Civil Justice Reform

Last month a high-level Working Party on Civil Justice Reform in Hong Kong released a widely anticipated Interim Report and Consultative Paper. The reforms, if enacted, would bring the most far-reaching changes to civil – including construction – litigation in the territory in more than 100 years. This month, in the first of a two-part series, our regular contributor Dr Arthur McInnis, looks at the context for the reforms and the reasons underlying them while next month the recommendations themselves will be examined.

The Short Context

At the outset, and before looking at some of the areas where civil litigation needs to be reformed, it is worth noting the short context for reform and the important function that civil litigation serves in Hong Kong. Simply put, litigation enables people's rights and interests to be recognised and enforced. Anyone doing business in other parts of Asia where these attributes do not exist will immediately understand their importance. Therefore, it can be said that litigation serves a valuable purpose. This should not be forgotten. It is of course the reason that the Consultative Paper speaks in terms of reforming civil justice and not replacing it.

The fact that litigation serves as a remedy of last resort is not a weakness but a strength and merely reflects the situation in Hong Kong that most rights and interests are self-enforcing. For example, construction companies sign orders and contracts and perform almost all of them without recourse to the courts. The absence of this self-enforcing aspect of our legal rights and interests would bring commerce very quickly to a grinding halt. Therefore, with this point made, readers will hopefully appreciate that litigation is the exception to and not the general rule by which business is done.

It may be worth noting that, while I have tended to focus on business here, these aspects of civil litigation may apply equally to individuals as well.

The Long Context

With that said about the underlying importance of litigation in Hong Kong there are nevertheless shortcomings associated with it. In the first instance, the main shortcoming concerns problems pertaining to access. Thus in a growing number of cases when litigation is called for access is denied or limited because of expense, delay, lack of understanding or otherwise. When this occurs justice is not served. Civil justice reform is intended to overcome these shortcomings.

Reforming the System

Where does one begin to reform the system of civil litigation? The first step has been to look at other jurisdictions where reforms have been undertaken and proved generally successful. Many other common law jurisdictions began the process earlier than Hong Kong. We have their steps and missteps to take notice of. Britain, Australia and Canada are all good models for what Hong Kong may achieve.

One may ask whether there is any consensus that comes from the actions taken in these countries. Yes, there is. Initially it can be remarked that what has been sought to be achieved through the process of reform is the following: Greater fairness and justice; reduced costs and procedures more proportionate to the nature of the matter and the amounts in issue; more speed in the conduct of litigation; more understandable procedures; greater responsiveness to litigants' needs; greater certainty in outcome; and more effective and organised procedures. These are all worthwhile ends.

Fairness and justice themselves deserve more attention. With regard to the objectives of a reformed system one may ask, "What of greater fairness and justice?" "Has anything been learned in these other countries?" Once again, the answer is yes. Put plainly, fairness and justice have been equated with several overriding objectives, namely, providing equal opportunities for recourse to the courts; adequate opportunities to state one's case and equal treatment of like cases. All of these could be better served in Hong Kong.

A Woolf at the Door

Pre-eminent in the influence of the direction of the reforms have been those undertaken in England and Wales following the release of the final report of Lord Woolf on Reforming Civil Justice. The publication of Lord Woolf's report was shortly followed by the subsequent publication of new Civil Procedure Rules in 1999. As is proposed for Hong Kong, the adoption of those rules brought the most far-reaching reforms to court procedures in England and Wales in over 100 years.

Focusing on the rules of court is correct for they sit at the heart of the process governing the conduct of litigation. These rules, in their current form, are predicated upon one key feature – our 'adversarial' system and it is this feature, more than any other, which has come in for criticism by proponents of reform.

The reformers have rightly pointed out how an unbridled adversarial system contributes to litigation's shortcomings.

As a result, litigation has become too skewed in one direction. Excessive adversariality has manifested itself in several ways. These may be illustrated. Take pleadings, for example, the documents which frame the issues in litigation. Pleadings have become long and drawn out. Very often, the pleadings now conceal rather than reveal the true issues between the litigants and as a result complicate and delay their eventual hearing. This leads to increased costs and limits the chances of settlement.

To take another example, the system of discovery, primarily production of documents, has also been co-opted and instead of being used as a tool to inform and limit the issues in cases is now often used instead to overwhelm the other side. This is especially true of construction litigation where vast amounts of documentation exist in relation to projects.

Turning to experts, once rarely used in litigation though now a routine feature of construction litigation, they too have been subject to abuses. In contrast to the role that experts used to serve in days gone by, namely as independent contributors to the litigation process, experts have now become simply 'hired guns'. They may say or do only that which clients expect. In taking client's positions and advocating them in this way, litigation turns into a 'battle of the experts'. This results in a turn away from the real issues in the case once again.

Lastly, the use of witness statements, prepared at great cost and with considerable care by solicitors on their clients' behalves, has come under increased scrutiny since these statements are no longer regarded as being as reliable as they once were. What has happened along the way is that solicitors have come to play a larger and larger role in the 'massaging' of the witnesses' statements to cater for a particular result. This has had the effect of sometimes distancing the evidence which should be given at trial from the true issues at hand. The result which follows when these factors are combined is the loss of much fairness and justice in the system.

Special Pressures on Litigation

While there is a high degree of commonality in the problems litigation experiences, Hong Kong exacerbates some of them. At the top of the list is expense. Expense is widely seen to be a barrier to bringing more deserving cases to court to be heard. The evidence is more than anecdotal. The Working Party undertook some research based upon legal bills which had been 'taxed' or approved by the courts and which indicated that expenses were very high indeed. One figure given to bring some 1,113 cases to court was nearly $500 million. Clearly expense has to be addressed lest litigation migrates from Hong Kong elsewhere when litigants have ties to other jurisdictions. Like expense, delay, too, appears to be often greater in Hong Kong than in other jurisdictions. The divided nature of the profession – with solicitors instructing barristers – might be relevant here. Of most concern to the Working Party was the fact that cases were routinely delayed in their preparation only then to be settled 'on the courthouse steps'. This entails a double loss of time, not only for the parties involved but for the courts as well, given that they often then sit empty.

Complexity is a further special pressure that pertains to civil litigation, though likely no more so in Hong Kong than elsewhere. Some of this complexity is attributable to dated vocabulary and practices while some of it is inherent in a system that involves an intricate balancing process. Irrespective of these explanations, though, there is widespread agreement that complexity can be reduced.

The last special pressure that may be mentioned in the Hong Kong context is the growing number of unrepresented litigants. It would appear that the cost of obtaining legal representation is such that more litigants are opting to represent themselves – notwithstanding the adverse effect this has on their likelihood of success. Being unrepresented also contributes to the appearance of inequality between litigants, given that a party who is legally represented is regarded as having a better prospect of success than an unrepresented party. For the judge in court as well there are a myriad of difficulties that emerge in presiding over a case with one side unfamiliar with the procedures and practices involved in litigation.

Summing Up

Civil justice in Hong Kong is in need of reform. The shortcomings I have outlined and the overriding objectives of improving access to the courts and thus fairness in their operation are laudable. Hong Kong's judicial system, its rule of law and the rights of companies, construction or otherwise, as well as individuals, to pursue the recognition of their rights and interests through the courts have long been seen as significant advantages which we enjoy over our neighbours. That these advantages are now seen as being under threat is very worrying. Complacency has prevailed far too long in this regard and it is now time for action. The ways and means through which it is proposed to overcome the threat and the actions which are suggested will be outlined next month.

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