

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT ON CLASS ACTIONS

### EXECUTIVE SUMMARY

1. The terms of reference of the Class Actions Sub-committee is as follows:

*"To consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to make suitable recommendations generally."*

2. The sub-committee recommended in the consultation paper introducing a class action regime in Hong Kong. We have altogether received 61 responses during the consultation exercise. After carefully considering these responses, we have decided to maintain its recommendation on introducing a class action regime in Hong Kong, albeit incrementally and starting with consumer cases. The layout of this report is as follows:

- Chapter 1: the current rule on representative proceedings;
- Chapter 2: the law on representative proceedings and class actions in other jurisdictions;
- Chapter 3: the need for the introduction of a class action regime;
- Chapter 4: opt-in v opt-out;
- Chapter 5: treatment of public law cases;
- Chapter 6: choice of plaintiff and avoidance of potential abuse;
- Chapter 7: handling of class actions involving parties from other jurisdictions;
- Chapter 8: funding models for the proposed regime;
- Chapter 9: main features of the proposed regime; and
- Chapter 10: a summary of all the recommendations.

#### **Chapter 1      The current rule on representative proceedings in Hong Kong**

3. In Hong Kong, the sole machinery for dealing with multi-party proceedings is provided by Order 15, rule 12 of the Rules of the High Court (Cap 4A) (RHC) which provides:

*"Where numerous persons have the same interest in any proceedings ... the proceedings may be begun, and, unless the Court*

*otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."*

According to Order 15, rule 12(2), the Court is also empowered, on the application of the plaintiffs, to appoint a defendant to act as representative of the other defendants being sued. A judgment or order given in representative proceedings will be binding on all persons so represented.

4. The defects of the current provisions have been summarised by the Chief Justice's Working Party on Civil Justice Reform as follows:

*"The limitations of these provisions are self-evident. While they are helpful and merit retention in the context of cases involving a relatively small number of parties closely concerned in the same proceedings for such cases, they are inadequate as a framework for dealing with large-scale multi-party situations. ... Without rules designed to deal specifically with group litigation, the courts in England and Wales and in Hong Kong have had to proceed on an ad hoc basis, giving such directions as appear appropriate and seeking, so far as possible, agreement among parties or potential parties to be bound by the outcome of test cases. Such limited expedients have met with varying degree of success."<sup>1</sup>*

5. According to the landmark case of *Markt & Co Ltd v Knight Steamship Co Ltd*,<sup>2</sup> the "same interest" requirement means that all class members have to show identical issues of fact and law. The implication is that they have to prove (a) the same contract between all plaintiff class members and the defendant, (b) the same defence (if any) pleaded by the defendant against all the plaintiff class members, and (c) the same relief claimed by the plaintiff class members.

### **Developments that facilitate representative actions**

6. The application in the *Markt* decision of the "same interest" requirement meant that few actions could be brought under the representative actions rule. As a result, the courts sought ways to relax the requirements in various cases so as to make it easier to bring representative proceedings by (a) changing from the "same interest" test to the "common ingredient" test, (b) making the existence of separate contracts no longer a hindrance to establishing the requisite "same interest" element, (c) allowing separate defences against different class members to be raised, and (d) allowing damages to be awarded in representative actions.

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<sup>1</sup> Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (2001), paras 385 to 387 at 148-9.

<sup>2</sup> [1910] 2 KB 1021 (CA).

7. Apart from the relaxation of the "same interest" requirement, there are other developments that could facilitate the commencement of representative actions:

- (i) formation of sub-classes;
- (ii) class description rather than identification;
- (iii) assessment of relative benefits of representative action; and
- (iv) no need to have express consent of the class.

8. While acknowledging the judicial endeavour to counter-balance the strictness imposed by the *Markt* decision, Professor Rachael Mulheron<sup>3</sup> believes that a full regime of multi-party litigation is more desirable so as to enable efficient, well-defined and workable access to justice. A full regime, in her opinion, provides statutory protection and a number of benefits and advantages that the representative procedure does not in the following areas: conduct of proceedings, protecting representative claimant, costs and lawyers' fees, disposal of the case, etc.

9. Despite the judicial efforts to expand the limits of Order 15 Rule 12, there have been very few cases where representative proceedings have been used in Hong Kong. In particular, we take note of the fact that in the types of cases which are most likely to involve, and have involved, multi-party disputes, the approach so far has been to resort to extra-judicial compensation schemes or to test actions. The reason for this lies in part with the fact that the judicial initiatives taken have been piecemeal and the landmark cases restricting the rule's application, have never been expressly over-ruled by an Appellate Court in Hong Kong. In the midst of such uncertainty, it is understandable that the Consumer Council's Consumer Legal Action Fund has hitherto preferred to use test cases rather than test the limits of a representative action. When resources useable for litigation are scarce, it would hardly be sensible to test uncertain judicial waters.

