in the same month accepted the Final Report and set up a Steering Committee on the CJR (the Steering Committee) to oversee the implementation of the recommendations therein. The Chief Justice had subsequently decided that the proposed changes should be implemented not just in the High Court (which comprises the Court of Appeal and Court of First Instance) but also in the District Court and the Lands Tribunal where such changes are appropriate. In April 2006, the Steering

Committee published the Consultation Paper on Proposed Legislative Amendments for the Implementation of the CJR (the Consultation Paper) to seek views from the legal profession and other interested parties.

4. The objectives of the CJR are –

(a) to preserve the best features of the adversarial system but curtail its excesses. One of the primary ways to achieve this is by giving even greater case management powers to the courts. This would prevent tactical manipulation of the rules to delay proceedings and also ensure that court and judicial resources are fairly distributed;

(b) to streamline and improve the civil procedures; and

(c) to facilitate early settlement by parties, cut out unnecessary steps and discourage (and if necessary, penalize) unnecessary applications.

In consequence, civil proceedings would become more efficient, expeditious and promote a sense of reasonable proportion and economy. The intention is to reduce delay and eliminate unnecessary expenses in litigation. There would also be greater equality between parties to proceedings and settlements would be both encouraged and facilitated. As far as the administration of the court is concerned, its resources would be more fairly distributed and utilized.

5. The Steering Committee has decided on a package of proposed amendments to both primary and subsidiary legislation. Amendments are recommended for-

(a) the following six Ordinances -

(i) High Court Ordinance (HCO) (Cap. 4);

(ii) Lands Tribunal Ordinance (LTO) (Cap. 17);

(iii) Law Amendment and Reform (Consolidation) Ordinance (LARCO) (Cap. 23);

(iv) District Court Ordinance (DCO) (Cap. 336);

(v) Small Claims Tribunal Ordinance (SCTO) (Cap. 338);

(vi) Arbitration Ordinance (AO) (Cap. 341); and

(b) the following three sets of subsidiary legislation -

(i) Rules of the High Court (RHC) (Cap. 4A);

(ii) Lands Tribunal Rules (LTR) (Cap. 17A); and

(iii) Rules of the District Court (RDC) (Cap. 336H).

The Bill

6. The purpose of the Bill is to amend the six Ordinances in paragraph 5(a) above as proposed by the Steering Committee to -

(a) implement some of the recommendations made in the Final Report published in 2004; and

(b) implement several recommendations proposed by the Steering Committee.

7. Parts 2 to 9 of the Bill seek to implement the relevant recommendations in the Final Report which are set out in the Schedule to the Bill. The recommendations not included in the Final Report but proposed by the Steering Committee relate to costs orders against non-parties (Part 10 of the Bill) and the Lands Tribunal (Part 12 of the Bill). In addition, in line with the objective that the two levels of Court should have the same set of procedures consequent upon the CJR, Part 11 of the Bill seeks to align the practice of the District Court with that of the Court of First Instance in relation to the execution of instruments.

Bills Committee

Composition

8. At the House Committee meeting on 27 April 2007, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

Views received

9. The Bills Committee has invited the two legal professional bodies and the respondents to the Consultation Paper to give views on the Bill. A list of the deputations which have given views to the Bills Committee is in **Appendix II**.

10. Taking into account the suggestions of the deputations, members have requested the Administration's team (comprising representatives from the Administration Wing of the Chief Secretary for Administration's Office, the Judiciary Administration, and the Department of Justice) to provide the latest draft version of the following items of subsidiary legislation for reference of the Bills Committee and have made reference to them, where appropriate, in the process of scrutiny of the Bill -

(a) those relating to Part 7 (wasted costs) and Part 10 (costs against non-parties) of the Bill;

(b) draft Orders 1A and 1B (case management powers of the court) of the RHC;

(c) draft Order 35 rule 3A (court's power to curtail the time allowed for cross-examining witnesses, for making oral submissions, etc) of the RHC; and

(d) draft Orders 62 and 62A (matters relating to costs) of the RHC.

Attendance at Bills Committee meetings

11. Under the chairmanship of Hon Margaret NG, the Bills Committee has held nine meetings with the Administration's team.

12. At the outset, the Administration's team attending meetings of the Bills Committee comprised Assistant Director of Administration from the Administration Wing of the Chief Secretary's Office, Judiciary Administrator and her staff from the Judiciary Administration, and a Senior Assistant Law Draftsman from the Department of Justice. The Chairman is of the view that it may not be appropriate for representatives of the Judiciary Administration to answer members' queries and concerns about the policy aspects of the Bill, as the subject matter of the Bill is related to the administration of justice, which should be a matter for the Judiciary and outside the remit of the Judiciary Administration. Since the Judiciary is in essence the sponsor of the Bill, the Chairman has asked whether it would be possible for representatives of the Judiciary to attend meetings of the Bills Committee to explain the proposals in the Bill.

13. In this respect, the Bills Committee has sought the advice of the Legal Adviser whose views are summarized below -

(a) the Legal Adviser is not aware of any rule which would prohibit the Bills Committee to invite judges to attend its meetings or any protocol which would make judges unable to come to the Legislative Council (LegCo);

(b) subject to the Chief Justice's agreement, the Chief Judge, in his capacity as Chairman of the Steering Committee, may be an appropriate person to be invited to attend the meetings of the Bills Committee, on the understanding that anything that might relate to judicial aspects of judges' functions would be outside the scope of discussion at these meetings. Alternatively, a representative of the Chief Judge who is knowledgeable enough to answer members' questions on the Bill may be invited to attend the meetings;

(c) in the United Kingdom, judges are increasingly involved in giving evidence to Select Committees in the House of Commons; and

(d) in working out a mutually acceptable arrangement, care should be taken to ensure that the arrangement does not have the effect of compromising judicial independence.

14. The Judiciary Administration has advised the Panel of the position of the Judiciary as follows -

(a) the Judiciary's position is that as a matter of constitutional principle, judges should not appear before the Bills Committee;

(b) the appearance of judges before a LegCo committee would undermine the independence of the Judiciary and its constitutional independence from the executive authorities and the legislature, which is guaranteed by the Basic Law and is fundamental to the rule of law. And as importantly, the perception of such independence would be jeopardized. Further, the appearance of judges before a committee of the LegCo would politicize the Judiciary and give rise to the perception of such politicization;

(c) in view of the constitutional role and independence of the Judiciary, it is the established practice that for matters relating to the Judiciary, the Judiciary Administration would act as the representative of the Judiciary to attend the relevant LegCo committee meetings to convey the Judiciary's views/stance on the matters and assist members in their discussion; and

(d) in accordance with consistent practice, together with the executive authorities who are responsible for piloting the Bill through the legislative process, the Judiciary Administration should continue, on behalf of the Judiciary and as authorized by the Chief Justice, to assist the Bills Committee in its scrutiny of the Bill. The Judiciary Administration's representatives have been closely involved in the process of the CJR, both in the work of the Working Party as well as the work of the Steering Committee.

15. In response to members' comment that Hon Mr Justice Rogers and Hon Mr Justice Stock had in the past attended committee meetings of LegCo, the Judiciary Administration has explained that the judges concerned had attended LegCo committee meetings in their respective capacity as the Chairman of the Standing Committee on Company Law Reform and the Chairman of a Sub-committee of the Law Reform Commission. They had attended meetings of LegCo committees in relation to law reform matters which were not related to the Judiciary's operation. They did not appear in their capacity as judges on behalf of the Judiciary and did not

speak on matters relating to the Judiciary's operation. Such appearances are of a totally different nature from what is being suggested by the Bills Committee. The appropriateness of such appearances by judges would depend on the circumstances in question, including the capacity and the subject matter in question. In any event, the appropriateness of such appearances may need to be re-visited in future.

16. Members have noted that according to the information provided by the House of Commons Information Office in response to the LegCo Secretariat's enquiry, when the Civil Procedure Bill, which was to implement Lord Woolf's recommendations on civil justice reform, was introduced into the UK Parliament, there was then no procedure for Standing Committees (the equivalent of LegCo's Bills Committees) to receive evidence from non-Members of Parliament. Mr Gary Streeter, a Minister in the Lord Chancellor's Department and a Member of the Parliament, was responsible for guiding the Bill through the Standing Committee. Mr Streeter was a lawyer and possessed the legal expertise to pilot the Bill through the legislative process.

