

CLASS ACTION REFORM IN HONG KONG



On 28 May 2012, the Law Reform Commission (the “Commission”) published its long-awaited report on the introduction of a class action regime in Hong Kong.

A class action involves a representative plaintiff suing a defendant on behalf of himself and other persons who have a claim alleging the same (or similar) wrong, which concerns the same questions of law or fact. The class members are not identified as individual parties to the action, but are described as a group in the claim. The class members are bound by the Court’s decision on the common issues in the class action.

Currently, there is a limited procedure for multi-party proceedings in Hong Kong governed by Order 15, rule 12 of the High Court Rules. However, the shortcomings in this procedure means that cases have been dealt with on an ad hoc basis in Hong Kong. There is no mechanism in place for large-scale multi-party cases, unlike other jurisdictions, such as Australia, Canada and the United States. The Commission

recommends that an “efficient, well-defined and workable mechanism” should be established for class actions in Hong Kong.

In its report, the Commission recommends:

- **Consumer cases** – The class action regime should first be made available for consumer cases, which will most likely be the majority of class actions. Consumer cases cover “tortious and contractual claims made by consumers in relation to goods, services and immovable property”. The regime may extend to other cases in the future.
- **Opt-out procedure for Hong Kong plaintiffs** – Once the Court confirms that a case may proceed as a class action, members of the defined class are automatically bound, unless they ‘opt out’ of the class action within the specified time limit. Therefore, Hong Kong plaintiffs will be automatically bound by the outcome of the class action, unless they take a positive step to indicate that they wish to be excluded.



The Commission recommends the ‘opt out’ procedure, because it overcomes the difficulty of identifying and naming all class members affected by the defendant’s wrongful conduct, and it achieves finality of issues with Hong Kong plaintiffs.

- **Opt-in procedure for foreign plaintiffs** – The Commission recommends a different approach for foreign plaintiffs, who it considers should have access to the class action procedure in Hong Kong. As a default position, class members outside of Hong Kong would not be included in the class action unless they take positive steps to ‘opt in’ to the action. This will mean that the class representative and his lawyers can identify the class members from other jurisdictions.
- **Foreign defendants** – Class actions may be commenced against both Hong Kong defendants and foreign defendants. However, the normal procedural rules apply concerning (i) service of the writ outside the jurisdiction on foreign defendants; and (ii) forum non conveniens. With respect to forum non conveniens, the Court will need to consider whether it is clearly more appropriate for a foreign court to resolve the dispute.

- **Choice of representative plaintiff and prevention of abuse** – The representative plaintiff must persuade the Court that he would be able to satisfy an adverse costs order if the class is unsuccessful in the action. The representative plaintiff should demonstrate that suitable funding and costs-protection arrangements are in place. This requirement is intended to prevent financially capable class members from deliberately choosing impecunious plaintiffs to act as the class representative. This is because it is a general feature of class action regimes that if the class loses, ordinary class members enjoy costs immunity. The Court may also be given the power to order the representative plaintiff to pay security for costs of the class action in appropriate cases.
- **Funding** – In the long term, a general class actions fund should be established to assist impecunious class action plaintiffs. In the meantime, the Consumer Legal Action Fund’s resources should be increased for this purpose.
- **Public law cases** – The class action regime should apply to public law cases. For example, a class action may be commenced with respect to the procedural lawfulness of an administrative

decision that affects a class of plaintiffs.

- **Certification** – The class action must meet various criteria in order to be certified by the Court, including that it has legal merit, that there is a minimum number of identifiable plaintiffs, and that there is sufficient common interest between class members.

In summary, the proposed class action regime is another major step for the reform of civil litigation in Hong Kong. It is likely to have significant effect in the area of product liability, and it may also be relevant to the sale of investment products. However, in relation to investment product disputes, much depends on each plaintiff’s individual circumstances, which means that many disputes will be unsuitable for class action.

The Commission has emphasized that it does not want to be “unduly encouraging litigation” and has proposed that the class action regime should coincide with the ongoing development of mediation in Hong Kong.

It is likely that the class action regime will not be established for some time, while the Commission’s recommendations are considered by the Hong Kong Government. We will continue to monitor the reception of the Commission’s recommendations and any proposed legislation in future.

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