10. We are of the view that even with the adoption of a more liberal view by the court of Order 15, rule 12 of the RHC, there remains a substantial degree of uncertainty in using the current representative action procedure. We agree with Professor Mulheron that a comprehensive regime for class actions is more desirable.

## **Chapter 2            The law on representative proceedings and class action regimes in other jurisdictions**

11. We have looked at the law on representative proceedings and class actions in a number of jurisdictions: Australia, Canada, England and Wales, Ireland, the People's Republic of China (the Mainland), New Zealand, Singapore, South Africa, and the United States of America. We have included reference to law reform proposals in some jurisdictions which have not yet introduced a class action regime, notably Ireland and South Africa.

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<sup>3</sup> R Mulheron, *The Class Action in Common Law Legal Systems, a Comparative Perspective* (2004, Oxford and Portland, Oregon: Hart Publishing).

12. In our survey of the common law jurisdictions, we have found that they commonly acknowledge the need to deal with multi-party litigation in a manner which is efficient and just. In a civil law jurisdiction such as the People's Republic of China (the Mainland), there is a similar acknowledgment. In the United States, Canada and Australia, there has been accumulated experience in the use of class actions for the resolution of multi-party disputes. We find that Ireland and South Africa are working towards a generic class action regime. England and Wales, whilst acknowledging the need for a multi-party regime, had decided to follow a sector by sector approach, but the part on collective proceedings in the relevant legislation was withdrawn for reasons unrelated to the merits of the regime. Singapore has decided to study the feasibility of a class action regime. In the light of these developments, it would be expected that Hong Kong should consider the feasibility of such a regime.

### **Chapter 3            The need for the introduction of a class action regime**

13. The consultation paper recommended the introduction in Hong Kong of a comprehensive regime for multi-party litigation. Thirty five of those who expressed views on this recommendation were in favour, while 18 were against it or expressed reservations.<sup>4</sup> The views for and against the proposal both came from a range of different sectors in society. Those in favour generally endorsed the consultation paper's rationale for a class action regime that it could enhance access to justice by providing one more channel for potential claimants to seek redress. Some also believed that the regime could deter wrong-doing because of easier access to justice by a large number of victims in one lawsuit.

14. On the other hand, opposition and reservations came from some public bodies, professional bodies and various service sectors (legal, accounting and commercial). The general opposing view was that the risks in having a class action regime outweighed the benefits.

15. We have carefully considered the potential risks of bringing in a class action regime. The risks identified by various overseas law reform agencies and academics, and their answers to those risks, are set out in Annex 2 of this report. We are conscious that a class action regime in Hong Kong may prompt unnecessary litigation. There could be additional costs involved for corporations, for example, in having to take out insurance to cover the risk of class litigation. Equally, however, corporations are in a position to manage their risks by avoiding the very circumstances giving rise to the risk of class litigation.

16. We are not persuaded that these concerns tip the balance against reform, though in framing our recommendations for reform we have remained alert to the concerns, opposition and reservations expressed in the public responses in respect of the possible risks associated with the introduction of a class action regime

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<sup>4</sup> Those who supported or opposed the introduction of a class action regime are listed at Tables 1 and 2 respectively at the end of this Chapter. A further six respondents who opposed the regime did not wish their names to be included in this report.

in Hong Kong. After carefully considering this issue, we have come to the conclusion that consideration could be given to phase in the implementation of a class action regime by starting with consumer cases<sup>5</sup> which, we believe, would constitute a large segment (or probably the majority) of cases suited to class actions. This incremental approach could reassure those who are now unsure of, or have expressed opposition, reservations or concerns regarding a class action regime. An incremental approach would also have the merit of having the proposed regime assessed and, with experience gained, a decision could be made whether to have it extended to other types of cases. A further practical reason in favour of an incremental approach is that both the consultation paper and Chapter 8 of this report have pointed out that without proper funding for representative plaintiffs of limited means a class action regime could not achieve much. Recommendation 8 in Chapter 8 of this report concludes that it is not likely that a comprehensive funding mechanism could be instituted in the short term, given the inherent complexities and difficulties in funding class actions. Nonetheless, with proper injection of resources, the Consumer Council's Consumer Legal Action Fund would be readily available to fund class actions brought by consumers, thus enabling an early start of implementing a class action regime.

### **Recommendation 1**

**We believe that there is a good case for the introduction of a comprehensive regime for multi-party litigation so as to enable efficient, well-defined and workable access to justice. In the light of opposition and reservations expressed in the consultation exercise, an incremental approach to implementing a class action regime merits consideration. For this purpose, a class action regime may start with consumer cases, and in the light of experience gained, the regime may be extended to other cases.**

17. We bear in mind the need for caution to ensure that the introduction of a class action regime in Hong Kong does not encourage unmeritorious litigation. It is important that there are appropriate procedures for filtering out cases that are clearly not viable and appropriate rules should be put in place to ensure fairness, expedition and cost effectiveness. At the same time, it will be necessary to explore procedures alternatives to the court process which complement class actions.