17. The Chairman maintains the view that representatives of the Judiciary Administration are not in a position to explain the Bill to the Bills Committee as it is outside their job responsibilities to do so. According to the list of the main responsibilities of the Judiciary Administrator, she can only play a liaison role with LegCo on, inter alia, legislative proposals affecting the Judiciary. As the Administration has confirmed that the Chief Secretary for Administration is the sponsor of the Bill, the Chairman has requested the Administration to consider how best to provide legal expertise to answer members' questions and concerns about the Bill. One way of doing it is to instruct counsel with the relevant legal expertise (whether from within or outside the Department of Justice) to attend future meetings of the Bills Committee.

18. After consideration, the Administration has made arrangement for a Senior Assistant Law Officer (Civil Law) of the Department of Justice to attend meetings of the Bills Committee with effect from October 2007.

Deliberations of the Bills Committee

Costs-only proceedings (Part 2, clauses 3 to 6)

19. Part 2 of the Bill relates to Recommendation 9 of the Final Report. The purpose of Part 2 is -

(a) to amend the HCO and the DCO to empower the Court of First Instance and the District Court to make a costs order even though no proceedings seeking substantive relief have been commenced;

(b) to set out the circumstances in which such proceedings may commence and the scale on which costs are to be taxed;

(c) to empower the Court of First Instance to order the transfer of such proceedings to the District Court and vice-versa; and

(d) to amend the Schedule to the SCTO to make it clear that the Small Claims Tribunal does not have jurisdiction to hear and determine such proceedings.

20. The Bills Committee has asked for explanations as to why a much wider discretionary power is provided to the Court under the proposed amendments. It has questioned, in particular, if the parties to the dispute have already reached an agreement as to the liability of costs and the only remaining question is the amount of costs, the reason for seeking to give additional powers to 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 on the CJR.

21. The Administration's team has advised that at present, where parties cannot agree on the amount of costs even though the substantive dispute has been resolved, it is necessary to litigate the whole dispute in order just to resolve the question of costs. To facilitate settlement, amendments are proposed to introduce a new cause of action called "costs-only proceedings" to enable parties who have reached settlement on a substantive dispute and have agreed who should pay the costs, but cannot agree on the amount of costs of the dispute, to apply for such costs to be taxed by the Court of First Instance and the District Court. Under the proposed amendments, the power of the Court is as follows -

(a) the Court may make an order for the costs of and incidental to the dispute to be taxed or assessed;

(b) as there will be costs of and incidental to the costs-only proceedings just like any other court proceedings, the Court may make an order awarding such costs to or against any party to the costs-only proceedings; and

(c) the Court may make an order awarding costs against a person who is not a party to the proceedings, if it is satisfied that it is in the interests of justice to do so and is intended to apply to the costs of and incidental to the costs-only proceedings, so as to give maximum flexibility to the courts.

22. Having noted the above explanations, the Bills Committee has suggested that the drafting of the proposed provisions be reviewed to ensure that the reference to "costs" therein refers to the costs of and incidental to the "cost-only proceedings", but not the costs of and incidental to the "substantive dispute". The Administration's team has agreed to introduce Committee Stage amendments (CSAs) to the proposed section 52B of the HCO in clause 3 and the proposed section 53A of the DCO in clause 5 to better reflect the policy intent.

Interim remedies and Mareva injunctions in aid of proceedings outside Hong Kong (Part 4, clauses 9 - 12)

23. Currently, a plaintiff in proceedings outside Hong Kong involving a defendant with assets in Hong Kong cannot seek interim relief from the Hong Kong courts. Only when substantive proceedings exist in Hong Kong can such interim relief be obtained. In the case of proceedings outside Hong Kong, interim relief can only be obtained if a judgment obtained in those proceedings is sought to be enforced in Hong Kong or if the same proceedings are instituted in Hong Kong.

24. Part 4 implements Recommendations 45 to 48 of the Final Report to provide assistance to plaintiffs in proceedings outside Hong Kong. The purpose of Part 4 is -

(a) to amend section 21L(3) of the HCO so that the power of the Court of First Instance to grant an interlocutory injunction under the new section 21M is also exercisable irrespective of whether the party against whom the injunction is made is domiciled, resident or present in Hong Kong (clause 9);

(b) to add two new sections to the HCO to empower the Court of First Instance to appoint a receiver or grant other interim relief in aid of proceedings outside Hong Kong which are capable of giving rise to a judgment which may be enforced in Hong Kong. The appointment of a receiver or the other interim relief may be sought as an independent form of relief without being ancillary or incidental to substantive proceedings in Hong Kong (clause 10);

(c) to amend section 2GC of the AO to give similar powers to the Court of First Instance to grant interim relief in relation to arbitration proceedings in or outside Hong Kong. But the power may only be exercised in relation to proceedings outside Hong Kong if those proceedings may be enforced in Hong Kong (clause 11); and

(d) to add a new section to the AO to empower the Rules Committee of the High Court to make rules of court relating to such applications for interim relief (clause 12).

25. The Bills Committee has requested the following information -

(a) the circumstances under which judgments made by foreign courts may be enforceable in Hong Kong at common law; and

(b) the considerations which would be taken into account by the Court in determining applications for grant of interim relief in foreign proceedings, and how such considerations compare with those taken into account by the Court in considering applications for interim relief in local proceedings.

26. The Administration's team has advised that -

(a) the foreign judgment must be a final one for a debt or liquidated sum which is not due in respect of foreign taxes or as a penalty. A judgment may be final even though subject to an appeal; and

(b) the foreign court must have jurisdiction to give the judgment. Such jurisdiction will arise if (i) the judgment debtor is present in the foreign country; (ii) the debtor counterclaims in the foreign court; (iii) the debtor submits to the jurisdiction of the foreign court; or (iv) if the debtor has previously agreed to submit to the jurisdiction of the foreign court (for example, by an exclusive jurisdiction clause in a contract).

27. In deciding whether to grant interim relief in support of a foreign judgment capable of enforcement in Hong Kong at common law, the Court is likely to apply the same criteria which it applies when deciding whether to grant interim relief in support of Hong Kong proceedings. For example -

(a) where a Mareva injunction is sought, whether there is a real risk of dissipation of assets if relief is not granted;

(b) where an interim injunction is sought, whether the balance of convenience test in the American Cyanamid case points to the grant of relief; and

(c) where an interim receiver is sought, whether there is a need to get in and protect assets pending resolution of the relevant dispute.

28. Moreover, in deciding whether to grant interim relief for court proceedings outside Hong Kong, the Court will take into account the fact that the proceedings here are only ancillary to the proceedings outside Hong Kong (proposed new section 21N of the HCO). Thus, where there is doubt as to whether relief should or should not be granted or whether relief would be effective, the Court may decide not to grant relief as a matter of discretion.

29. The Administration's team has advised the Bills Committee that having considered the views of the Working Group set up by the Department of Justice to consider proposals for reform of arbitration law, the Steering Committee agrees with the Working Group's views that reference to "arbitral tribunal" in the proposed section 21N(1)(b) of the HCO in clause 10 is not necessary because clause 10 is intended to deal with the grant of interim measures in aid of foreign court proceedings, whereas clause 11 already amends section 2GC of the AO to deal with the grant of interim measures in aid of arbitral proceedings. A CSA will be moved to delete the reference to "arbitral tribunal" in clause 10.

Vexatious litigants (Part 5, clause 13)

Proposals in the Bill

30. Part 5 implements Recommendations 67 and 68 of the Final Report. The existing section 27 of the HCO is replaced by the proposed sections 27 and 27A which introduce the following changes -

(a) it allows a vexatious litigant order to be made not only on an application of the Secretary for Justice, but also on an application of an "affected person";

(b) it raises the threshold for granting leave to a vexatious litigant to institute fresh proceedings, requiring the Court of First Instance to be satisfied that the proceedings are not an abuse of the process and that there are reasonable, not just prima facie, grounds for the proceedings;

(c) it makes it clear that a vexatious litigant order may be made for a specific period or remain in force indefinitely; and

(d) it also makes it clear that there is no appeal against a grant or refusal of leave unless leave to appeal has been given by the Court of First Instance.

31. The Administration's team has advised that at present, applications to restrict a vexatious litigant from issuing fresh proceedings except with the leave of the Court, can only be made by the Secretary for Justice under very narrow circumstances. The proposed amendments would help screen out vexatious litigation, thereby enabling fairer distribution of the Court's resources for genuine disputes.

