

LRC report proposes setting up class action mechanism

The Law Reform Commission published a report today (May 28) proposing that a mechanism for class actions should be adopted in Hong Kong. The proposal was put forward after careful and thorough consideration of the responses to the Commission's consultation paper.

The Commission believes that the introduction of a comprehensive regime for class actions would enhance access to justice and would provide an efficient, well-defined and workable mechanism.

The Chairman of the Commission's Sub-committee on Class Actions, Mr Anthony Neoh, SC, said that the Commission recommended phasing the implementation of a class action regime by starting with consumer cases, which would bring within the net potentially the largest segment (or even the majority) of cases suited to class actions. This cautious approach was to avoid the risk of unduly encouraging litigation.

Another merit of this incremental approach is to allow the court system and the community to gain experience in this new type of procedure. In the light of experience gained, the Administration can assess whether and when the regime should be extended to other types of cases.

The overwhelming message received through the public consultation of the Sub-Committee was that whilst a class action regime should be welcomed so that there may be increased access to justice, the regime should not be a charter for unnecessary and unmeritorious litigation. The Commission therefore recommends that in accordance with all class action regimes elsewhere, class actions should only be allowed to continue as class actions if they have been so certified by the court. In addition, the proposed regime should be introduced first in the Court of First Instance and its extension to the District Court should be deferred for five years until sufficient experience is accumulated through the establishment of a body of case laws on the new procedures. If the regime is eventually extended to the District Court, judges should also be given the power to transfer complex cases to the Court of First Instance.

The Commission recommends that the proposed regime should adopt an "opt-out" approach. In other words, once the court certifies that a case is suitable for a class action, members of the class, as defined in the court order, would be automatically bound by the class action, unless they "opt

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 action unless they take active steps to "opt in" to the action), and the court has the discretion to adopt an "opt-out" procedure if the particular circumstances of the case warrant it.

The Commission also recommends the following in the report:

- the proposed regime, and in particular an "opt-out" version, should also apply to public law litigation, say, judicial reviews, in Hong Kong (when the class action regime is extended beyond consumer actions);

- there should be procedural safeguards 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); and

- there should be safeguards in respect of class actions involving parties from other jurisdictions where problems such as forum shopping, duplication of proceedings, etc may arise.

"It is generally accepted that a class action regime would achieve little unless there were mechanisms in place to enable plaintiffs with limited funds to take proceedings. As a comprehensive funding mechanism is unlikely to be put in place in the short term, the Consumer Council's Consumer Legal Action Fund should be properly injected with resources to make it readily available to fund class actions brought by consumers, thus enabling an early start of the class action regime," Mr Neoh said.

"In the short term, we think that the proposed regime should apply initially only to consumer cases where there are already funding mechanisms in place. Our intention is to take a step-by-step approach, leading to the establishment of a general class action fund in the long term," he added.

Mr Neoh said, "Once experience is accumulated in the funding of class actions by the Consumer Legal Action 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."

Mr Ambrose Ho, SC, a member of the Sub-committee, speaking from the perspective of consumers, said, "Consumer cases are particularly suited for the implementation of the proposed regime because of the general disincentives of individual claimants to seek judicial redress."

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 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 cases relating to, for example, consumer protection (such as product liability and consumer fraud), insurance, personal injury (such as food poisoning), etc.

Under the existing 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.

The report can be browsed at the Commission's website at www.hkreform.gov.hk. Hard copies are available on request from the Commission's Secretariat at 20/F, Harcourt House, 39 Gloucester Road, Wan Chai, Hong Kong.

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