### **Mediation and arbitration**

18. Our attention has been drawn to the growth in alternative dispute resolution (ADR) mechanisms, led by a desire to avoid the costs and delays of litigation processes and adoption of new techniques involving ADR and ombudsman mechanisms.

19. Class actions seeking damages usually consist of two parts. The first part deals with the determination of the applicable legal principles that have to be applied to individual cases and, where appropriate, also deals with the determination

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<sup>5</sup> This will be further discussed in Chapter 9 under the heading "Consumer cases".

of the issue of liability of the defendant. The second part of the litigation deals with the application of those legal principles to individual cases and, where appropriate, assessment of the quantum of damages to be paid to individual class members. ADR procedures are especially useful to the second part of class actions.

20. We are of the view that the use of ADR could promote cost-effective dispute resolution of class actions if this can be done in a controlled manner. Full adoption of ADR techniques such as mediation and arbitration on both an interim and final basis in class actions, in the light of the relevant experience in overseas jurisdictions, should be further considered in greater detail in Hong Kong.

## **Recommendation 2**

- (1) We consider that the principle of equal access to justice, that is founded on the concepts of fairness, expedition and cost effectiveness, should guide any change to the present system for mass litigation. Thus guided, we are satisfied that, a good case has been made out for consideration to be given to the establishment of a general procedural framework for class actions in Hong Kong courts, bearing in mind the need for caution that litigation should not thereby be unduly promoted.**
- (2) We believe that in any system for class actions it is crucial that there are appropriate procedures for filtering out cases that are clearly not viable and that appropriate rules should be in place to assure fairness, expedition and cost effectiveness.**
- (3) In addition, Alternative Dispute Resolution techniques such as mediation and arbitration, on both an interim and final basis, should be fully utilised.**

## **Chapter 4 Opt-in v Opt-out**

21. Under an "opt-out" scheme, persons who hold claims concerning questions (of law or fact) which are raised in the class proceedings are bound as members of the class and their rights will be subjected to any judgments made in the class proceeding unless they take an affirmative step to indicate that they wish to be excluded from the action and from the effect of the resulting judgment. The "opt-out" approach has been adopted in jurisdictions such as Australia, British Columbia, Ontario, Quebec and the United States. In contrast, under the "opt-in" approach, a potential class member must expressly opt into the class proceeding by taking a prescribed step within the stipulated period. A person will not be bound by the judgment or settlement unless he has opted in to the proceedings.

22. The arguments for and against the opt-out approach are as follows:

<b>For</b>	<b>Against</b>
<p>(a) defendants are unlikely to have to deal with any claims other than those made in the class action, and if they do, then they can know more precisely how many class members they may face in subsequent individual proceedings;</p> <p>(b) the opt-out regime enhances access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically and who would be unable for one reason or another to take the positive step of including themselves in the proceedings;</p> <p>(c) increased efficiency and the avoidance of multiplicity of proceedings to the benefit of all concerned;</p> <p>(d) access to justice is the basic rationale for class actions, and inclusiveness in the class should be promoted (ie, the vulnerable should be swept in);</p> <p>(e) safeguards can prevent "roping in" (eg, adequate notice explaining opt-out rights, permission to opt out late in the action, and other procedural requirements);</p> <p>(f) for each class member, the goal of individual choice whether or not to pursue a remedy can be achieved if the decision for the class member is whether to continue proceedings rather than commence them;</p> <p>(g) opting out more effectively ensures that defendants are assessed for the full measure of the damages they have caused rather than escaping that consequence simply because a number of class members do not take steps to opt in;</p> <p>(h) the meaning of silence is equivocal, and does not necessarily indicate indifference or lack of interest, so class members should not be denied whatever benefits are secured by</p>	<p>(a) it is objectionable that a person can pursue an action on behalf of others without an express mandate;</p> <p>(b) a person is required to take a positive step to disassociate from litigation which he/she has done little or nothing to promote;</p> <p>(c) class actions may be raised by busy-bodies, encouraged by unprincipled entrepreneurial lawyers;</p> <p>(d) absent class members may know about the litigation too late to opt out, in which case they are bound by the result, whether or not they want to be;</p> <p>(e) unfairness to defendants is increased by creating an unmanageably large group in which the members are not identified by name and it is very difficult to undertake negotiations for a settlement;</p> <p>(f) it is unattractive for a court to enforce claims against the defending party at the instance of plaintiffs who are entirely passive and may have no desire to prosecute the claim;</p> <p>(g) opt-out regimes create potential for the general <i>res judicata</i> effect of the class action judgment to be undermined by individual class members exercising their right of exclusion;</p> <p>(h) to the extent that class members exercised opt-out rights for the purpose of prosecuting their individual suits, the desired economies would suffer and the risk of inconsistent decisions would increase;</p> <p>(i) opt-out regimes do not cure the fact that persons will not want to engage in litigation because they are timid, ignorant, unfamiliar with business or legal matters, or do not understand</p>

For	Against
the class action by failing to act at an early stage of the action – fairer for the silent to be considered part of the class than not.	the notice – the same persons who would not opt in may also opt out, which can undermine the purpose of inclusive class membership.