32. At the request of the Bills Committee, the Administration's team has conducted research on legislation on prevention of vexatious proceedings in four common law jurisdictions, namely England and Wales, New Zealand, Canada (Ontario) and Australia, and has responded to members' views and concerns on the proposals in the Bill as follows.

The term "vexatious legal proceedings"

33. Under the proposed section 27(2) of the HCO, the Court of First Instance may make a vexatious litigant order if it is satisfied that the person against whom the order is to be made has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings against the same person or different persons. The Bills Committee has asked whether the term "vexatious legal proceedings" is defined in the law of other common law jurisdictions.

34. According to the Administration's team, the term "vexatious proceedings/litigants" is defined in the law of four States/Territories of Australia, but not in England and Wales, New Zealand and Canada (Ontario). The term "vexatious legal proceedings" is not statutorily defined in the HCO. Nevertheless, the meaning of the term can be found in the relevant case law. In short, all vexatious proceedings amount to an abuse of the Court's process.

35. The Administration's team has advised that substantial case law has been developed both in England and in Hong Kong on the meaning of "vexatious legal proceedings". Given the infinite wisdom of a litigant, there is always scope for new forms of vexatious proceedings. Hence, it is best to allow the case law to continue to develop by building on, as far as possible, the present formulation.

Threshold for granting vexatious litigant order

36. Under the proposed section 27(2)(a) of the HCO, the Court may grant a vexatious litigant order if it is satisfied that the person against whom the order is to be made has habitually and persistently and without reasonable ground instituted vexatious legal proceedings. Some members have suggested that the requirement of "habitually and persistently" be changed to "habitually or persistently".

37. The Administration's team has advised that the expression "habitually and persistently" involves an element of repetition and is the existing threshold of section 27 of the HCO. Members' suggestion would lower the threshold of a vexatious litigant order. In addition, the existing section 27 is based on section 51 of the Supreme Court Judicature (Consolidation) Act 1925 in England and Wales, which has since been replaced by section 42 of the Supreme Court Act 1981. Given its origin, the Hong Kong courts have been able to make reference to judgments in other common law jurisdictions, which share the common origin and similar wording, in construing section 27. It is considered inappropriate to make any change to the existing formulation, which has been well tested with a wealth of common law case law to refer to.

The definition of "affected person"

38. The term "affected person" in proposed section 27(5) is defined to mean a person who -

(a) is or has been a party to vexatious proceedings instituted by a vexatious party, or

(b) who has directly suffered adverse consequences resulting from such proceedings.

The Bills Committee has expressed concern whether the definition of the term is too wide, and whether the proposal to provide for a vexatious litigant order to be made on

the application of an "affected person" would open a floodgate of applications for vexatious litigant orders and therefore at variance with the objective of the CJR to, inter alia, streamline the civil procedures and discourage unnecessary applications.

39. According to the overseas research conducted by the Administration's team, in seven States/Territories of Australia, persons other than the Law Officer and the Registrar may apply to the court for an order to restrain a vexatious litigant from instituting or continuing proceedings. The term used to describe such persons varies from one State/Territory to another and generally includes "aggrieved person" or "person who has a sufficient interest in the matter".

40. The Administration's team has advised that the term "affected person" under the Bill means a person who has directly suffered adverse consequences resulting from vexatious proceedings, and such persons may include -

(a) persons served with orders in a vexatious litigation - as they may have to incur costs and time to respond to such orders; or

(b) beneficiaries to an estate who are not parties to the vexatious litigation but nevertheless are adversely affected - as they may not be able to get their entitlement to an estate until the vexatious litigation is over.

41. In the light of the overseas research findings and the explanation of the Administration's team, the Bills Committee agrees to accept the definition of "affected person" as proposed in the Bill.

Threshold for granting leave to institute or continue proceedings

42. Under the existing section 27 of HCO, leave may be granted for a vexatious litigant to institute or continue proceedings if the Court is satisfied that there are prima facie grounds for the proceedings. Under the proposed section 27A(1)(b), leave for the institution and continuation of any legal proceedings by a vexatious litigant shall be given if the Court is satisfied that there are reasonable grounds for the proceedings. The Bills Committee has requested an explanation for raising the threshold from "prima facie grounds" to "reasonable grounds" for granting such leave.

43. The Administration's team has advised that the existing section 27 of the HCO is modeled on section 51 of the Supreme Court Judicature (Consolidation) Act 1925 in England and Wales, which has since been replaced by section 42 of the Supreme Court Act 1981. One of the changes introduced by section 42 of the Supreme Court Act 1981 is raising the threshold for granting a vexatious litigant leave to issue fresh proceedings or for making a fresh application, requiring the court to be satisfied that the proceedings or application are not an abuse of the process and that there are reasonable, not just prima facie, grounds for the proceedings or application. The Working Party on the CJR considered that the amendments introduced by section 42 of the Supreme Court Act were plainly desirable.

44. Given that all vexatious litigants subject to an order under section 27 of the HCO would invariably have a history of instituting vexatious litigations, it is considered that the higher threshold of "reasonable", instead of "prima facie", grounds would not create any injustice to the vexatious litigant. The proposed amendment is also in line with the objective of Part 5 of the Bill to screen out vexatious litigation, thereby enabling fairer distribution of the court's resources for genuine disputes.

Mechanism for setting aside a vexatious litigant order

45. The Bills Committee has discussed whether a mechanism should be provided for a person who is subject to a vexatious litigant order to apply for setting aside the order.

46. According to the Administration's team, a vexatious litigant order can be appealed against under section 14(1) of HCO. If the appeal period is over, an application can be made to the Court of Appeal for extension of time for appealing. It is therefore considered unnecessary to introduce a mechanism for a person who is subject to a vexatious litigant order to apply for setting aside the order.

Safeguard to prevent unmeritorious applications

47. Since any party to the proceedings or any person who alleges that he has directly suffered adverse consequences resulting from such proceedings may apply for a vexatious litigant order under the proposed section 27 of the HCO, the Bills Committee has discussed whether there is any safeguard to prevent unmeritorious applications which may cause complications or delay in rightful proceedings.

48. The Administration's team has advised that under the proposed section 27, an "affected person" may apply for a vexatious litigant order without any leave requirement. It was originally considered that some safeguard could be provided by the exercise of the Court's discretion in dealing with such applications under section 27. Any abuse of the new provision may be addressed to by a suitable costs order. However, having researched into the relevant legislation on vexatious proceedings in other common law jurisdictions, it is noted that in Queensland, Western Australia and Northern Territory of Australia, leave of the court is required for lay persons (i.e. other than the law officers and the Registrar) to apply for a vexatious litigant order. Since the object of Part 5 of the Bill is to screen out vexatious litigation, thereby enabling fairer distribution of the court's resources for genuine disputes, the Administration's team has proposed to make CSAs to introduce a leave requirement for applications from affected persons.

49. After further deliberation, the Bills Committee considers that there is no need to introduce the proposed leave requirement for the following reasons -

(a) the definition of "affected person" in relation to a non-party under the proposed section 27(5)(b) is sufficiently narrow to filter out unmeritorious applications; and

(b) the addition of a leave requirement would be at variance with one of the objectives of the CJR to reduce unnecessary interlocutory applications as far as possible.

Having regard to members' views, the Administration will not proceed with the proposed CSAs.

Discovery (Part 6, clauses 14 to 17)

Proposals in the Bill

50. Currently, the Court's jurisdiction to order potential parties to make pre-action disclosure is limited to personal injuries and fatal accident claims. Part 6 implements Recommendations 75, 77 and 78 of the Final Report to promote greater transparency between the parties at an earlier stage with a view to facilitating settlement. The purpose of Part 6 is to amend the HCO and the DCO so that -

(a) the jurisdiction of the Court of First Instance and the District Court to order disclosure before commencement of proceedings covers all types of cases (and not merely cases involving personal injuries and death claims);

(b) orders for pre-action disclosure should relate to disclosure and inspection of specific documents which are "directly relevant" to an issue in the anticipated proceedings; and

(c) the jurisdiction of the Court of First Instance and the District Court to order post-commencement, pre-trial disclosure of documents against non-parties applies to all types of cases (and not merely to personal injuries and fatal accident claims).

