LAW REFORM COMMISSION CONSULTATION PAPER
CLASS ACTIONS

Submissions

Introductory comments

The Civil Litigation Committee ("the Committee"), a sub-committee of the Law Society of Hong Kong charged with reviewing matters relating to civil litigation, has considered the Class Actions Consultation Paper ("Consultation Paper") prepared by the Law Reform Commission of Hong Kong. Set out below are the Law Society's considered responses to the specific questions posed in the Consultation Paper.

The purpose of this introduction is to highlight some of the Law Society's concerns about the possible introduction of class actions.

On a first reading, the Consultation Paper makes an apparently convincing case for class actions. No one can argue with providing greater and potentially cheaper access to justice for claimants.

Similarly, many of the questions posed in the Consultation Paper are capable of only one answer. For example, how can one disagree with the proposition in Question 2 that "fairness, expedition and cost-effectiveness should guide any change in procedure for multi-party litigation"?

However, the Law Society believes that the possible introduction of amendments to the rules to permit class actions, without addressing issues of the funding of such class actions, is putting the proverbial "cart before the horse".

In the United States, where class actions are common, contingency fees are the norm. This means there is at both state and federal level a substantial "Plaintiffs' Bar" which is prepared to act in class actions. The class of plaintiffs is exposed to no financial risk because, with certain limited exceptions, litigation in the U.S. is risk-free when it comes to costs because, unlike the Hong Kong system, there is no principle of "loser pays costs". Furthermore, the plaintiffs' lawyers take on the financial risk of the litigation so no plaintiff in a class action is required to pay money. In return, the plaintiffs' lawyers can expect a bumper return (percentages of ¼ to ⅓ of damages recovered to be paid by way of costs are not uncommon) when the class action either settles or is tried and the plaintiffs succeed.

The Law Society has traditionally been opposed to the introduction of contingency fees in Hong Kong[1] as it believes the advantage of giving claimants greater access to justice is outweighed by the disadvantage of increases in nuisance litigation and the potential conflict of interest into which lawyers are placed when they have a financial interest in the outcome of the litigation.

The Law Society has followed closely the introduction of conditional fees in England but note these have not proven to be the panacea which many advocates had promised before their introduction.

It is to be noted in Hong Kong that the laws against champerty and maintenance are still in place. There has been discussion of various forms of litigation funding but, unlike other common law jurisdictions such as Canada, which has class action funds, or Australia, where litigation funding is now a recognised and acceptable business activity, the law in Hong Kong is still murky as to the legitimacy of litigation funding where the funder has no direct economic interest in the outcome of the litigation.

The difficulty the Law Society foresees is that lawyers in Hong Kong will be unwilling to take on the additional burden of prosecuting a class action, with the concomitant requirements of advertising for the class etc., unless there is some financial incentive for lawyers and this runs straight into the Law Society's primary concern that lawyers should not have a financial interest in their clients' litigation.

It is instructive to note from the consultation paper that the Director of Legal Aid seems resolute in not agreeing to fund class actions but instead maintains his only concern is the well-being of the individual plaintiff who has applied for and been granted Legal Aid.

Apart from funding issues, there is also a specific issue which arises from Hong Kong's unique geographical and constitutional position within the principle of "one country, two systems".

There is much discussion in the Consultation Paper of the advantages and disadvantages of opt-in against opt-out. The consultation paper does not arrive at any determined conclusions but a distinction is drawn between potential plaintiffs within and without the jurisdiction.

