

Class Action Consultation Paper

◦ 集體訴訟諮詢文件

10th May 2010

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集體訴訟小組委員會

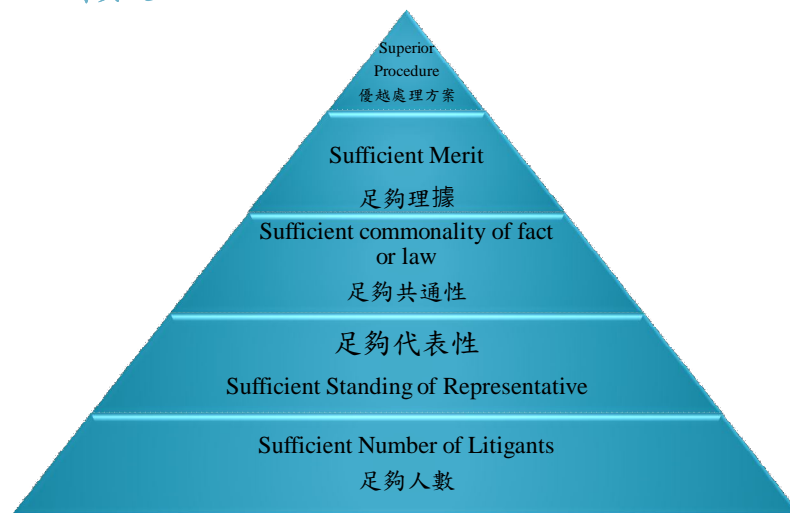
Essential features of class action

集體訴訟的特徵

1. Certification (核證制度) .
2. Opt-out as default procedure (選擇退出為預設模式) .
3. Keep loser pays costs as default procedure; (保持輸者付費為預設模式)
4. Compatible with ADR procedures (與非訴訟糾紛解決方法兼容) 。
5. Adequate Funding Arrangements (足夠的資金) .
6. Public law litigation to remain under Order 53 (公法案件保留在第53號命令範疇)
7. Legislative backup (立法的支持) .

Certification

核證



Funding Arrangements

資金籌措

- Existing (現成方案):
 - Permitting legally aided person to be representative litigant in class action (允許獲法律援助的人擔任集體訴訟代表)。
 - Increasing size of Consumer Council Legal Action Fund (擴大消費者委員會訴訟基金)。
- Longer Term (遠期方案):
 - Extending Legal Aid to class action (擴大法律援助範圍)。
 - Considering Litigation Funding Companies (訴訟出資公司)。

Should Class Action Be Introduced in Hong Kong

Presentation by

Mr. Huen Wong

President of the Law Society of Hong Kong

10 May 2010



Views on Key Issues from The Law Society's Perspective

General

- 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
- No one can disagree with the proposition that “fairness, expedition and cost-effectiveness should guide any change in procedure for multi-party litigation”
- BUT – any possible introduction of amendments to the rules to permit class actions without addressing issues of the funding of such class actions is putting the “cart before the horse”



Funding

- Unlike the United States, where class actions are common and contingency fees are the norm, such fee arrangements in Hong Kong are strictly prohibited
- In the US, there is a substantial “Plaintiffs’ Bar” prepared to act in class actions. The class of plaintiffs is exposed to little or no financial risk
- In the US, unlike the Hong Kong system, there is no principle of “loser pays costs”
- In the US, the plaintiffs’ lawyers take on the financial risk, in return, they can expect a bumper return (1/4 to 1/3 of damages recovered)



Funding (continued)

- The Law Society has always opposed the introduction of contingency fees in Hong Kong
- Reasons include: increases in nuisance litigation, potential conflict of interest on the part of lawyers who have a potential interest in the outcome of the litigation
- Laws against champerty and maintenance are still in place in Hong Kong
- There seems to be no financial incentive for lawyers to take on the additional burden of prosecuting a class action



Funding (continued)

- The Director of Legal Aid seems resolute in not agreeing to fund class actions
- But so long as an individual applicant is qualified for legal aid, commencement of a class action will not itself disqualify him from that entitlement
- DLA would not be concerned about whether the action proceeded as a class action but DLA would only be responsible for the cost of the aided person
- The Law Society agrees that ordinary legal aid and supplementary legal aid schemes could be extended to class action proceedings



Funding (continued)

- The Law Society agrees that the eventual aim should be the establishment of a class action fund
- The fund will be more flexible in its application
- The fund can assist all class litigations and not just those who are impecunious as with legal aid and for any kind of remedy sought
- This is most preferable of all third party funding schemes
- The Law Society has reservation on funding by litigation funding companies (“LFC”)



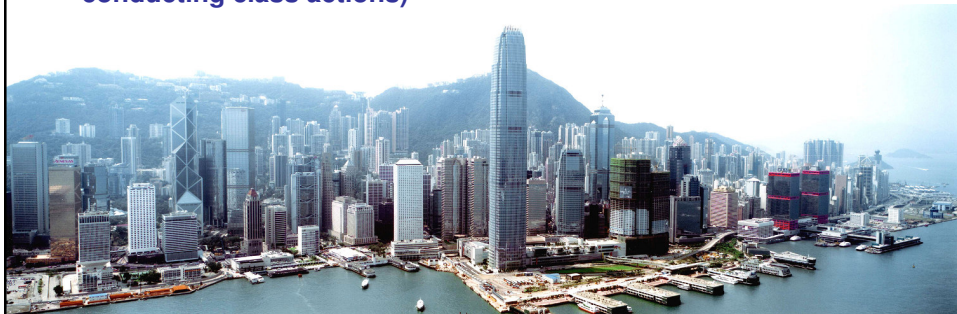
“Opt-out” or “Opt-in”?

- No easy answer to the question; competing policy choices – no unanimous view within the Law Society
- Need for a finality to litigation and to promote access to justice – opt-out approach
- The fundamental principle and convention that individual should normally choose to be a claimant in court proceedings – opt-in approach



“Opt-out” or “Opt-in”? (continued)

- On balance, the Law Society is inclined for the moment to favour an “opt-out approach”
- It should be borne in mind that potential claimants domiciled out of the jurisdiction should participate by opting-in (given the proximity of the Hong Kong and Pearl River Delta areas and the mobility of people in both places, it may pose a problem in conducting class actions)



Thank you !

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Should Class Actions be Introduced in Hong Kong?

**The Accounting
Profession's Perspective**

Key Issues

- **Has a real need for a class action regime been properly identified?**

- **What type of claims should a class action regime apply to?**

- consumer claims
- anti-competition claims
- others

- **Does our current legal system provide fairness to professionals under such a regime?**

- who has really gained from any wrongdoing?
- would the damages be proportionate to the wrong committed?
- potential for abuse.

- **Why securities litigation is not readily suitable for a class action regime**

- wide spectrum of possible plaintiffs
- different interests of potential plaintiffs
- duty, loss, causation

- **Who would be the class?**

- how would the mechanism work?
- stringent test required

- **Opt-out method serves to inflate damages**

- people are not plaintiffs by choice
- larger class artificially created

- **Funding – who is to provide it? How will it work?**

- the practicalities
- the loser pays principle
- litigation funders