## Conclusion

23. In a comparative study covering the major class action systems in a number of jurisdictions it was found that the degree of participation under opt-in systems was lower than that found under opt-out systems. The opt-out procedure overcomes the difficulties of identifying and naming all class members affected by the defendant's misconduct and achieves the closure of issues between the parties.

24. The consultation paper recommended that the proposed class action regime should adopt an opt-out approach as the default position, subject to the court's discretion to order otherwise in the interests of justice. This default position could be departed from by application from a party who will bear the burden to show that the exceptional circumstances of the case dictate that an opt-in approach will better serve the interests of justice. After carefully considering the responses from the public, we believe that the benefits of an opt-out approach outweigh its problems, and therefore maintain the original recommendation on adopting this approach unless there are strong reasons to depart from this in the interests of justice.

### Recommendation 3

**We recommend that, subject to discretionary powers vested in the court to order otherwise in the interests of justice and the proper administration of justice, the new class action regime should adopt an opt-out approach. In other words, once the court certifies a case suitable for a class action, the members of the class, as defined in the order of court, would be automatically considered to be bound by the litigation, unless within the time limits and in the manner prescribed by the court order a member opts out.**

## Chapter 5 The treatment of public law cases

25. In this Chapter we consider, in light of the special features of public law litigation in Hong Kong, including in particular the unique constitutional position prevailing under the Basic Law, whether the adoption of a class action regime as proposed in Recommendations 1 to 3 is suitable, either generally or with modifications, for public law cases.

26. A challenge to the substantive or procedural lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function is made by way of an application for judicial review pursuant to section



21K(1) of the High Court Ordinance (Cap 4) and Order 53 of the RHC. In many situations, a public law decision on an application for judicial review may have wider ramifications beyond the individual applicant's case. By way of example, a challenge to the constitutionality of primary legislation will, if successful, generally result in a declaration of inconsistency with the Basic Law. It is therefore pertinent to examine whether a class action regime, and in particular whether an opt-out model of such a regime, is appropriate in the context of public law litigation generally and in Hong Kong in particular.

27. In jurisdictions which have a class action procedure, it is available in the context of both private and public law litigation. Certain features of public law litigation call for special attention to be given to the procedural rules governing multi-party situations. One such feature is the fact that, in public law litigation, although there may be issues of law and/or facts common to the group which may justify the use of the class action procedure, the individual circumstances of each claimant's case may be highly material to the outcome of the administrative decision-making process.

### **Possible alternative approaches**

28. The consultation paper put forward four options for public discussion:

Option 1: Public law cases should be excluded from the general class action regime and dealt with separately, leaving the class action regime for private law cases only;

Option 2: The court should be given the discretion in a public law case to adopt either the opt-in or opt-out procedure, with no presumption in favour of the opt-out procedure;

Option 3: Public law cases should follow the same opt-out model recommended for general application in Recommendation 3, with additional certification criteria to be put in place to filter out public law cases that are not suitable for class action proceedings; and

Option 4: Public law cases should adopt an opt-in model, so that only those persons who have expressly consented to be bound by a decision in a class action will be treated as parties to that judgment.

The consultation paper did not come to a firm view on the matter and views from the public were invited before drawing any conclusion. There was more or less the same support for each of these four options from those who responded on the issue.

### **Conclusion**

29. We believe that the present separation between public law and private law cases should be maintained. At present, public law cases are initiated in the Court of First Instance of the High Court and are governed by Section 21K(1) of the

High Court Ordinance and Order 53 of the RHC. The consultation paper recommended that there be no change to this basic system and that any group litigation regime should be built upon it. This was supported by the responses from the public.

30. The next questions are whether the proposed regime should apply to public law cases and, if so, whether the opt-in or opt-out approach should be adopted. We believe that it would be appropriate to invoke the class action regime in public law cases:

- (a) for the sake of finality and preventing a flood of individual cases; and
- (b) for the sake of consistency as the regime has been recommended for private law cases.

While we are aware of the possible risks of an opt-out approach, we on balance are in favour of adopting this approach as the default position for public law cases as for private law cases, provided the court is empowered to order the opt-in approach in the interests of justice.