This distinction may work in a large country such as the United States but it is unlikely to work in Hong Kong. To take an example, a common form of class action in the United States is product liability where a class of plaintiffs has been injured by a particular product. One can easily foresee a similar type of class action in Hong Kong. However, it is highly unlikely the product will have been sold only in Hong Kong; instead, it is likely to have been sold throughout the Pearl River Delta Region. This means there are potential plaintiffs in the class action both in Hong Kong and in the Mainland. By trying to draw a distinction between opting-in and opting-out dependent upon residence in the jurisdiction,

[1] See the Law Society's Response to the LRC's Report on Conditional Fees dated September 2007

one ends with the peculiar position that plaintiffs in Hong Kong might be bound by any class action decision but not those resident in Shenzhen. This problem is exacerbated by the increasing mobility of people in the region where many Hong Kong residents, i.e. those with Hong Kong Identity Cards, now live and work across the border while conversely many residents of Guangdong Province regularly visit and spend substantial periods of time in Hong Kong.

Law Society's Response to Questions in the Consultation Paper

Questions 1
Do you agree that a comprehensive scheme for multi-party litigation should be introduced in Hong Kong?

Answer: The Law Society gives qualified agreement to the proposal subject to our commentary below:

The existing procedures for representative actions set out at Order 15 rule 12 of the Rules of the High Court ("RHC") are perceived as uncertain, and are thus used less frequently than they could be.

The recommendations set out in the Consultation Paper are consistent with Civil Justice Reforms ("CJR") underlying objectives of improved access to justice, expedition of proceedings and possible settlement discussions, and judicial economy. The potential risks of abuse noted in the American class action system are mitigated by the absence of contingency fees and the proposal for representative certification. The proposal for a legislated framework for multi party litigation will remove the current uncertainty that has contributed to the underutilisation of the current representative action procedures and improve access to justice.

Question 2
Do you agree with the sub-committee that fairness, expedition and cost effectiveness should guide any change in procedure for multi-party litigation?

Answer: Yes, the Law Society agrees with this proposition in principle, but would wish to qualify its agreement as follows:

The underlying objectives of the CJR are an acceptable starting point for consideration of the merits of a multi-party litigation regime, but should not be the only criteria taken into consideration in guiding procedural reform. In particular the Law Society takes the view that change need not be made for changes' sake, and whilst the existing regime under Order 15 Rule 12 of the RHC could be improved, any changes to be made should only be made by way of improvement. The Law Society considers that areas in which such improvements could be made include clear directions as to what constitutes acceptable litigation finance, and the protection of the interests of successful class action defendants in recovering their costs. These issues, and others, are addressed in more detail below.

Question 3
Do you agree that the proposed class action regime should adopt an "opt-out" approach (in other words, all the members of the class are automatically bound by the litigation, unless they specifically opt out)?

Answer
As the Sub-committee notes the question of whether to adopt a class action regime based on an opt-in or an opt-out basis is a significant and potentially controversial issue. The perceived advantages and disadvantages of an opt-out approach are commendably set out in Chapter 4 of the Consultation Paper (in particular, paragraph 4.5). The question is by no means an easy one to answer and, for most stakeholders, is probably ultimately a matter of preference between competing policy choices. It would be fair to state that our members are far from unanimous in their opinions as to which approach is to be preferred. At the risk of over simplifying the matter, on the one hand there is a need for a finality to litigation and a need to promote access to justice (which are commonly stated to favour an opt-out approach); on the other hand, there is the fundamental principle and convention that an individual should normally choose to be a claimant in court proceedings (and more so with respect to foreign parties).

However, we would urge some caution in trying to predict the likely consequences in adopting one or other approach. The adoption of a comprehensive scheme for multi-party litigation in Hong Kong will bring with it such fundamental changes to the current rules for representative court proceedings that there are likely to be unintended and unforeseen consequences.

That said, if Hong Kong is to adopt a comprehensive scheme for multi-party litigation (an issue that, of itself, transcends the question of opt-in or opt-out), on balance and like the Sub-committee we are (for now) persuaded that the "default position" should normally be an opt-out approach. We arrive at this conclusion with some difficulty and primarily with the following aspirations in mind: an efficiency of court proceedings, reducing the prospect of a multiplicity of related court proceedings, enhancing the prospects for the finality of court proceedings and the general administration of justice. The desire to enhance the finality of disputes that are the subject of multi-party class actions and attempts to have regard to the interests of prospective defendants in this respect are not to be underestimated; particularly, with regard to such fundamental reforms. This desire is ultimately the result of a preference between competing policy choices.

