

LRC releases consultation paper on class actions

The Law Reform Commission's Class Actions Sub-committee today (November 5) released a consultation paper proposing that a mechanism for multi-party litigation should be adopted in Hong Kong.

The chairman of the sub-committee, Mr Anthony Neoh, SC, said the sub-committee believed that the introduction of a comprehensive regime for multi-party litigation would enhance access to justice and provide an efficient, well-defined and workable mechanism.

The need for such a mechanism most typically arises where a large number of persons have been adversely affected by another's conduct, but each individual's loss is too small to make undertaking individual litigation economically viable. Such circumstances may arise in relation to, for example, consumer cases (such as product liability and consumer fraud), insurance cases, personal injury cases (such as food poisoning) and so on.

Under the current law in Hong Kong, the sole machinery for dealing with multi-party proceedings in Hong Kong is a rule on representative proceedings under the Rules of the High Court which was criticised as restrictive and inadequate by the Chief Justice's Working Party on Civil Justice Reform in its Final Report in 2004.

Some jurisdictions have adopted a procedure known as a "class action", which enables the claims of a number of persons against the same defendant to be determined in a single court action. In a class action, a representative plaintiff sues on behalf of himself and all the other persons ("the class") who have a claim in respect of the same (or a similar) alleged wrong, and whose claims raise the same questions of law or fact.

The LRC sub-committee is well aware of the risk that a class action regime might unduly encourage litigation and is conscious of the need for caution.

In line with that approach, the sub-committee recommends that in order to filter out cases that are clearly not suitable, class action proceedings should only be allowed to continue as collective proceedings if they have been certified by the court.

In addition, the new regime should be introduced first in the Court of First Instance and its extension to the District Court should be deferred for at least five years until sufficient experience is accumulated through establishing a body of case law on the new procedures. If the regime is eventually extended to the District Court, District Court judges should be given the power to transfer complex cases to the Court of First Instance.

The sub-committee also recommends that the new class action regime should adopt an “opt-out” approach. In other words, once the court certifies that a case is suitable for a class action, any member of the class, as defined in the order of court, will be automatically bound by the subsequent litigation, unless he “opts out” of the class action within the time limits prescribed by the court order.

Where the proceedings involve parties from outside Hong Kong, an “opt-in” procedure should be the default position (that is, persons will not be included in the class litigation unless they take active steps to “opt in” to the litigation), with a discretion given to the court to adopt an “opt-out” procedure if the particular circumstances of the case warrant it. The consultation paper seeks views from the public on this fundamental aspect of the proposed multi-party litigation system.

In the consultation paper, the sub-committee also makes recommendations and seeks public views and comments in respect of a number of issues arising from the use of a class action regime:

- whether a class action regime, and in particular whether an “opt-out” version of such a regime, is appropriate for public law litigation in Hong Kong;
- whether there should be and if so, the type of procedural safeguards which should be put in place to avoid abuse of the process of the court and to ensure that those put at risk of litigation should be fairly protected (for example, a successful defendant not being able to recover his costs from an impecunious plaintiff who has been deliberately chosen as the class representative);
- whether there should be and if so, what safeguards should be put in place in respect of class actions involving parties from other jurisdictions where problems such as forum shopping and duplication of proceedings may arise;
- what funding models which allow plaintiffs with limited funds to take proceedings should be adopted.

The consultation paper explains that the sub-committee considers that it is generally accepted that a class action regime will achieve little unless there are mechanisms in place to enable plaintiffs with limited funds to take proceedings.

“In the short term, we think that the new class action proceedings in Hong Kong should apply initially only to sectors where there are already funding mechanisms in place. Our general intention is to take a step-by-step approach, leading to the establishment of a general class actions fund in the long term,” Mr Neoh said.

The sub-committee emphasises that the recommendations in the consultation paper are intended to facilitate discussion and do not represent the sub-committee’s final conclusions.

Mr Neoh said the sub-committee would welcome views, comments and suggestions on any issues discussed in the consultation paper, and in particular on the questions set out in Chapter 10. The consultation period will last until February 4, 2010.

Copies of the consultation paper are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The consultation paper can also be accessed on the Commission's website at www.hkreform.gov.hk.

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