51. Under the Bill, a document is only to be regarded as "directly relevant" to an issue arising or likely to arise out of a claim in the anticipated proceedings if -

(a) the document would be likely to be relied on in evidence by any party in the proceedings; or

(b) the document supports or adversely affects any party's case.

Impact on personal injuries cases

52. In response to the Bills Committee on the difference between "relevant" and "directly relevant" documents under the existing and proposed legislation respectively,

the Administration's team has advised that the term "relevant" in the existing legislation has been interpreted as having the same meaning as "relating to a matter in question" under Order 24, rule 1 of the RHC. Documents which are covered by this term would therefore extend to documents which might fairly lead to a train of inquiry in the Peruvian Guano sense. By contrast, the use of the term "directly relevant' and its definition in proposed section 41(2) of the HCO is intended to narrow the scope of pre-action disclosure by excluding "train of inquiry" or "background" documents. The use of the term "directly relevant" and its definition are intended to reflect Recommendations 75 and 77 of the Final Report. As stated in paragraph 487 of the Report, "[i]t is considered that such a rule strikes a reasonable balance between the need to protect against harassment and fishing applications on the one hand and the need to enable a potentially meritorious plaintiff to bring a claim which could not effectively otherwise be brought."

53. The Bills Committee points out that personal injuries litigation largely involves employees' claims in respect of industrial accidents, medical or other types of professional negligence and traffic accidents. Pre-action discovery in the existing sections 41 and 42 of the HCO gives a right to potential personal injuries claimants through pre-action discovery of relevant documents to ascertain whether they have a valid claim. The likelihood of their claims and hence the possibility of early settlement often depend on the outcome of pre-action discovery. A major concern of the Bills Committee is the impact of the new stricter test of "direct relevance" on personal injuries claims as it would restrict the claimants' right of access to "background" or "train of inquiry" documents, without which they do not know whether they have a valid claim.

54. The Administration's team has advised that all applications for pre-action disclosure will have to satisfy the new test. Although potential claimants in personal injuries claims will be required to meet the new, somewhat stricter, test of "direct relevance", it is considered that they will be able to obtain the same documents as they are presently able to obtain under the existing provision as applied in practice by the Court. In addition, it may be relevant to note that the concept of "directly relevant" is already set out (although not defined) in the existing Practice Direction 18.1 on the procedures of the Personal Injury List. Paragraph 7 of Practice Direction 18.1 states -

> "……In considering whether to make any order for specific discovery or disclosure, the court will have regard to … … whether the documents and matters sought to be discovered or disclosed are strictly and directly relevant to the issues between the parties."

55. The Administration's team has explained that the Steering Committee considers that it would be preferable to have a single, unified, "direct relevance" test for all applications for pre-action disclosure. It is difficult to justify why there should be a laxer test for pre-action disclosure in personal injuries claims, but a tighter one for other claims. In both situations, the purpose of ordering pre-action disclosure is the

same, namely, to enable the intending plaintiff to ascertain whether or not he has a viable claim.

56. In response to the request of the Bills Committee, the Administration's team has specifically sought the comments of the relevant committees of the two legal professional bodies on the proposed application of the "direct relevance" test to pre-action discovery in personal injuries cases. The Bills Committee notes that the Law Society has confirmed its support for the proposal and does not consider that the "direct relevance" test for pre-action disclosure, although slightly stricter than the previous "relevance" test, will restrict potential personal injuries claimants' right to access to "train of inquiry" documents. The Bar Association also supports the proposal as it would ensure that a uniform test would be applied to all claimants seeking pre-action disclosure. Its comments are summarized below -

(a) while the new "direct relevance" test would impact on the rights currently enjoyed by personal injury claimants to obtain pre-action disclosure, the actual impact, in practical terms, would be nil or negligible because "train of inquiry" documents are rare, if ever, ordered to be disclosed to potential claimants under the current law and practice;

(b) documentary evidence relevant to personal injuries claims usually takes the form of accident and other related reports. These would be recoverable under the "direct relevance" test. It is difficult to conceive a class of document relating to a personal injuries claim that would only qualify as a "train of inquiry" document but not as a "directly relevant" document; and

(c) there is no reason why personal injuries claimants should enjoy greater rights of discovery than other claimants. On the other hand, all claimants continue to enjoy the right to apply for discovery of "train of inquiry" documents after proceedings have been commenced.

Scope of the term "professional adviser"

57. The Bills Committee has noted that by virtue of section 41(b) and section 42(1)(b) of the HCO, the Court may, in appropriate cases, order the relevant documents to be disclosed to the applicant's medical, legal or professional adviser instead of the applicant himself. These two sections are modeled on section 33 of the Supreme Court Act 1981 of the UK and specifically enacted in 1987 for the special needs of personal injuries claims as a result of the recommendations of a sub-committee of the Supreme Court Rules Committee chaired by Kempster J. Members have asked about the scope and definition of the term "professional adviser" after the Court's jurisdiction is broadened to cover pre-action disclosure in all types of civil cases, and whether the drafting of Part 6 of the Bill should be reviewed to see if it is more appropriate to make separate and general provisions relating to pre-action discovery in cases other than personal injuries claims.

58. The Administration's team has advised that -

(a) the present scope of the term "professional adviser" is wide enough to cover any professional adviser employed by an intending plaintiff;

(b) in the personal injuries context, such professional advisers may include (apart from medical advisers) actuaries or other professionals qualified to advise on the quantification of damages. It may also include other professional advisers whose expertise may be relevant in the context of the particular claim that arises, e.g. architects or engineers whose views may be relevant to the issue of liability in a case involving injuries arising in an accident caused by an unsafe or dangerous structure; and

(c) if the scope of section 41 is expanded to cover all civil claims, the type of professional advisers whose input may be needed by an intending plaintiff would depend on the nature of his claim. It may therefore extend to advisers such as experts in accounting, financial or investment matters, or in relation to scientific or technical matters. There does not seem to be any reason why disclosure to such other professional advisers should not be provided for in an appropriate case.

Wasted costs (Part 7, clauses 18 to 19)

Proposals in the Bill

59. Part 7 relates to Recommendations 94 to 97 of the Final Report. It amends section 52A of the HCO and section 53 of the DCO to empower the Court of Appeal, the Court of First Instance and the District Court to make wasted costs order against barristers and solicitors.

60. Currently, the Court may make wasted costs orders against solicitors whom it considers to be responsible for any costs improperly incurred or wasted by undue delay or other misconduct. Under the proposed amendments, "wasted costs" means any costs incurred by a party as a result of -

(a) an improper or unreasonable act or omission; or

(b) any undue delay or other misconduct or default,

on the part of any legal representative, whether personally or through an employee or agent of the legal representative. "Legal representative", in relation to any proceedings, means a counsel or solicitor conducting litigation on behalf of the party.

Provision on "fearless advocacy"

61. Under the proposed section 53(4) of the HCO, the Court shall, in addition to all

other relevant circumstances, take into account the interest that there be fearless advocacy under the adversarial system of justice when determining whether or not to make a wasted costs order. The Law Society points out that the proposed provision is different from the one included in the Consultation Paper. It considers that the proposal to include "fearless advocacy" in the CJR is misconceived as the jurisdictions of civil and criminal law are not comparable and are two separate and distinct branches of the law. There is no duty on an advocate in the civil jurisdiction to be a "fearless advocate". The Law Society is of the view that the proposed provision on "fearless advocacy" should be removed from the Bill.

62. However, the Bar Association considers that the proposed provision will help address the profession's concern about the likely impact of the wasted costs provisions on their advocacy during proceedings. Moreover, the duty to fearlessly advocate for a client's case applies to all legal practitioners, barristers and solicitors alike, and there is no distinction between civil and criminal proceedings in this regard.

63. The Administration's team has advised that the proposed provision is included in the Bill, having regard to similar amendments proposed by the Administration to the Costs in Criminal Cases Ordinance (Cap. 492) in the Statute Law (Miscellaneous Provisions) Bill 2007. It is considered that there should be consistency in this regard for both civil and criminal cases.

Public funds to recompense wasted costs

64. The Bills Committee has requested the Administration to consider the legal profession's suggestion that public funds be made available to recompense a legal representative's costs in successfully defending a wasted costs order which is initiated on the Court's own motion.

