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CONSULTATION DRAFT

A BILL

To

Amend several Ordinances to implement some of the recommendations made in the Final Report of the Chief Justice's Working Party on Civil Justice Reform.

Enacted by the Legislative Council.

**PART 1
PRELIMINARY**

1. Short title and commencement

(1) This Ordinance may be cited as the Civil Justice (Miscellaneous Amendments) Ordinance 2007.

(2) This Ordinance shall come into operation on a day to be appointed by [] by notice published in the Gazette.

**PART 2
PRE-ACTION PROTOCOLS**

Recommendation 9

High Court Ordinance

2. Costs in Court of First Instance and Court of Appeal in its civil jurisdiction

Section 52A(2) of the High Court Ordinance (Cap. 4) is repealed.

3. Section added

The following is added immediately after section 52A –

"52B. Costs-only proceedings

(1) This section applies where –

(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs of and incidental to the

dispute) which is made or confirmed in writing, but they have failed to agree the amount of those costs; and

(b) no proceedings relating to the dispute have been commenced.

(2) Either party to the agreement may commence proceedings for an order for the costs of and incidental to the dispute in accordance with rules of court.

(3) In any proceedings commenced under subsection (2), the Court of First Instance may make an order for the costs of and incidental to the dispute.

(4) In subsection (3), "Court of First Instance" () includes the Registrar and a Master."

District Court Ordinance

4. Costs

Section 53(2) of the District Court Ordinance (Cap. 336) is repealed.

5. Section added

The following is added immediately after section 53 –

"53A. Costs-only proceedings

(1) This section applies where –

(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs of and incidental to the dispute) which is made or confirmed in writing, but they have failed to agree the amount of those costs; and

(b) no proceedings relating to the dispute have been commenced.

(2) Either party to the agreement may commence proceedings for an order for the costs of and incidental to the dispute in accordance with rules of court.

(3) In any proceedings commenced under subsection (2), the Court may make an order for the costs of and incidental to the dispute.

(4) In subsection (3), "Court" () includes the Registrar and a master of the Court."

**PART 3
PLEADINGS**

Recommendation 25

Law Amendment and Reform (Consolidation) Ordinance

6. Long title amended

The long title to the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) is amended by repealing the full stop and substituting ", and to amend the law relating to the defence of tender before action."

7. Section added

The following is added in Part VI –

"30. Defence of tender before action

(1) Notwithstanding any rule of law, in proceedings for a monetary claim, whether liquidated or unliquidated, it is a defence for the defendant to prove that before the claimant commenced the proceedings, the defendant had unconditionally offered to the claimant -

- (a) the amount due where the claim is liquidated; or
- (b) an amount sufficient to satisfy the claim where the claim is unliquidated.

(2) This section does not apply in relation to proceedings commenced before the commencement of this section."

**PART 4
INTERIM REMEDIES AND MAREVA INJUNCTIONS
IN AID OF FOREIGN PROCEEDINGS**

Recommendations 45 to 48

High Court Ordinance

8. Injunction and receiver

Section 21L(3) of the High Court Ordinance (Cap. 4) is amended by adding "or section 21M" after "subsection (1)".

9. Section added

The following is added –

"21M. Interim relief in the absence of substantive proceedings

(1) Without prejudice to section 21L(1), the Court of First Instance may by order grant interim relief or appoint a receiver in relation to proceedings which –

- (a) have been or are to be commenced in a place outside Hong Kong; and
- (b) are capable of giving rise to a judgment which is capable of being enforced in Hong Kong under any Ordinance or at common law.

(2) An order under subsection (1) may be made either unconditionally or on such terms and conditions as the Court of First Instance thinks just.

(3) Subsection (1) applies notwithstanding that –

- (a) the subject matter of those proceedings would not, apart from this section, give rise to a cause of action over which the Court of First Instance would have jurisdiction; or
- (b) the interim relief sought or the appointment of the receiver is not ancillary or incidental to any proceedings in Hong Kong.

(4) The Court of First Instance may refuse an application for interim relief or appointment of a receiver under subsection (1) if, in the opinion of the Court, the fact that the Court has no jurisdiction apart from this section in relation to the subject matter of the proceedings concerned makes it unjust or inconvenient for the Court to grant the application.

(5) The power to make rules of court under section 54 includes power to make rules of court for –

- (a) the making of an application for interim relief or appointment of a receiver under subsection (1); and
- (b) the service out of the jurisdiction of an application or order for such interim relief or appointment of a receiver.

(6) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the Rules Committee considers necessary or expedient.

(7) In this section, "interim relief" () includes an interlocutory injunction referred to in section 21L(3).