Therefore, in principle (and based on the information in Chapter 4 of the Consultation Paper), we agree with Recommendation 3, although we consider that the arguments set out in that chapter can also fairly be described as "finely balanced". Furthermore, the desired "goals" of an opt-out approach are by no means guaranteed. Much will depend on the expertise and common sense of the judiciary in applying the "framework of principles" identified at paragraph 4.17 of the Consultation Paper; in particular, with regard to the practical difficulties that may arise (and identified in Chapter 4) and with regard to applications to depart from a default opt-out position.

We also note the academic references quoted at paragraph 4.1 and footnote 4 of page 92 of the Consultation Paper; namely, that an opt-out approach "has been overwhelmingly adopted among the common law jurisdictions". As yet these jurisdictions notably do not include England & Wales and the Civil Procedure Rules ("CPR") regime for Group Litigation Orders ("GLO") (CPR 19.11 - noted at paragraph 4.4 of the Consultation Paper). At paragraph 4.9 of the Consultation Paper reference is made to a recent "Research Paper" of the Civil Justice Council of England & Wales, which we understand was followed by its detailed report on "Improving Access to Justice through Collective Actions" in November, 2008. The Civil Justice Council identified what is stated to be an "unmet need" for collective court actions (over and above a GLO) in England & Wales. As the Sub-committee members may well know, the UK Government introduced the Financial Services Bill ("Bill") before the UK Parliament on 19 November, 2009 (just after the publication of the Consultation Paper). That Bill provides for collective court actions (and the apparent "unmet need") in the local financial services sector and allows for the local courts to decide whether a class action should be conducted on an opt-in or an opt-out basis. The proposal in the Bill to introduce the option of an opt-out class action is significant. The Bill also proposes that any potential claimants domiciled out of the jurisdiction should participate by opting-in.

It would appear that the UK Financial Services Bill represents a move towards the position set out in the Sub-committee's Recommendations 3 and 5(1) (albeit limited for now to the financial services sector). In deciding the fiendishly difficult question of an opt-in or an opt-out default position some comfort can be taken from this recent development in a principal common law jurisdiction.

Question 4
Which of these four options do you think should be adopted in Hong Kong for dealing with public law cases under the proposed class action regime?

Answer
We find it difficult to come to a conclusion regarding the treatment of public law cases in Hong Kong. Since public law cases often involve the civil liberties of our citizens (rather than pure monetary interest), greater caution has to be exercised before any reform is introduced in this area. We share the observation that in public law litigation, although there may be issues of law and/or facts which are common to the group, the individual circumstances of each claimant's case may be highly material to the outcome of the administrative decision–making process. We have to take heed of the danger that individual claims would be left unheard if the representative action fails. We also have concerns that the introduction of a class action regime may amount to a potential "radical constitutional change" in light of Article 158 of the Basic Law. The costs and benefits of representative proceedings in public law litigation have to be assessed against this background. We therefore consider that any proposal to introduce class action reform in public law cases will provide significant benefits to the public which are not currently available under the existing system.

We do not consider a convincing argument has been made to introduce a class action regime for public law cases in Hong Kong and that the present separation

of public law and private law cases should be maintained. Individuals should therefore apply for leave for judicial review pursuant to section 21L(1) of the High Court Ordinance (Cap.4), Order 53 of the Rules of High Court and Practice Direction SL3 before he can proceed to the substantive hearing of the application. This procedure ensures no litigant would be barred from litigating a similar issue and raising his own individual circumstances in public law cases; this model would eliminate the risk of infringing Article 10 of the Hong Kong Bill of Rights and/or Article 35 of the Basic Law (access to the courts), or Articles 6 and 105 of the Basic Law (protection of property rights), potential problems which were identified in paragraph 5.68 of the Consultation Paper.