65. The Administration does not find the suggestion justifiable for the following reasons -

(a) a useful body of case law exists that will assist the Courts in dealing with wasted costs orders;

(b) in line with amendments to the Costs in Criminal Cases Ordinance (Cap. 492) in the Statute Law (Miscellaneous Provisions) Bill 2007, the proposed wasted costs provisions in the Bill have specifically provided that "the interest that there be fearless advocacy under the adversarial system of justice" should be one of the circumstances which the Court should consider when it determines whether or not to make a wasted costs order; and

(c) the wasted costs provisions are modeled on those in England and Wales, which do not contain provisions for public funds to recompense a legal representative's costs for successfully defending a wasted costs order.

The Administration's team has also advised that it would be made clear in the RHC that wasted costs orders should be subject to an unqualified right of appeal to the Court of Appeal.

66. To facilitate members to consider whether amendments should be proposed to the Bill at this stage, the Bills Committee has asked whether the legal profession's suggestion can be effected by subsidiary legislation after the passage of the Bill. The Administration's team has confirmed that as the suggestion involves the use of public funds, it cannot be effected by subsidiary legislation only.

Leave to appeal (Part 8, clauses 20 to 25)

67. Part 8 implements Recommendations 110 to 113 and 115 of the Final Report. Currently, appeals from the Court of First Instance to the Court of Appeal are as of right, i.e. leave is not required. To screen out unmeritorious appeals on interlocutory matters which do not determine substantive rights, amendments are proposed under the HCO to introduce the requirement that an interlocutory appeal to the Court of Appeal can only be brought with leave of the Court of First Instance or the Court of Appeal. Leave to appeal would only be granted if the Court is satisfied that the appeal has a reasonable prospect of success or there is some other compelling reason why the appeal should be heard. Refusal of leave by the Court of Appeal is final. It also provides that one or two Justices of Appeal can deal with such applications for leave to appeal. Part 8 also amends the DCO to similarly improve the procedures for applications for leave to appeal to the Court of Appeal.

68. Some members have expressed reservation whether the requirement of "some other compelling reason" would import too high a threshold for obtaining leave to appeal. The Administration's team has been requested to consider replacing the phrase "some other compelling reason" by "some other reason".

69. While the Administration's team considers that the requirement of "some other reason" would be too broad, it has agreed to propose CSAs to amend the phrase to read "some other reason in the interests of justice why the appeal should be heard". The Bills Committee has no objection to the proposed CSA.

Costs against a non-party (Part 10, clauses 27 to 28)

70. To allow the Court to order costs to fall where they are appropriate in cases where costs have been incurred as a result of the conduct of someone who is not a party to the proceedings, Part 10 amends the HCO and DCO to empower the Court of First Instance, the Court of Appeal and the District Court to make a costs order against a person who is not a party to the relevant proceedings.

71. The Bills Committee notes that the proposed amendments do not originate from the Final Report. They are recommendations proposed by the Steering Committee having regard to developments since the publication of the Final Report.

Members have expressed concern that the proposed changes mark a radical departure from the current practice, and have enquired about the practice in the UK, the criteria for awarding costs against a non-party, and whether there are safeguards to protect the right of non-parties.

72. The Administration's team has advised that the existing section 52A of HCO is modeled on section 51 of the English Supreme Court Act 1981. Section 51 of the English Supreme Court Act 1981 gives the court full power to award costs against non-parties. However, section 52A(2) of the HCO provides that subject to specific provision, no order of costs may be made against a non-party. As such, in order to seek costs against a non-party, a person must satisfy the court that the non-party is in fact a "party" within the meaning of section 2, or apply for a joinder to join the non-party to the proceedings in order to overcome the prohibition in section 52A(2). As many Hong Kong cases have recognized, a literal application of the existing section 52A of HCO can produce unjust results. Notably, it cannot catch funders behind the litigation who are not parties to the proceedings (or parties on the record).

73. The Administration's team has further advised that there are well established principles at common law governing the court in exercising its discretion to order costs against non-parties. For instance, a recent Court of Final Appeal case has recognized that justice would normally require that a self-interested funder behind a litigation who is not a party to the proceedings be ordered to pay the costs for the funded litigant's successful opponent. To safeguard the interests of the non-party concerned, it is proposed to add a new rule 6A to Order 62 of the RHC to provide that where the Court is considering whether to make such an order, the person who is not a party to the proceedings must be joined as a party to the proceedings for the purposes of costs, and that person must be given an opportunity to attend a hearing at which the Court should consider the matter further.

<u>Rules as to costs and interest (new Part 10A, clauses 28A and 28B)</u>

74. The Administration's team has advised the Bills Committee that under the existing Order 62 rule 22(3) of the RHC, in the event of undue delay, a taxing master is empowered to disallow any item contained in the bill of costs. The Steering Committee is of the view that a taxing master should have the power to make a global deduction of the bill, instead of the power to arbitrarily disallow an item. Hence, it has been proposed in the Consultation Paper issued in April 2006 that the existing rule 22(3) be amended to permit a taxing master to make any order as he sees fit as to any part of the costs and to disallow interest, to ensure that taxation is proceeded with expeditiously. These amendments are in line with the objective of the CJR for a case to be dealt with as expeditiously as is reasonably practicable. To pursue the proposed amendments, the Steering Committee has proposed that enabling provisions be introduced to HCO and DCO by way of CSAs to the Bill.

75. The Bills Committee notes that under the new clauses 28A and 28B, enabling

provisions will be introduced in the HCO (proposed section 55D) and DCO (proposed section 72CA) for rules of court to be made to empower the Registrar to -

(a) disallow all or part of any costs to be taxed pursuant to a costs order made by the Court of Appeal and the Court of First Instance, if there has been undue delay in commencing or proceeding with taxation;

(b) disallow all or part of any interest for undue delay in commencing or proceeding with taxation; and

(c) impose interest sanctions to penalize a party for unnecessary taxation as a result of his failure to accept "sanctioned offers and payments" on costs.

Lands Tribunal (Part 12, clauses 30 to 38)

Background

76. In response to members' request, the Administration's team has provided information on the background and the consultation on the proposed amendments in Part 12 of the Bill which do not originate from the Final Report on the CJR. The Bills Committee notes that in April 2005, the Judiciary completed a review of the LTO and the LTR (the Review) and informed the Panel on Administration of Justice and Legal Services (AJLS Panel) of its recommendations. Most of the recommendations are related primarily to application for possession of premises, with a view to streamlining the procedures. Recommendations are also made in respect of the jurisdiction and other practice and procedure of the Lands Tribunal, with a view to making the processing of claims in the Lands Tribunal more efficient and expeditious. Members of the AJLS Panel generally supported the recommendations in the Review.

77. The Judiciary Administration has also consulted the two legal professional bodies on the Review and responded to their comments. The two legal professional have indicated either agreement to or no comments on the proposed amendments.

78. The recommendations requiring amendments to the LTR were effected by the Lands Tribunal (Amendment) Rules 2006 which came into operation on 30 April 2007. As regards the recommendations in the Review requiring amendments to primary legislation, they are contained mainly in Part 12 of the Bill, which also contains amendments consequential to some of the amendments made in respect of the HCO and DCO for the CJR.

Proposals in the Bill

79. Part 12 amends the LTO to provide greater flexibility for the Lands Tribunal to adopt the practice and procedures of the Court of First Instance and streamline the processing of claims. Specifically, this Part –

(a) provides that the Lands Tribunal has jurisdiction to make an order for possession of any premises or for ejectment of a tenant from those premises, and make orders for the payment of damages in respect of a breach of tenancy or sub-tenancy in relation to any application for possession or for ejectment;

(b) makes it clear that the Lands Tribunal has the same jurisdiction, powers and duties of the Court of First Instance in respect of its practice and procedure;

(c) makes it clear that, unless provided for by other enactment, the Lands Tribunal does not have jurisdiction to deal with cost-only proceedings;

(d) empowers the Lands Tribunal to make costs orders against non-parties and wasted costs orders against barristers and solicitors; and

(e) specifies the persons who may tax the costs ordered by the Lands Tribunal.

This Part also amends the HCO and the DCO to empower the Court of First Instance and the District Court respectively to order the transfer to the Lands Tribunal of any action or proceeding brought before them and which is within the jurisdiction of the Lands Tribunal.