21N. Supplementary provisions as to interim relief in the absence of substantive proceedings

(1) In exercising the power under section 21M(1), the Court of First Instance shall have regard to the fact that the power is –

- (a) ancillary to the relevant proceedings that have been or are to be commenced in a place outside Hong Kong; and

- (b) for the purpose of facilitating the process of a court or arbitral tribunal outside Hong Kong which has primary jurisdiction over such proceedings.

(2) The Court of First Instance has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an order granted under section 21M as if the order were granted under section 21L in relation to proceedings commenced in Hong Kong."

Arbitration Ordinance

10. Special powers of Court in relation to arbitration proceedings

Section 2GC of the Arbitration Ordinance (Cap. 341) is amended –

- (a) in subsection (1), by repealing "The Court or a judge of the Court may, in relation to a particular arbitration proceeding" and substituting "Subject to subsection (1A), the Court or a judge of the Court may, in relation to particular arbitration proceedings which have been or are to be commenced in Hong Kong or in a place outside Hong Kong";
- (b) by adding –

"(1A) In relation to arbitration proceedings which have been or are to be commenced in a place outside Hong Kong, the Court or a judge of the Court may make an order under subsection (1) or grant an interim injunction or direct any other interim measure to be taken under that subsection, only if the arbitration proceedings are capable of giving rise to an arbitral award (whether interim or final) which is capable of being enforced in Hong Kong under this Ordinance or any other Ordinance.

(1B) Subsection (1A) applies notwithstanding that –

- (a) the subject matter of the arbitration proceedings would not, apart from that subsection, give rise to a cause of action over which the Court or a judge of the Court would have jurisdiction; or
- (b) the order sought or the interim injunction or interim measure is not ancillary or incidental to any arbitration proceeding in Hong Kong.

(1C) In exercising the power under subsection (1) in relation to arbitration proceedings in a place outside Hong Kong, the Court or a judge of the Court shall have regard to the fact that the power is –

- (a) ancillary to the arbitration proceedings outside Hong Kong; and

- (b) for the purpose of facilitating the process of a court or arbitral tribunal outside Hong Kong which has primary jurisdiction over the arbitration proceedings.

(1D) The Court or a judge of the Court has the same power to make any incidental order or direction for the purpose of ensuring the effectiveness of an interim relief granted in relation to arbitration proceedings in a place outside Hong Kong as if the interim relief were granted in relation to arbitration proceedings in Hong Kong.

(1E) In subsection (1D), "interim relief" () means –

- (a) an order made under subsection (1);
- (b) an interim injunction granted under that subsection; or
- (c) any other interim measure directed to be taken under that subsection."

11. Section added

The following is added –

"49. Rules of court

(1) The power to make rules of court under section 54 of the High Court Ordinance (Cap. 4) includes power to make rules of court for –

- (a) the making of an application for an order under section 2GC(1) or for an interim injunction or any other interim measure under that section; and
- (b) the service out of the jurisdiction of an application or order for such order, interim injunction or other interim measure.

(2) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the authority making the rules may consider necessary or expedient."

PART 5
VEXATIOUS LITIGANTS

Recommendations 67 and 68

High Court Ordinance

12. Section substituted

Section 27 of the High Court Ordinance (Cap. 4) is repealed and the following substituted –

"27. Restriction of vexatious legal proceedings

(1) If, on an application made under this section by the Secretary for Justice or an affected person, the Court of First Instance is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the Court of First Instance may, after hearing that person or giving him an opportunity of being heard, make an order specified in subsection (2).

(2) The order referred to in subsection (1) is an order that –

- (a) no legal proceedings shall without the leave of the Court of First Instance be instituted by the person against whom the order is made; and
- (b) any legal proceedings instituted by that person in any court before the making of the order shall not be continued by him without the leave of the Court of First Instance.

(3) An order made under subsection (1) –

- (a) may be made on such terms and conditions as the Court of First Instance thinks just; and
- (b) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.

(4) Leave for the institution or continuance of any legal proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the Court of First Instance is satisfied that –

- (a) the proceedings are not an abuse of the process of the court in question; and
- (b) there are reasonable grounds for the proceedings.

(5) No appeal shall lie from a decision of the Court of First Instance refusing leave required under this section.

(6) A copy of an order made under subsection (1) shall be published in the Gazette.

(7) In subsection (1), "affected person" () means a person who –

- (a) is or has been a party to any of the vexatious legal proceedings; or
- (b) has directly suffered adverse consequences resulting from such proceedings."

**PART 6
DISCOVERY**

Division 1 – Recommendations 75 and 77

High Court Ordinance

13. Section added

The High Court Ordinance (Cap. 4) is amended by adding –

"41A. Extension of powers of Court of First Instance to order disclosure, etc. of documents before commencement of proceedings

(1) On the application of a person who appears to the Court of First Instance to be likely to be a party to subsequent proceedings in that Court in which a claim (being a claim that is neither in respect of personal injuries nor in respect of a person's death) is likely to be made, the Court of First Instance may make an order specified in subsection (3) against a person who appears to the Court to be likely –

- (a) to be a party to the proceedings; and
- (b) to have or to have had in his possession, custody or power any documents which are directly relevant to an issue arising or likely to arise out of that claim.