We therefore prefer Option 1, namely 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.

Question 5
Do you agree that appropriate measures should be established to prevent class members with sound financial capability from abusing the class action procedure by deliberately selecting impecunious plaintiffs to act as the class representatives?

Answer
We agree in principle that appropriate measures should be established to prevent class members with sound financial capability from abusing the class action procedure by deliberately selecting impecunious plaintiffs to act as the class representatives.

It is noted that it is a general feature of all class action regimes that if the class loses, the class members enjoy specific and unilateral costs immunity. This immunity is statutorily provided in Australia, Ontario and British Columbia. Accordingly, there is a strong incentive on the part of the class members to structure class action proceedings by appointing impecunious members to be the Plaintiff, thereby avoiding adverse costs orders. In the absence of such appropriate measures, there is a high risk that a successful defendant in a class action proceeding will not be able to recover his costs from an impecunious plaintiff acting as the class representative. Appropriate measures should be implemented to prevent the potential abuse of court process in this respect.

We note that this issue might be affected by other matters discussed in the Consultation Paper e.g. whether an opt-out or opt-in approach should be adopted in a class action regime and the discussion on the various funding models in Chapter 8.

Question 6
If so, do you agree that:
(a) provision should be made for truly impecunious litigants to obtain funding under the new class actions regime

Answer
The issue of whether provision should be made for truly impecunious litigants to obtain funding under the new class actions regime would be affected by the

outcome of the discussion on the "*Funding models for the class actions regime*" in Chapter 8 (which range from an extension of the existing legal aid scheme to the introduction of litigation funding companies).

One of the main drawbacks against measures designed to filter out abusive class representative is the criticism that it can also filter out or stifle meritorious class action claims where members are disadvantaged merely due to their lack of requisite funding/ financial support. This will in effect limit the access to justice for these plaintiffs. Indeed, this is reflected in Recommendation 7(1) in this Consultation Paper that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime.

(b) the court should be given the power to order the representative plaintiffs to pay security for costs in specified circumstances?

Answer:
We agree in principle that the court should be given the power to order the representative plaintiffs to pay security for costs in appropriate circumstances. A summary of the case law in Australia on security for costs in class action is set out in paragraph 6.18 of the Consultation Paper.

It may be necessary to amend Order 23 of the RHC to provide that the Court should consider certain matters (which list is not exhaustive) in dealing with an application by the respondent for security for costs. Some of the relevant matters include:

a. **the identity and characteristics of the group members;**
b. **the source of funding of the proceedings;**
c. **the merits of the claims;**
d. **the rule may also specifically provide that an impecunious natural person may be ordered to provide security for costs (this is to deal with the traditional rule that security for costs will not be ordered against a natural person by reason only of his impecuniousness, see e.g. paragraph 23/3/13 of the *White Book*).**

We consider that security for costs application should not prevent the Court from considering the financial resources of the representative claimant at the certification stage. In other words, this should not merely be an alternative as suggested in paragraph 6.48 of the Consultation Paper.

The Ontario case of *Fehringer v Sun Media Corp*. stated that:

> ***"the court must be satisfied as to the financial ability of the representative Plaintiff to bear the expense that is necessarily involved for the proper prosecution of a class action… The absence of such evidence leaves the court without an essential element necessary to conclude that the proposed representative Plaintiff would fairly and adequately represent the interests of the class."***

The court considers that the class representative's financial resources should be a relevant consideration in determining whether he will be an adequate representative.

We have considered whether our proposal would enable the respondent to challenge the applicant twice, one by way of certification and the other by applying for security for costs. We consider that the two issues are different and the relevant considerations involved are not the same. Also, the fact that the Plaintiff is impecunious is only one factor to be considered by the Court.

We do not have any objection in principle to the recommendation 4 (3) that there should be a provision in Hong Kong similar to section 33ZG of the Federal Court of Australia Act 1976 (as set out below) to empower the court to order security for costs in appropriate cases.