#### **Recommendation 4**

**We recommend that:**

- (1) the new class actions regime should apply to public law cases, in addition to the current section 21K(1) of the High Court Ordinance (Cap 4) and Order 53 of the Rules of the High Court; and**
- (2) an opt-out approach should be the default position unless the court orders otherwise in the interests of justice and the proper administration of justice.**

## **Chapter 6 Choice of plaintiff and avoidance of potential abuse**

31. We consider that where there is a risk in a class action that the successful defendant will not be able to recover his costs from an impecunious plaintiff acting as the class representative, appropriate protection should be put into place against such unsuccessful claims. To avoid abuse of the process of the court and to ensure that those put at risk of litigation should be fairly protected, we believe that procedural safeguards should be established.

32. It is a general feature of class action regimes that if the class loses, class members enjoy specific and unilateral costs immunity. This immunity is statutorily provided in, for example, Australia, British Columbia and Ontario. However costs are generally awarded against the representative plaintiff in an unsuccessful class action. In such circumstances, there is a strong incentive on the part of class members to structure class action proceedings so as to avoid wealthy class members paying adverse costs. If the defendant wins the action (or wins the

certification battle at the outset), and obtains an award of costs in its favour, it can easily be confronted with significant legal costs, which cannot be recovered.

33. There are four ways in which the indigent representative claimant issue can be handled, either within the class action regime itself or by recourse to the usual civil procedural rules.

### **Reliance on vexatious/abusive rules of court**

34. Deliberately choosing a "straw" claimant with no financial means could be construed as vexatious and abusive conduct, thereby bringing the proceedings to a halt on that basis. It is always open to a court to draw that inference if the sense of frustration of the defendant sufficiently convinces the court that a "straw plaintiff" is being used to shield more financially viable class members from costs orders. However, we have come to the view that the usual vexatious/abusive provisions of the court rules and the principles distilled from case law are not sufficiently effective because they are not aimed at tackling the problem of impecunious class representatives.

### **The representative certification criterion**

35. One of the certification criteria in any opt-out class action regime is the "*adequacy of the representative claimant*". This has been held to include that the representative claimant has the ability to satisfy any adverse costs order that might be awarded against him. If the representative claimant has no means of proving to the court that he can do that, then certification of the class action may be disallowed (or at least with that particular representative claimant).

### **Funding proof at certification**

36. A class action regime may also contain an explicit provision that the representative must prove to the satisfaction of the court that suitable funding and costs-protection arrangements (on the part of the representative claimant and/or his lawyers) have been made for the litigation.

### **Security for costs**

37. Another option is to empower the courts to order security for costs so as to prevent impecunious plaintiffs from being intentionally put forward as the lead plaintiffs and to protect defendants from unmeritorious claims.

### **Conclusion**

38. We are satisfied that, on balance, the security for costs mechanism would provide a reasonable filtering process which could effectively prevent class

members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, thereby abusing the process.

39. The proposed class action regime could include a provision similar to section 33ZG of the Federal Court of Australia Act 1976 to empower the court to order security for costs in appropriate cases. In addition, the representative claimant's financial standing could properly form part of the "adequacy of the representative" certification criterion. Furthermore, the ability of the representative claimant to fund the action and to meet any adverse costs award could be made part of the certification criterion.

## **Recommendation 5**

**We recommend that:**

- (1) To prevent class members with sound financial capability from deliberately selecting impecunious plaintiffs to act as the class representatives, and thereby abusing the court process, a representative plaintiff's ability to satisfy an adverse costs order should be made a certification criterion and he should be required to prove to the court's satisfaction that suitable funding and costs-protection arrangements are already in place at the certification stage.**
- (2) Truly impecunious plaintiffs should have access to discretionary funding providing financial support for them to obtain legal remedies.**
- (3) To avoid abuse of the court process and to ensure that those put at risk of litigation should not suffer unfairly, the court should be empowered, in appropriate cases, to order representative plaintiffs to pay security for costs in accordance with the established principles for making such orders and by way of a provision similar to section 33ZG of the Federal Court of Australia Act 1976.**

## **Chapter 7            Handling of class actions involving parties from other jurisdictions**

40. We envisage that parties in class actions commenced in Hong Kong may straddle across a number of jurisdictions (eg mainland China, Hong Kong and a third jurisdiction). Problems associated with class actions involving parties from other jurisdictions include forum shopping, duplication of proceedings and the *res judicata* effects of a judgment on foreign or extra-territorial class members.

## Possible options

41. Discretion to transfer class action proceedings The court could be empowered, in the interests of justice, to order a transfer of the class proceedings or a stay of the proceedings on the basis of the inappropriateness of Hong Kong as the litigation forum.
42. Excluding foreign class members An alternative approach is to exclude foreign class members, if the court regards this as appropriate.
43. Sub-classing of class members from other jurisdictions Foreign class members participating in a class action commenced in Hong Kong could be required to form their own sub-class with their own representative claimant. In that way, separate notice requirements could be applied to that representative in respect of members of the sub-class, and if separate legal issues arise that are common to that sub-class alone, they can be accommodated, but dealt with separately from the main class action (even by separate hearing).
44. Opt-in requirement As a means of controlling or limiting foreign class members, and of ensuring that due process concerns are met as regards those foreign class members, non-residents may participate in the proceedings by opting in, for example, the British Columbia Class Proceedings Act. Opting in signifies that foreign class members submit to the jurisdiction of the British Columbia court.