(2) The application shall be made in accordance with rules of court, and the order shall only be made in such circumstances as may be specified in those rules.

(3) The order specified for the purposes of subsection (1) is an order which requires the person against whom the order is sought to –

- (a) disclose whether those documents are in his possession, custody or power; and
- (b) produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order –
 - (i) to the applicant's legal advisers;
 - (ii) to the applicant's legal advisers and any other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any professional adviser of the applicant.

(4) For the purposes of subsection (1), a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if –

- (a) the document would be likely to be relied on by any party in the proceedings; or
- (b) the document supports or adversely affects any party's case."

14. Provisions supplementary to sections 41 and 42

Section 43 is amended –

- (a) in the heading, by repealing "**and 42**" and substituting "**, 41A and 42**";
- (b) in subsection (1), by repealing "or 42" and substituting ", 41A or 42";
- (c) in subsection (2), by repealing "sections 41 and and 42" and substituting "section 41, 41A or 42";
- (d) in subsection (3), by repealing "42" and substituting "41A".

15. Application to Government of sections 41 to 44

Section 45(2) and (3) is amended by adding "41A," after "41,".

District Court Ordinance

16. Section added

The District Court Ordinance (Cap. 336) is amended by adding after section 47A –

"47AA. Extension of powers of the Court to order disclosure, etc. of documents before commencement of proceedings

(1) A person who appears to the Court to be likely to be a party to subsequent proceedings (other than proceedings for personal injuries or arising out of the death of a person) may apply to the Court for an order for discovery of documents against a person who is likely to be a party to the proceedings and who has in his possession, custody or power documents directly relevant to an issue arising out of the claim.

(2) The application is to be made in accordance with rules of court.

(3) The Court may order the person, if it appears to it that the person is likely to have or to have had in his possession, custody or power any directly relevant documents –

- (a) to disclose whether those documents are in his possession, custody or power; and
- (b) to produce the documents in his possession, custody or power to the applicant or, on the conditions specified in the order –
 - (i) to the applicant's legal advisers;
 - (ii) to the applicant's legal advisers and any other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any professional adviser of the applicant.

(4) For the purposes of subsections (1) and (3), a document is only to be regarded as directly relevant to an issue arising out of a claim in the anticipated proceedings if –

- (a) the document would be likely to be relied on by any party in the proceedings; or
- (b) the document supports or adversely affects any party's case."

17. Provisions supplementary to sections 47A and 47B

Section 47C is amended –

- (a) in the heading, by repealing "**and 47B**" and substituting ", **47AA and 47B**";
- (b) in subsection (1), by repealing "or 47B" and substituting ", 47AA or 47B";
- (c) in subsection (3), by repealing "sections 47A and 47B" and substituting "section 47A, 47AA or 47B".

18. Application to Government of sections 47A to 47D

Section 47E(2) and (3) is amended by adding "47AA," after "47A,".

Division 2 – Recommendation 78

High Court Ordinance

19. Extension of powers of Court of First Instance to order disclosure of documents, inspection of property, etc.

Section 42(1) of the High Court Ordinance (Cap. 4) is amended by repealing "in respect of personal injuries to a person or in respect of a person's death".

District Court Ordinance

20. Extension of powers of the Court to order disclosure of documents, inspection of property, etc.

Section 47B(1) and (3) of the District Court Ordinance (Cap. 336) is amended by repealing "for personal injuries or arising out of the death of a person".

**PART 7
WASTED COSTS**

Recommendations 94 to 97

High Court Ordinance

**21. Costs in Court of First Instance
and Court of Appeal in its civil
jurisdiction**

Section 52A of the High Court Ordinance (Cap. 4) is amended by adding –

"(4) In any proceedings mentioned in subsection (1), the Court of First Instance may by order disallow, or order the legal representative concerned to meet, the whole or any part of any wasted costs in accordance with rules of court.

(5) In subsection (4), "wasted costs" () means any costs incurred by a party as a result of –

- (a) any improper or unreasonable act or omission; or
- (b) any undue delay or any other misconduct or default,

on the part of any legal representative, whether personally or through an employee or agent of the legal representative.

(6) In this section, "legal representative" (), in relation to a party to any proceedings, means a counsel or solicitor conducting litigation on behalf of the party."

District Court Ordinance

22. Costs

Section 53 of the District Court Ordinance (Cap. 336) is amended by adding –

"(3) In any proceedings mentioned in subsection (1), the Court may by order disallow, or order the legal representative concerned to meet, the whole or any part of any wasted costs in accordance with rules of court.