FEDERAL COURT OF AUSTRALIA ACT 1976 - SECT 33ZG

Saving of rights, powers etc.

Except as otherwise provided by this Part, nothing in this Part affects:

(a) the commencement or continuance of any action of a representative character commenced otherwise than under this Part; or

(b) the Court's powers under provisions other than this Part, for example, its powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the Court; or

(c) the operation of any law relating to:

(i) vexatious litigants (however described); or

(ii) proceedings of a representative character; or

(iii) joinder of parties; or

(iv) consolidation of proceedings; or

(v) security for costs.

Question 7

If class action proceedings involve parties from jurisdictions outside Hong Kong, do you agree that:

(a) the default position should be an "opt-in" procedure (in other words, class members will not be bound by the litigation unless they specifically opt into it), with the court able to apply an "opt-out" procedure to foreign plaintiffs in a particular case where an application is made for this approach to be adopted;

Answer
The Law Society agrees that an opt-out regime for class members residing in a jurisdiction outside Hong Kong creates problems such as difficulties in respect of the recognition and enforcement of a class action judgment in another jurisdiction and that an opt in regime is the better option for class members not resident in Hong Kong.

The Law Society also recognises that the problems identified do not exist in every case where non-resident class members exist and is in principle in agreement with the proposal to confer residual discretion on courts to apply an "opt-out" procedure in a particular case. The Law Society reserves the right to comment further when the principles are formulated.

(b) the current rules for service of proceedings outside Hong Kong set out in Order 11 of the Rules of the High Court (with minor adaptation) should apply;

Answer
The Law Society sees no reason why the general rules for service out should be departed from on account of a class action and is not convinced why the rules should be relaxed 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. As a matter of principle, a claimant should not be in a better position in relation to asserting jurisdiction over a defendant resident outside of the jurisdiction simply because he is in a class action.

(c) the court should be able to stay the class action proceedings on the grounds of forum non conveniens if it would be inappropriate for the court to exercise jurisdiction and if a court elsewhere has more appropriate jurisdiction to resolve the dispute?

Answer
The Law Society agrees and sees no reason why the procedural law of litigating in Hong Kong generally should be departed from simply on account of a class action unless a clear case is made out.

Question 8
Do you agree that:

(a) A legally aided person who agrees to act as representative plaintiff in a class action should only be funded or protected to the extent allowed by the Legal Aid Ordinance;

Answer
We agree that a legally aided person who agrees to act as representative plaintiff in a class action should only be funded or protected to the extent allowed by the Legal Aid Ordinance. The Director of Legal Aid has made it clear that, so long as an individual applicant is qualified for legal aid, the commencement of a class action will not itself disqualify him from that entitlement. The DLA would not be concerned about whether the action proceeded as a class action or whether the remaining class members could get funding from other sources, but that DLA would only be responsible for the costs of the aided person as if that person had

conduct of the action as a personal, as opposed to, a representative party. The DLA further stressed that the underlying policy of legal aid was to help those who could not afford to get access to justice. Well-off class members should not be allowed to "free ride" on the legally aided representative of the class.

If the legally aided person were to be funded or protected beyond the extent allowed under the Legal Aid Ordinance, amendments to the Ordinance are necessary.

(b) If a representative plaintiff in a class action is a legally aided person, the part of the total common fund costs which would have been attributable to the aided person if he had pursued the action on a personal basis should be disaggregated;

Answer
We agree that if a representative plaintiff in a class action is a legally aided person, the part of the total common fund costs which would have been attributable to the aided person if he had pursued the action on a personal basis should be disaggregated. As explained by the DLA, common fund costs cannot normally be recovered from the opposite party on taxation, disaggregation from the total common fund costs is necessary. This would have the effect of preventing the "free ride" situation from arising.

(c) If the Legal Aid Ordinance is amended to accommodate legal aid for class actions, those who are not legally aided should share equitably in the costs?