Proposed leave requirement for Lands Tribunal appeals

80. At present, section 11(2) of the LTO stipulates that any party may appeal against a determination or order of the Lands Tribunal to the Court of Appeal on the ground that such determination or order is erroneous in point of law. In the Consultation Paper published in April 2006, the Steering Committee proposed that the recommendations on the requirement for leave to appeal in the Final Report should be made equally applicable to the Lands Tribunal, and that accordingly, section 11 of LTO should be amended along similar lines as the proposed amendments to the HCO in relation to leave to appeal.

81. The Bar Association was against introducing a leave requirement in addition to the existing provision, which already confines the scope of appeals. The Bar Association considered that where an appeal not seeking in substance to argue a point of law was filed, the respondent (which was usually the Government or the public authority) could be relied on to act diligently to seek the striking out of the notice of appeal. In view of the Bar Association's position, the proposed amendments to section 11 of the LTO were not included in the Bill.

82. In 德喜大廈業主立案法團 與 黎明光 CACV 171/2006 (decision on 30 July 2007), the Court of Appeal commented that many of the appeals from the

Lands Tribunal, particularly those where the appellants were unrepresented, had not been made in accordance with the statutory ground, i.e. the Lands Tribunal's determination or order was erroneous in point of law. It was noted by way of contrast that appeals from the Labour Tribunal and the Small Claims Tribunal concerning points of law required leave. The Court of Appeal commented that there was a need to consider amending the LTO to introduce a leave requirement for appeals from the Lands Tribunal, so that only appeals involving questions of law would be dealt with at the substantive hearing.

83. The Steering Committee has therefore reconsidered the matter in the light of the Court of Appeal's comments in CACV 171/2006. The relevant considerations are -

(a) whilst there are Lands Tribunal appeals in which the Government is the respondent (mostly compensation cases), experience has shown that there are a very substantial number of appeals in which the respondent is not the Government (particularly in building management and possession cases). These are likely to be cases in which the appellants are unrepresented litigants. There are also applications for stay of execution pending appeals (mostly possession cases);

(b) for unmeritorious appeals not involving points of law, legal costs incurred by the respondents are very often disproportionate to the subject matter of the appeal, and in possession cases, such legal costs are probably unrecoverable due to the insolvency of the appellant; and

(c) unless there is a leave requirement, the objective of section 11(2) of the LTO to limit the scope of appeals to those determinations or orders which are erroneous in point of law is often defeated and such appeals become costly for the respondent.

84. In view of the above, the Steering Committee proposes to introduce a leave requirement for interlocutory and final appeals from the Lands Tribunal to the Court of Appeal to ensure that the appeal involves a question of law, and to achieve consistency with the grounds for granting leave for appeals to the Court of Appeal in the HCO and the DCO. To give effect to the proposal, the Administration will introduce CSAs to the Bill (addition of new clauses 32A and 32B).

85. The Bills Committee has noted that the two legal professional bodies have been consulted and indicated agreement to the Steering Committee's proposal. The Bar Association has reconsidered its earlier position, taking into account the number of disputes submitted to the Lands Tribunal in which the Government is not a party outnumbers those in which the Government is a party, and the Court of Appeal's concern expressed in CACV 171/2006.

86. The Bills Committee has no objection to the introduction of the proposed CSAs to implement the Steering Committee's proposal.

Committee Stage amendments

87. Apart from the major CSAs highlighted above, the Administration will also move minor and consequential amendments. A full set of the CSAs to be moved by the Administration and agreed by the Bills Committee is in **Appendix III**.

Recommendation and advice sought

Resumption of Second Reading debate

88. Subject to the moving of the proposed CSAs by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 30 January 2008.

Formation of a subcommittee to study draft subsidiary legislation

89. Amendments to both primary and subsidiary legislation are required for the implementation of the CJR. After the passage of the Bill, amendments to three sets of subsidiary legislation will be introduced and they are subject to the negative vetting procedure of the Council. The key features of the proposed amendments to subsidiary legislation are set out in **Appendix IV**.

90. In view of the relatively large number and complexity of the proposed amendments to subsidiary legislation and in order to allow sufficient time for scrutiny, the Bills Committee recommends that a subcommittee should be set up immediately under the House Committee to study the draft subsidiary legislation.

91. Members are invited to support the recommendations of the Bills Committee in paragraphs 88 and 90 above.

Council Business Division 2
Legislative Council Secretariat
16 January 2008

Appendix I

Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Membership list

Chairman	Hon Margaret NG
Members	Hon James TO Kun-sun Hon LI Kwok-ying, MH, JP Hon Ronny TONG Ka-wah, SC Total : 4 Members
Clerk	Mrs Percy MA
Legal Adviser	Miss Kitty CHENG
Date	15 May 2007

附錄 II
Appendix II

《2007 年民事司法制度(雜項修訂)條例草案》委員會
Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

曾向法案委員會表達意見的團體/個別人士名單
List of organizations/individual who have given views to the Bills Committee

團體/個別人士名稱	**Name of organizations and individual**
1. 香港大律師公會	Hong Kong Bar Association
2. 香港律師會	The Law Society of Hong Kong
3. 香港訟費員協會	Hong Kong Law Costs Draftsmen Association
4. 香港調解會	Hong Kong Mediation Council
5. 國際糾紛決議事務所(香港)有限公司	ADR Chambers (Hong Kong) Limited
6. W S CLARKE 先生	Mr W S CLARKE

CIVIL JUSTICE (MISCELLANEOUS AMENDMENTS) BILL 2007

COMMITTEE STAGE

Amendments to be moved by the Chief Secretary for Administration

Clause	Amendment Proposed
3	In the proposed section 52B, by adding – "(3A) A reference to costs in subsection (3)(b) and (c) is a reference to the costs of and incidental to the proceedings commenced under subsection (2) or transferred to the Court of First Instance under section 53B of the District Court Ordinance (Cap. 336).".
5	In the proposed section 53A, by adding – "(3A) A reference to costs in subsection (3)(b) and (c) is a reference to the costs of and incidental to the proceedings commenced under subsection (2) or transferred to the Court under section 52C of the High Court Ordinance (Cap. 4).".
10	In the proposed section 21N(1)(b), by deleting "or arbitral tribunal".
New	By adding immediately after clause 15 – "**15A. Powers of the Court exercisable before commencement of action** Section 47D(1) is amended by repealing "for personal injuries or arising out of the

death of a person".".

New — By adding immediately after clause 16 –

"**16A. Provisions supplementary to sections 41 and 42**

Section 43(3) is repealed.

16B. Application to Government of sections 41 to 44

Section 45(1) is amended by repealing "involving a claim in respect of personal injuries to a person or in respect of a person's death".".

New — By adding immediately after clause 17 –

"**17A. Application to Government of sections 47A to 47D**

Section 47E(1) is amended by repealing "for personal injuries or arising out of the death of a person".".

21 — (a) In the proposed section 14AA(4)(b), by deleting "compelling reason" and substituting "reason in the interests of justice".

(b) In the proposed section 14AA, by adding –

"(5) This section does not apply in relation to an interlocutory judgment or order of the Court of First Instance made before the commencement of this section.".

25 In the proposed section 63A(2)(b), by deleting "compelling reason" and substituting "reason in the interests of justice".

New By adding –

"PART 10A

RULES OF COURT

High Court Ordinance

28A. Section added

The High Court Ordinance (Cap. 4) is amended by adding –

"**55D. Rules as to costs and interest**

(1) Notwithstanding sections 49 and 52A, the power to make rules of court under section 54 includes power to make provision for enabling the Registrar, in such circumstances as may be specified in the rules, to –

(a) disallow all or part of any costs to be taxed pursuant to a costs order made by the Court of First Instance or the Court of Appeal;

(b) disallow all or part of any interest otherwise

payable under section 49 on taxed costs, or reduce the period for which such interest is payable or the rate prescribed in section 49 at which such interest is payable; and

(c) increase the rate prescribed in section 49 at which interest on taxed costs or costs of taxation is payable.

(2) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the Rules Committee may consider necessary or expedient.".

District Court Ordinance

28B. Section added

The District Court Ordinance (Cap. 336) is amended by adding –

"**72CA. Rules as to costs and interest**

(1) Notwithstanding sections 50 and 53, the Rules Committee may make rules of court for enabling the Registrar, in such circumstances as may

be specified in the rules, to –

(a) disallow all or part of any costs to be taxed pursuant to a costs order made by the Court;

(b) disallow all or part of any interest otherwise payable under section 50 on taxed costs, or reduce the period for which such interest is payable or the rate prescribed in section 50 at which such interest is payable; and

(c) increase the rate prescribed in section 50 at which interest on taxed costs or costs of taxation is payable.