## Conclusion

45. We are not in favour of adopting a rigid exclusionary rule. If plaintiffs from other jurisdictions are excluded from class action proceedings in Hong Kong, then the judgment of those proceedings will only bind class members who are resident in Hong Kong. If litigants from other jurisdictions were excluded from a class, then it would be difficult for the court to deal with the common issue of the class action. In principle, the court should allow as many members of the class as possible to have the benefit of the class action. On the other hand, we also note that an opt-out procedure for class actions involving parties from other jurisdictions would be expensive.
46. In contrast to the opt-out regime recommended for class actions in general, the consultation paper recommended that the default position for any class members residing in a jurisdiction outside Hong Kong should be that they must opt in to the class action proceedings commenced in Hong Kong in order to be bound by, or to benefit from, a judgment on the common issues. Practically speaking, such a requirement ensures that the class representative (and his lawyers) knows who the class members from other jurisdictions are. To assist potential parties from other jurisdictions, class action proceedings commenced in Hong Kong could be publicised on a website. An on-line class action database should be set up in Hong Kong.
47. A vast majority of those who responded to the consultation paper supported these recommendations. We also understand that Hong Kong is an international city with an open economy, and believe that a balance has to be struck

between extending the class action regime to foreign plaintiffs and avoiding abuses. We therefore also recommend imposing a condition on opting-in foreign plaintiffs requiring them to give a declaration and undertaking that the class action judgment or settlement amounts to a final and conclusive resolution of their claims.

### **Class actions involving defendants from other jurisdictions and the common law doctrine of *forum non conveniens***

48. The consultation paper recommended that where a defendant is from a jurisdiction outside Hong Kong, the current rules on service of proceedings outside Hong Kong as set out in Order 11 of the RHC should be equally applicable and sufficient to control class actions with defendants outside Hong Kong. Each separate plaintiff in a given action who wishes to pursue a cause of action against defendants abroad requires separate leave, although this may be applied for in one application. In the context of class action proceedings, this requirement may pose difficulties in proving that each class member has a cause of action against the foreign defendant. There is a need to relax the legal restriction so as to allow an application for service outside the jurisdiction without the need to show each claim of the members in a class action falls within the ambit of Order 11 rule 1(1). As long as the representative plaintiff can make out a case for a grant of leave, an order could be made for service outside jurisdiction.

49. The consultation paper also recommended applying the common law doctrine of *forum non conveniens* to class actions. In other words, the court is empowered to stay the proceedings where either the plaintiffs seeking access to justice in the local court or the defendants resisting claims before the local court are from another jurisdiction if it is clearly inappropriate to exercise its jurisdiction and if a court elsewhere has jurisdiction which is clearly more appropriate to resolve the dispute. These recommendations were supported in the consultation.

### **Recommendation 6**

#### **We recommend that:**

- (1) (a) Where class action proceedings involve foreign plaintiffs, an opt-in procedure should be adopted as the default position, subject to the court's discretion to adopt an opt-out procedure for the entire class of foreign plaintiffs or for defined sub-classes, which may have their own representatives, in the light of the particular circumstances of each case upon application.**
- (b) On opting-in, foreign plaintiffs would need to give a declaration and undertaking that the class action judgment or settlement would amount to a final and conclusive resolution of their claims.**

- (2) The current rules on service of process outside Hong Kong as set out in Order 11 of the Rules of the High Court should be applicable to foreign defendants, with an adaptation to the effect that as long as the representative plaintiff can make out a case for a grant of leave, an order should be made for service out of jurisdiction.
- (3) The court may stay class action proceedings involving foreign plaintiffs or defendants in reliance on the common law rule of *forum non conveniens*, if it is clearly inappropriate to exercise its jurisdiction and if a court elsewhere has jurisdiction which is clearly more appropriate to resolve the dispute.
- (4) To assist potential foreign plaintiffs to consider whether to join in class action proceedings commenced in Hong Kong, information on those proceedings should be publicised on a website.

## **Chapter 8 Funding models for the class actions regime**

50. It is clear that the costs of litigation are a crucial issue in class action proceedings. It is generally accepted that if a suitable funding model could not be found which allows plaintiffs with limited funds to take proceedings, little could be achieved by a class action regime.

51. The additional procedural requirements of class actions increase substantially the costs incurred by the representative plaintiff and render a class action a considerably more expensive form of litigation than individual proceedings. The general rule that "costs follow success" would constitute a major obstacle to commencing a class action. Plaintiffs will face the prospect of being liable for their own legal costs and a significant portion of the costs incurred by the defendant should their cases fail. This potential liability for large amount of costs has the practical effect of deterring many individuals from taking legal actions, even though they have meritorious claims.