Answer
We agree that if the Legal Aid Ordinance is amended to accommodate legal aid for class actions, those who are not legally aided should share equitably in the costs as the DLA stressed the underlying policy of legal aid was to help those who could not afford to get access to justice.

Question 9
Do you agree that the ordinary legal aid and supplementary legal aid schemes should be extended to class action proceedings, with the Director of Legal Aid allowed to refuse legal aid to prevent class members who are outside the financial eligibility limits for legal aid from benefiting?

Answer
We agree that the ordinary legal aid and supplementary legal aid schemes should be extended to class action proceedings, and that the Director of Legal Aid should have the authority to refuse legal aid to prevent class members, who are outside the financial eligibility limits for legal aid, from benefiting.

The legal aid schemes are one of the most feasible ways of providing third party funding without the drawbacks of the other alternatives. This generally stems from the fact that the legal aid schemes, although capable of being self-sustaining through contributions made by the legally aided persons after winning, does not seek to generate a profit so there is less potential for a conflict of interest (for

discussion of other third party funding schemes and possible conflicts, please refer to Q12).

If extended, the legal schemes would be more readily available to members of the public than, say the Consumer Legal Action Fund which only deals with consumer claims and takes into account a wider range of considerations.

Our reason for allowing the DLA to refuse legal aid to members outside the financial eligibility limits once again relates to the purpose of legal aid which is primarily to provide access to justice for those who do not have the means to do so and that those who can afford it should not be given a 'free ride'.

Question 10
Do you agree that the eventual aim should be the establishment of a class actions fund? This would make discretionary grants to all eligible class action plaintiffs and the representative plaintiffs would have to reimburse the class actions fund from proceeds recovered from the defendants.

Answer
We agree that the eventual aim should be the establishment of a class action fund which would make discretionary grants to all eligible class action plaintiffs and representative plaintiffs would have to reimburse the class actions fund from proceeds recovered from the defendants.

The setting up of a class action fund will not only be an acknowledgment of the public interest served by a class action scheme (such as increasing access to justice, promoting judicial economy, etc.) but is also the best method of all third party assistance in class action because it is more flexible in application. Under a class action fund scheme, the fund can assist all class litigants (and not just those who are impecunious, as with legal aid) for any kind of remedy sought (and not just monetary compensation or damages, which are the only remedies a CLAF would cover).

A variety of factors should be considered by the fund before funding is granted (as opposed to only the 'means and merits' test under the current legal aid scheme) such as whether the plaintiff has made reasonable efforts to raise funding, whether there is a clear and reasonable use of the funds awarded, whether there are appropriate controls to ensure that the funds are spent for the purposes of the award, public interest considerations and the likelihood of success.

A class action fund is also the most preferable of all third party funding schemes as it is funded by the government, subject to oversight and does not set out to make a profit; this means the interests of the class members are better guarded.

A class action fund, being similar in structure to legal aid, would also be capable of sustaining itself after the provision of initial funding by the government. As shown in the Legal Aid Department Annual Reports, for the years 2005-2007, the Legal Aid Fund was able to generate surpluses, showing that it is

economically able to sustain itself (although the 2008 Report did note a large deficit in that year).

Question 11
Do you agree that the scope of legal and financial assistance of the Consumer Legal Action Fund should be extended to class action litigation in consumer claims?

Answer
We agree that the scope of the Consumer Legal Action Fund should be extended to class action litigation for consumer claims.

The Consumer Council's Consumer Legal Action Fund (the "Fund") already has in place a system of evaluating claims similar to the Ontario class action funding scheme. The current scheme of the Fund also goes beyond assistance provided by typical class action funding schemes including in-house legal advice, which acts as a preliminary vetting system by allowing potential plaintiffs to consult legal experts before considering commencing action.

The Fund also currently operates in a similar fashion to a class action funding scheme with the Fund paying all costs and expenses if the plaintiff loses; there is also a existing system for calculating an aided plaintiff's contributions if he wins.