(2) Rules made under this section may include incidental, supplementary and consequential provisions that the Rules Committee considers expedient.

(3) In this section, "Registrar" ( ) includes a Master.".

New By adding –

"**32A. Decisions of Tribunal final**

Section 11 is amended –

(a) in subsection (2) –

(i) by adding "section 11AA and" after "Subject to";

(ii) by repealing "determination or order" where it twice appears and substituting "judgment, order or decision";

(b) in subsection (4), by repealing "of the making of the determination or order appealed against" and substituting "on which leave to appeal is granted under section 11AA".

32B. Sections added

The following are added immediately after section 11 –

"**11AA. Leave to appeal**

(1) Subject to subsection (2), no appeal may be made under section 11(2) unless leave to appeal has been granted

by the Tribunal or the Court of Appeal.

(2) Subject to subsection (4), an appeal lies as of right to a presiding officer from a judgment, order or decision of a registrar.

(3) An appeal under subsection (2) is subject to rules made under section 10(3).

(4) Where rules made under section 10(3) provide that an appeal from a specified judgment, order or decision of a registrar lies to the Court of Appeal, the appeal may be made to the Court of Appeal with leave of a registrar or the Court of Appeal.

(5) Leave to appeal may be granted –

(a) in respect of a particular issue arising out of the judgment, order or decision; and

(b) subject to such conditions as the Tribunal, the Court of Appeal or the registrar hearing the application for leave considers necessary in order to secure the just,

expeditious and economical disposal of the appeal.

(6) Leave to appeal shall not be granted unless the Tribunal, the Court of Appeal or the registrar hearing the application for leave is satisfied that –

(a) the appeal has a reasonable prospect of success; or

(b) there is some other reason in the interests of justice why the appeal should be heard.

(7) This section does not apply in relation to a judgment, order or decision of the Tribunal or a registrar of the Tribunal made before the commencement of this section.

(8) In this section, "registrar" ( ) includes a deputy registrar or assistant registrar of the Tribunal.

11AB. Decision on leave to appeal final

No appeal lies from a decision of the Court of Appeal as to whether or not leave to appeal to it should be granted.".

33 In the proposed section 12(7), by deleting "Subject to" and substituting "Notwithstanding subsection (1) and section 12C but subject to".

34 (a) In the heading, in the English text, by deleting "**Section**" and substituting "**Sections**".

(b) In the English text, by deleting "The following is added" and substituting "The following are added".

(c) By adding immediately after the proposed section 12A –

"**12B. Interest on claims for debt and damages**

(1) In proceedings (whenever instituted) before the Tribunal for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the Tribunal thinks fit or as rules made under section 10(3) may provide, on all or any part of the debt or damages in respect of which –

(a) judgment is given; or

(b) payment is made before judgment.

(2) Interest under subsection (1) may be awarded for all or any part of the period between the date when the cause of action arose and –

(a) in the case of any sum paid before judgment, the date of the payment; and

(b) in the case of the sum for which judgment is given, the date of the judgment.

(3) Where –

(a) there are proceedings (whenever instituted) before the Tribunal for the recovery of a debt; and

(b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),

the defendant is liable to pay the plaintiff interest, at such rate as the Tribunal thinks fit or as rules made under section 10(3) may provide, on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.

(5) Interest under this section may be calculated at different rates in respect of different periods.

(6) Subsections (1) and (3) are subject to rules made under section 10(3).

(7) In this section –

"defendant" ( ) means the person from whom the plaintiff seeks the debt or damages;

"plaintiff" ( ) means the person seeking the debt or damages.

12C. Interest on judgments

(1) Subject to any other Ordinance, judgment debts carry simple interest on the aggregate amount of the debts, or on such part of the debts as for the time being remains unsatisfied, from the date of the judgment until satisfaction.

(2) Interest under this section is –

(a) at such rate as the Tribunal may order; or

(b) in the absence of such order, at such rate as may be determined from time to time by the Chief Justice by order.

(3) Interest under this section may be calculated at different rates in respect of different periods.".

《2007年民事司法制度(雜項修訂)條例草案》

委員會審議階段

由政務司司長動議的修正案

條次	建議修正案
3	在建議的第52B條中，加入 —
	“(3A) 凡在第(3)(b)及(c)款提述訟費，即為對根據第(2)款展開或根據《區域法院條例》(第336章)第53B條移交原訟法庭的法律程序的訟費及附帶訟費的提述。”。
5	在建議的第53A條中，加入 —
	“(3A) 凡在第(3)(b)及(c)款提述訟費，即為對根據第(2)款展開或根據《高等法院條例》(第4章)第52C條移交區域法院的法律程序的訟費及附帶訟費的提述。”。
10	在建議的第21N(1)(b)條中，刪去“或仲裁庭”。
新條文	在緊接第15條之後加入 —
	“**15A. 區域法院在訴訟展開前可行使的權力**
	第47D(1)條現予修訂，廢除“為在人身傷害或因某人的死亡而”。”。

新條文　　在緊接第 16 條之後加入 —

"**16A. 第 41 及 42 條的補充條文**

第 43(3)條現予廢除。

16B. 第 41 至 44 條對政府的適用範圍

第 45(1)條現予修訂，廢除" 而該法律程序是涉及就某人的人身傷害或就某人的死亡而提出的申索，" 。" 。

新條文　　在緊接第 17 條之後加入 —

"**17A. 第 47A 至 47D 條對政府的適用範圍**

第 47E(1)條現予修訂，廢除" 而該法律程序是為人身傷害或因某人的死亡而提起的，" 。" 。

21　(a)　在建議的第 14AA(4)(b)條中，刪去" 使人信服的理由解釋為何" 而代以" 有利於秉行公正的理由，因而" 。

(b)　在建議的第 14AA 條中，加入 —

" (5)　本條並不就在本條生效之前作出的原訟法庭的非正審判決或命令而適用。" 。

25　在建議的第 63A(2)(b)條中，刪去" 使人信服的理由解釋為何" 而代以" 有利於秉行公正的理由，因而" 。

新條文　　加入 —

“ 第 10A 部

法院規則

《高等法院條例》

28A. 加入條文

《高等法院條例》(第 4 章)現予修訂，加入 —

“ **55D. 關於訟費及利息的規則**

(1) 儘管有第 49 及 52A 條的規定，根據第 54 條訂立法院規則的權力，包括以下權力：即作出規定，使司法常務官可在該等規則指明的情況下 —

(a) 否決任何依據原訟法庭或上訴法庭作出的訟費命令而評定的全部或部分訟費；

(b) 否決本須根據第 49 條就經評定的訟費而支付的利息的全部或部分，或縮短須為之支付該等利息的期間或調低第 49 條訂明的該等須予支付的利息的利率；及

(c) 調高第 49 條訂明的須就經評定的訟費或評定費支付的利息的利率。

(2) 憑藉本條訂立的規則可包括規則委員會認為需要或合宜的附帶、補充及相應條文。”。

《區域法院條例》

28B. 加入條文

《區域法院條例》(第 336 章)現予修訂，加入 —

“ **72CA. 關於訟費及利息的規則**

(1) 儘管有第 50 及 53 條的規定，規則委員會可訂立法院規則，使司法常務官可在該等規則指明的情況下 —

(a) 否決任何依據區域法院作出的訟費命令而評定的全部或部分訟費；

(b) 否決本須根據第 50 條就經評定的訟費而支付的利息的全部或部分，或縮短須為之支付該等利息的期間或調低第 50 條訂明的該等須予支付的利息的利率；及

(c) 調高第 50 條訂明的須就經評定的訟費或評定費支付的利息的利率。

(2) 根據本條訂立的規則可包括規則委員會認為合宜的附帶、補充及相應條文。

(3) 在本條中，“ 司法常務官” (Registrar)包括聆案官。” 。” 。

新條文 加入 —

“ **32A. 審裁處的決定是最終決定**

第 11 條現予修訂 —

(a) 在第(2)款中 —

(i) 在“ 除” 之後加入“ 第 11AA 條及” ；

(ii) 廢除兩度出現的“ 裁定或命令” 而代以“ 判決、命令或決定” ；

(b) 在第(4)款中，廢除“ 上訴所針對的裁定或命令作出” 而代以“ 根據第 11AA 條批予上訴許可” 。

32B. 加入條文

在緊接第 11 條之後加入 —

"**11AA. 上訴許可**

(1) 除第(2)款另有規定外，除非審裁處或上訴法庭已批予上訴許可，否則任何人不得根據第 11(2)條提出上訴。

(2) 在符合第(4)款的規定下，針對司法常務官的判決、命令或決定而向法官提出上訴，屬當然權利。

(3) 第(2)款所指的上訴，受根據第 10(3)條訂立的規則所規限。

(4) 凡根據第 10(3)條訂立的規則規定可針對司法常務官作出的指明判決、命令或決定向上訴法庭提出上訴，則在獲得司法常務官或上訴法庭的許可下，該上訴可向上訴法庭提出。