52. After considering a number of funding options for representative plaintiffs, the consultation paper recommended establishing a class actions fund as well as expanding legal aid schemes and the Consumer Legal Action Fund. Upon reflecting on the public responses, we recommend establishing a class actions fund for the long term and expanding the Consumer Legal Action Fund for the short term.

### **Conditional fee agreements**

53. The consultation paper stated that conditional fee agreements warranted further study. The majority of the responses were, however, against it. In view of the strong reservations expressed, we therefore withdraw the observation on further studying this option.

## **Legal aid schemes**

54. The consultation paper proposed extending the ordinary legal aid and supplementary legal aid schemes to class actions. The majority of the respondents supported the extension of the legal aid schemes to class actions. Some respondents, however, believed that class actions should not be funded out of the public purse. We have carefully considered these responses, especially the concerns that it would not be easy to fit the class action regime into the legal aid schemes. If the class action regime is to operate within the strait-jacket of the legal aid schemes, the regime might well be constrained. We do not think that that is desirable and conclude that the legal aid schemes should not be extended to cover class actions.

55. The consultation paper recommended that a legally aided representative plaintiff in a class action should only be funded as if he were pursuing a personal action and that part of the total common fund costs attributable to him should be disaggregated, and class members who are not legally aided should share equitably the costs. These suggestions were supported and generally regarded as fair by those who responded. We therefore maintain these recommendations, except the part that if the legal aid schemes were expanded to cover class actions, those who are not legally aided should share equitably the costs (Recommendation 7). This is because we conclude, as discussed in the preceding paragraph, that legal aid schemes should not be extended to cover class actions.

## **Class action fund**

56. The majority of the respondents supported the recommendation on establishing a class action fund. We conclude that a separate class action fund to be administered by the Director of Legal Aid would seem to be a more acceptable solution (Recommendation 8(2)). The experience of the Director of Legal Aid in administering the self-financing Supplementary Legal Aid Fund is particularly relevant.

## **Consumer Legal Action Fund**

57. Recommendation 1 in this report proposed an incremental approach to the implementation of a class action regime, starting with consumer cases. The current Consumer Legal Action Fund, with proper injection of resources, would be readily available to fund class actions. After carefully considering the minority views from the public responses against our proposal and the overwhelming support, we decide to maintain the proposal in the consultation paper (Recommendation 8(3)). We believe that increasing the resources of the Consumer Legal Action Fund so as to enable it to fund class actions, would deal with a large segment of cases (probably the majority of cases) where class actions would be most likely. Once experience is accumulated in the funding of class actions by this Fund, then a general class action



fund extended to actions outside the ambit of the Consumer Council could be considered if the proposed regime is extended to other types of cases.

### **Litigation funding companies (“LFCs”)**

58. The consultation paper pointed out that LFCs would be controversial, and invited views from the public. This issue had indeed aroused much discussion from the respondents. The majority of the respondents were against it. Some respondents suggested further consideration of the matter. We have carefully considered the arguments for and against allowing LFCs to operate in Hong Kong, and have concluded that it is not appropriate to permit LFCs to operate at this juncture, as the community at large does not accept the idea of funding litigation for profit.

#### **Recommendation 7**

**We recommend that:**

- (1) A legally aided person should not lose his legal aid funding by agreeing to act as representative plaintiff in a class action, but he should only be funded or protected to the extent as if he were pursuing a personal, as opposed to a class action.**
- (2) If a legally aided person becomes a representative plaintiff in a class action, that part of the total common fund costs which would be attributable to the aided person as if he were pursuing the action on a personal basis should be disaggregated.**

#### **Recommendation 8**

- (1) We conclude, as generally accepted, that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime.**
- (2) In the long term we recommend establishing a general class actions fund, that is a special public fund which can make discretionary grants to all eligible impecunious class action plaintiffs providing financial support for them to obtain legal remedies and which in return the representative plaintiffs must reimburse from proceeds recovered from the defendants.**
- (3) Given the complexity and the difficulties of introducing a comprehensive funding mechanism in Hong Kong and our recommendation that the proposed class action regime should be implemented incrementally, starting with consumer cases, we recommend increasing the Consumer**

**Legal Action Fund's resources to make funding available for class action proceedings arising from consumer claims. If the scope of the Fund were to be expanded to cover class actions, it would be important to devise mechanisms to ensure that class members who are not assisted by the Fund should share equitably in the costs of the proceedings.**

## **Chapter 9            Main features of the proposed regime**

59.            Recommendation 1 in this report recommended that a new court procedure for class actions should be introduced in Hong Kong incrementally, and should start with consumer cases before extending the procedure to other types of cases in due course once the regime has proved satisfactory. Despite this incremental approach, the mechanism for a full class action regime would need to be put in place from the outset. There is also a need to consider what the design features of the new procedure should be and what specific provisions should be adopted if a class action regime is introduced.