Question 12
Should the funding of class actions by private litigation funding companies be recognised and regulated?

Answer
We have reservation as to whether funding of class actions by private litigation funding companies should be recognised and regulated. Although there is a growing recognition of private litigation funding companies ("LFC") in other common law jurisdictions, notably Australia, the situation in Hong Kong is different as the offences of champerty and maintenance continue to apply (and actively so) in Hong Kong. To allow third party funding, the current law would have to be changed by abolishing these two offences.

The introduction of LFCs could increase the risk of frivolous litigations, as funding class actions could be regarded as a means to generate profits. This could seriously undermine one of the main goals of class litigation, which is to improve judicial economy and preventing unnecessary waste.

There might also be a conflict of interest for it may be in the best interest for the LFC to settle (little work and high payout with no risk of high costs) but doing so at the expense of the class members.

There is the risk that the LFCs would sweep all the 'good' cases up leaving the class action fund to handle the remaining cases which would put the class action fund's long-term economic viability in jeopardy.

Question 13
Do you agree that, if a class actions regime is introduced in Hong Kong, it should be established by legislation?

Answer
Yes, the Law Society agrees. However, as noted, there are potentially serious ramifications in the proposed class actions regime as outlined in the Consultation Paper. The introduction of a class actions regime will raise controversial issues and questions as there are likely to be unintended and unforeseen consequences by the adoption of the new class actions regime (see our Answer to Question 3 above). This issue requires further public consultation and debate as this will assist the discussion of difficult issues such as funding etc.

Question 14
Do you agree that class actions should only be allowed to proceed if they have been certified by the court as complying with rules to be set out in the Rules of the High Court?

Answer
Yes, the Law Society agrees. It is essential to establish a certification process to avoid abuse of the new regime which should be undertaken in order to filter out unsuitable cases. We note adoption of criteria will ultimately be a matter of policy. The following are the Law Society's initial views on certification:

The "numerosity" criterion
Whether to adopt the straight-forward approach being used in Australia and Canada where a minimum number of litigants are required[2] or the USA approach where consideration of whether the application of the conventional procedure of consolidation is impracticable[3] depends on a number of factors.

In terms of improving the efficient use of judicial resources and cost-effectiveness, class actions should provide improvements to both the judicial system and parties over existing procedures. As each case depends on its own facts it is difficult to lay down a hard and fast rule as to the minimum number of claimants required to commence a class action; we note such a number, in any event, would be artificial as it cannot cater for every situation.

The "merits" criterion
There are existing rules to deal with cases which disclose no cause of action or which amount to an abuse of process; an extra merits test is considered to be unnecessary.

However, if a "merits" criterion is adopted then the court will have to review the merits of the intended class action which could be time consuming and costly, and thus strain the court's resources. We suggest a threshold test should be set higher than that of showing "a cause of action".
The "commonality" criterion

[2] See page 228 of the Consultation Paper.
[3] See page 228 of the Consultation Paper.

We suggest that as a minimum the degree of commonality of issues between members of the class should not be any lower than the existing requirements for consolidation under Order 4 Rule 9 of the RHC, or joinder of parties under Order 15 Rule 4 of the RHC. The following criteria could be considered:-

> **"*Whether if each member of the class is to commence a separate action instead of a single class action,***
>
> ***(a) some common question of law or fact would arise in such separate actions; and***
> ***(b) the rights to relief claimed in such separate actions are in respect of or arise out of the same transaction or series of transactions or transactions with substantially the same subject matter.*"**

The "superiority" criterion
Paragraph 9.8(d) of the Consultation Paper states:

> **"*it is necessary to make clear that a class action should be resorted to only where it is likely to be the preferable or superior means of resolving the common issues when compared with the traditional means of dispute resolution*".**