(5) 上訴許可 —

(a) 可就在有關判決、命令或決定中出現的某特定爭論點而批予；及

(b) 的批予，可受聆訊該許可申請的審裁處、上訴法庭或司法常務官認為為使上訴得到公正、迅速及合乎經濟原則的處置而需要的條件所規限。

(6) 除非聆訊有關許可申請的審裁處、上訴法庭或司法常務官信納 —

(a) 有關上訴有合理機會得直；或

(b) 有其他有利於秉行公正的理由，因而該上訴應進行聆訊，

否則不得批予上訴許可。

(7) 本條並不就在本條生效之前作出的審裁處或審裁處司法常務官的判決、命令或決定而適用。

(8) 在本條中，“司法常務官”(registrar) 包括審裁處副司法常務官或助理司法常務官。

11AB. 就上訴許可所作的決定為最終的決定

就上訴法庭對應否批予向它提出上訴的上訴許可的決定，任何人不得提出上訴。”。”。

33 刪去建議的第 12(7)條而代以 —

“(7) 儘管有第(1)款及第 12C 條的規定，《高等法院規則》(第 4 章，附屬法例 A)第 62 號命令在作出必要的變通後，適用於審裁處的訟費的判給、評定及追討；但如第(5)款及終審法院首席法官根據第 10(3)條訂立的規則另有規定，則屬例外。”。

34 (a) 在標題中，在英文文本中，刪去“Section”而代以“Sections”。

(b) 在英文文本中，刪去“The following is added”而代以“The following are added”。

(c) 在緊接建議的第 12A 條之後加入 —

“**12B. 債項及損害賠償申索的利息**

(1) 在審裁處席前進行的追討債項或損害賠償的法律程序(不論在何時提起)中，在判令獲得的任何款項中，可加入按審裁處認為合適或根據第 10(3)條訂立的規則訂定的利率計算的單利，該筆單利須就 —

(a) 判令獲得的全部或部分債項或損害賠償計算；或

(b) 在判決作出前已繳付的全部或部分債項或損害賠償計算。

(2) 第(1)款所指的利息，可就自訴訟因由產生的日期與以下日期之間的全部或部分期間判給 —

(a) (就任何在判決作出前已繳付的款項而言)繳付該筆款項的日期；及

(b) (就判令獲得的款項而言)判決的日期。

(3) 凡 —

(a) 有追討債項的法律程序(不論在何時提起)在審裁處席前進行；及

(b) 被告人向原告人償付全部債項(並非依據在有關法律程序中作出的判決而償付)，

被告人有法律責任就全部或部分債項，向原告人繳付按審裁處認為合適或根據第 10(3)條訂立的規則訂定的利率計算的利息，該等利息須就自訴訟因由產生的日期與債項償付的日期之間的全部或部分期間繳付。

(4) 如一筆債項的利息已在某段期間孳生(不論原因為何)，則不得根據本條判給該筆債項在該段期間的利息。

(5) 本條所指的利息，可就不同期間按不同利率計算。

(6) 第(1)及(3)款受根據第 10(3)條訂立的規則所規限。

(7) 在本條中 —

“原告人”(plaintiff)指索求債項或損害賠償的人;

“被告人”(defendant)指被原告人索求債項或損害賠償的人。

12C. 判決的利息

(1) 除任何其他條例另有規定外,判定債項的總額或判定債項當其時尚未清償的部分須孳生單利,由有關判決的日期起計,直至清償為止。

(2) 本條所指的利息的利率 —

(a) 為審裁處所命令 ;或

(b) 在沒有上述命令的情況下,為終審法院首席法官不時藉命令所決定 。

(3) 本條所指的利息,可就不同期間按不同利率計算。”。

KEY FEATURES OF THE PROPOSED AMENDMENTS TO SUBSIDIARY LEGISLATION

Underlying Objectives

It is proposed that courts would exercise their powers with regard to the underlying objectives to -

(a) increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
(b) ensure that a case is dealt with as expeditiously as is reasonably practicable;
(c) promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
(d) promote greater equality between the parties;
(e) facilitate settlement of disputes; and
(f) ensure that the resources of the Court are distributed fairly.

Case Management Powers

2. It is proposed that courts have such case management powers as-

(a) identifying the issues at an early stage;
(b) fixing timetables and controlling the progress of the case; and
(c) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Court-determined Timetables

3. It is proposed that court-determined timetables be set at an early stage of proceedings, taking into account the needs of the particular case and the reasonable requests of the parties, with firm milestone dates for the major steps, such as case management conferences, pre-trial reviews and the trial or trial period. Only in the most exceptional circumstances would a milestone date be changed.

Commencement of Proceedings

4. It is proposed that the present system, with four different modes of commencement of proceedings - writs, originating summonses, originating motions and petitions – be simplified, so that the modes of commencement would be confined to –

(a) writs where substantial factual disputes are likely to arise; and
(b) originating summonses where questions of law involving no or little factual investigation are to be placed before the court.

Pleadings

5. It is proposed that new requirements be introduced for pleadings to be verified by "statements of truth" and for substantive defences to be properly identified. This would enable the relevant issues in proceedings to be more easily identified at an early stage and discourage the raising of unmeritorious allegations or defences.

Admissions and Default Judgments

6. It is proposed that a new procedure for making admissions to money claims be introduced. This would facilitate settlements and save court time and costs by enabling payment terms (as to, say, time and instalments) to be proposed by defendants who submit to default judgments.

Sanctioned Offers and Payments

7. It is proposed that a system of sanctioned offers and payments be introduced so that, effectively, offers to settle any type of dispute (not just money ones) may be made, thereby bringing the whole action or a part of it, to an end. The proposals substantially alter the existing system of payments into court and would considerably widen the ambit of offers to settle cases. For example, under the existing rules, only defendant may offer to settle claims by payments into court, thereby putting a plaintiff at risk as to costs. Under the proposed system, a plaintiff, by making an offer to the defendant, can put the defendant at such risk.

Expert Evidence

8. It is proposed that in order to counter the possible lack of impartiality or independence of expert witnesses, amendments be introduced to –

(a) declare that expert witnesses owe a duty to the court which overrides any obligation to those instructing or paying them;
(b) require the expert to acknowledge that overriding duty in his report; and
(c) require the expert to declare his agreement to be bound by an approved code of conduct for experts.

9. It is also proposed that amendments be introduced to (a) empower the court, in appropriate cases, to order the parties to appoint a single joint expert ("SJE"), and (b) set out the factors which the court has to take into account in deciding whether or not to appoint an SJE.

System of Interlocutory Applications

10. It is proposed that changes be introduced to the system of interlocutory applications to cut down the number of applications and hearings by –

(a) making orders "self-executing", i.e. prescribing an appropriate sanction which automatically applies for non-compliance, without the need to apply to the court for enforcement;
(b) dealing with interlocutory applications on paper as far as practicable; and
(c) penalising unwarranted interlocutory appeals with appropriate costs and other sanctions.

Procedures for Costs Assessment

11 It is proposed that changes be introduced to the procedures for costs assessment to –

(a) provide for summary assessment of costs, whereby the court, can assess the amount of costs payable and then order payment to be made within a certain period of time;

(b) empower Masters to do provisional taxation on paper without a hearing;
(c) empower Chief Judicial Clerks to tax costs if the amount of the bill of costs does not exceed the sum of $200,000 (currently $100,000).

The introduction of summary assessment of costs is aimed at discouraging unwarranted interlocutory applications. The proposed changes are also intended to dispense with the present elaborate and lengthy taxation procedures, thereby saving time and costs.

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