### **Consumer cases**

60.            It is necessary to clarify what claims falling within the broad heading "consumer cases" should be considered eligible for class actions. Mass torts involving physical harm may arise from a large-scale accident or the supply of faulty mass-produced goods by retailers or pharmacies, prompting victims to sue manufacturers under the principle of tort. A consumer may also wish to bring alternative causes of action, such as misrepresentation, deceit or other tortious claims. The proposed regime should allow this, though in every case the tortious claims would have to be in a consumer context if they were to be covered by the new scheme. We therefore recommend that the proposed class action regime should cover tortious and contractual claims made by consumers in relation to goods, services and immovable property (Recommendation 9(1)).

### **Models of certification criteria**

61.            A certification stage is an essential element of any class actions mechanism, which should take place as early as possible in the litigation and which should be applied rigorously by the court. This means that a representative plaintiff would be required to satisfy the court of the following certification criteria:

- (a)    There is a minimum number of identifiable claimants (the "numerosity" criterion);
- (b)    The claim is not merely justiciable (discloses a genuine cause of action) but has legal merit (ie certification requires the court to conduct a preliminary merits test) (the "merits" criterion);

- (c) There is sufficient commonality of interest and remedy among members of the class (the "commonality" criterion);
- (d) The class action is the most appropriate legal vehicle to resolve the issues in dispute (the "superiority" criterion); and
- (e) The representative plaintiff should have the standing and ability to represent the interests of the class of claimants both properly and adequately (the "representative" criterion).

62. The consultation paper recommended that to filter out unsuitable cases, class actions should not be allowed to continue as such unless certified by the court. All the respondents who responded to this issue endorsed this recommendation. We therefore maintain the recommendation (Recommendation 9(4)).

### **Legislation to implement a class action procedure in Hong Kong**

63. Overseas experience shows that it may be preferable to introduce reform through statutory enactment rather than subsidiary legislation. If the recommendations in this report are to be implemented, there will be a need to pass enabling legislation and make changes to the rules pursuant to that enabling legislation. The consultation paper recommended that provision for introducing a class action procedure in Hong Kong should be made by primary legislation. This was well supported in the public consultation. We therefore maintain this recommendation (Recommendation 9(2)).

64. Order 15 of the RHC The consultation paper recommended that a self-contained order of the RHC on the general procedural framework for class actions would be needed to replace the existing Order 15 rule 12. As Recommendation 1 in this report recommended an incremental approach to implementing a class action regime, we consider that the existing rule should be retained at least until the proposed regime is extended to all cases. Whether this rule should still be retained after the extension to all cases should be reviewed at that time (Recommendation 9(3)).

65. Case management powers We believe that the procedure adopted for class actions should reflect the experience gained from the implementation of the Civil Justice Reform report's proposals for express case management powers. The consultation paper recommended that depending on operational experience, features which facilitate active case management (such as case management conferences and alternative dispute resolution procedures) may be useful and can be incorporated into the class action procedural rules. This recommendation was endorsed by those who responded, and is therefore maintained (Recommendation 9(5)).

66. Jurisdiction to hear class action cases Consideration must be given to which courts should be authorised to hear class actions. We regard it as advisable to defer the extension of the jurisdiction of the lower courts to hear class actions until such time as the procedure has been in operation in the Court of First Instance for five years or more and a body of case law has been established. In

due course, consideration could be given to extending the jurisdiction to hear class actions to the District Court. The Small Claims Tribunal should not be empowered to hear class actions. We have decided to maintain these recommendations as they were endorsed by the respondents (Recommendation 9(6)-(8)).

### **Recommendation 9**

**We recommend that:**

- (1) The proposed class actions regime should cover tortious and contractual claims made by consumers in relation to goods, services and immovable property.**
- (2) The provisions for introducing a new court procedure for class actions should be made by primary legislation in Hong Kong, thus enabling those elements of reform which may affect substantive law to be debated fully and implemented in a way that would preclude *ultra vires* challenges. The detailed design of the legislative provisions to be adopted for class action litigation should be further studied.**
- (3) The existing rule for representative actions under Order 15 Rule 12 of the Rules of the High Court should be retained at least until the proposed regime is extended to all cases. Whether this rule should still be retained after the extension to all cases should be reviewed at that time.**
- (4) To implement our recommendation for appropriate procedures to filter out cases that are clearly not viable, class action proceedings should not be allowed to continue as collective proceedings unless certified by a court.**
- (5) In addition to certification, detailed design features which facilitate active case management should be incorporated into the class action procedural rules.**
- (6) The extension of the District Court jurisdiction to hear class actions should be deferred for a period of at least five years until a body of case law of the Court of First Instance on the new procedures has been established.**
- (7) District Court judges should be given the power to transfer appropriate class action cases (on the ground of complexity) to the Court of First Instance.**
- (8) The Small Claims Tribunal should not be empowered to hear class action proceedings.**