As a matter of principle, the Law Society agrees the court should have discretion to order a class action to be discontinued when it is no longer appropriate for it to continue. Rather than adopting a general test of whether a class action is "preferable" as in Ontario[4] we suggest it is more appropriate for the court to consider various factors such as:

> **(a) Costs efficiency between unitary and class litigation.**
> **(b) Number of claims (including litigation and other dispute resolution methods) already commenced by the member of the class.**
> **(c) The distribution of the members of the class in terms of geographical locations or legal jurisdiction.**
> **(d) Availability of alternative means of resolving the dispute.**
> **(e) Whether class action is in general appropriate/inappropriate.**

We consider it appropriate to conduct further study and consultation before deciding which factor(s) should be adopted.

The "representative" criterion
It is crucial for the representative party to be able to fairly and adequately represent and protect the interest of all members of the class. Relevant factors includes the financial ability of the party, the absence of any interest which conflicts with the interests of other members of the class, adequate legal representation, means (including financial means) to provide adequate information to class members on the progress of the action, etc. Typicality of the case of the representative party should not be made a pre-requisite.

[4] See page 229 of the Consultation Paper

The court should have discretion to allow a representative party to be replaced where appropriate or where the interests of justice or fairness dictate.

We consider it appropriate to conduct further study and consultation before deciding which factor should be adopted for Hong Kong.

Question 15
Should the existing rule for representative actions under Order 15 rule 12 of the Rules of the High Court be replaced by a new collective action procedure to be set out in the Rules of the High Court?

Answer
We note that if a self-contained order governing the procedural framework for class actions is to be introduced, Order 15 Rule 12 will become redundant in due course. However, we have no objection to retain the old system and allowing it to run in parallel until the new class action regime has developed.

Question 16
Do you agree that provisions to facilitate active case management by the court should be incorporated into the class action procedural rules?

Answer
Yes, the Law Society agrees. The court should have the ability to scrutinize the conduct of the proceedings to ensure fairness and prevent abuse of process by a representative plaintiff e.g. by obtaining an unjustified settlement award as compared to other class members [5], or by a defendant e.g. by making unreasonable settlement offers such as differentiating offers made to different class members, in an attempt to close the floodgate of potential litigation by a large class of litigants.

Question 17
Do you agree that class actions should not be heard in the District Court for at least five years after the new regime has been introduced?

Answer
Yes, the Law Society agrees. Whether class actions should be heard in the District Court should be the subject of further study in any event.

[5] In the preamble to the Class Action Fairness Act of 2005 (28 U.S.C. Sections 1332(d), 1453, and 1711-1715) ("CAFA"), the US Congress, while finding that class action lawsuits "*are an important and valuable part of the legal system*" also noted that "[o]*ver the past decade, there have been abuses of the class action device*" and "[c]*lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where…unjustified awards are made to certiain plaintiffs at the expense of other class members*". Section 1714 of CAFA was introduced which provides that "[t]*he court may not approve a proposed settlement that provides for payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court*". In light of the unforeseeable undesirable situations that may emerge from the new class actions regime to be introduced in Hong Kong, it is suggested that the Hong Kong Court should have a wide discretion to disallow proposed settlement proposals in class actions than in the US. Statutory restrictions against settlement proposals whereby the representative plaintiff receives more than other class members could be considered but the non-monetary costs of the representative plaintiff in prosecuting the class action for other members should not be completely ignored. Furthermore, class members should be given a second chance to opt-out from the action before any settlement proposal is approved by the Court.

Question 18
Should District Court judges be given the power to transfer complex class actions to the Court of First Instance?

Answer
Only the High Court should deal with class actions pending a review on whether the District Court is a suitable venue for such actions.

Question 19
Do you agree that the Small Claims Tribunal should not be able to hear class action proceedings?

Answer
We agree. It is inappropriate for the Smalls Claims Tribunal to hear class actions given the complexity involved in administering such cases.

The Law Society of Hong Kong
Civil Litigation Committee
23 March 2010
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