(4) In this section –

"legal representative" (), in relation to a party to any proceedings, means a counsel or solicitor conducting litigation on behalf of the party;"

"wasted costs" () means any costs incurred by a party as a result of –

- (a) any improper or unreasonable act or omission; or
- (b) any undue delay or any other misconduct or default,

on the part of any legal representative, whether personally or through an employee or agent of the legal representative.

Small Claims Tribunal Ordinance

23. Jurisdiction of Tribunal

The Schedule to the Small Claims Tribunal Ordinance (Cap. 338) is amended in the proviso to paragraph 1 –

- (a) in paragraph (e), by repealing the full stop and substituting a semicolon; and
- (b) by adding –
 - "(f) any action or proceeding for an order for the costs of and incidental to a dispute in relation to which no proceedings have been commenced in the tribunal."

PART 8

LEAVE TO APPEAL

Recommendations 110, 111, 112, 113 and 115

High Court Ordinance

24. Appeals in civil matters

Section 14(1) of the High Court Ordinance (Cap. 4) is amended by adding "and section 14AA" after "subsection (3)".

25. Section added

The following is added before section 14A –

"14AA. Leave to appeal required for interlocutory appeals

- (1) Except as provided by rules of court made under section 54, no appeal shall lie to the Court of Appeal from an interlocutory judgment or order of the Court of First Instance unless leave to appeal has been granted by the Court of First Instance or the Court of Appeal.
- (2) Rules of court made under section 54 may specify a judgment or order of any prescribed description to which subsection (1) does not apply and accordingly an appeal lies as of right from the judgment or order.
- (3) Leave to appeal granted under subsection (1) may be granted –
 - (a) in respect of a particular issue arising out of the interlocutory judgment or order; and
 - (b) subject to such conditions as the court hearing the application for leave considers necessary in order to secure the just, expeditious and economical disposal of the appeal.

(4) Leave to appeal under subsection (1) shall not be granted unless the court hearing the application for leave is satisfied that –

- (a) the appeal has a reasonable prospect of success; or
- (b) there is some other compelling reason why the appeal should be heard.

(5) No appeal shall lie from a decision of the Court of Appeal as to whether or not leave to appeal should be granted under subsection (1)."

**26. Composition of Court of Appeal
in its civil jurisdiction**

Section 34B(4) is amended by adding –

- (a) by adding –
 - "(aa) hearing or determining any application for leave to appeal (except an application for leave to appeal to the Court of Final Appeal);"; and
- (b) in paragraphs (a), (b), (c) and (e), by repealing "hearing and determining" and substituting "hearing or determining".

District Court Ordinance

27. Appeal to Court of Appeal

Section 63(3) of the District Court Ordinance (Cap. 336) is amended by repealing "or 52D" and substituting ", 52D or 52E".

**PART 9
APPEALS**

Recommendation 120

High Court Ordinance

**28. Composition of Court of Appeal
in its civil jurisdiction**

Section 34B(4) of the High Court Ordinance (Cap. 4) is amended by adding –

- "(ab) hearing or determining any interlocutory application in relation to a cause or matter pending before it;".

Explanatory Memorandum

The purpose of this Bill is to amend certain Ordinances to implement some of the recommendations made in the Final Report of the Chief Justice's Working Party on Civil Justice Reform ("the Report"). The recommendations implemented by the Bill are set out in the attached Table.

Part 2 of the Bill – Pre-action Protocols

2. Clauses 2 and 3 relate to Recommendation 9 in section 5 of the Report. Clause 2 amends section 52A of the High Court Ordinance (Cap. 4) and clause 3 adds a new section 52B to that Ordinance to make it clear that the Court of First Instance has jurisdiction to make a costs order in costs-only proceedings. The new section 52B also sets out the circumstances in which a party may bring such proceedings. Clauses 4 and 5 make similar amendments to the District Court Ordinance (Cap. 336).

Part 3 - Pleadings

3. Clause 7 implements Recommendation 25 in section 9 of the Report. At present, the case law has established that the common law defence of tender before action only applies to a liquidated claim but not to a claim for unliquidated damages. Clause 7 adds a new section to the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) to extend the defence of tender before action to a claim for unliquidated damages.

4. Clause 6 consequentially amends the long title of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) upon the addition of the new section 30 contained in clause 7.

Part 4 – Interim Remedies and Mareva Injunctions in aid of Foreign Proceedings

5. Clause 8 amends section 21L(3) of the High Court Ordinance (Cap. 4) so that the power of the Court of First Instance to grant a Mareva injunction under the new section 21M is also exercisable irrespective of whether the party against whom the Mareva injunction is made is domiciled, resident or present in Hong Kong.

6. Clause 9 adds 2 new sections to the High Court Ordinance (Cap. 4) to implement Recommendations 45 to 48 in section 12 of the Report. The new section 21M empowers the Court of First Instance to grant interim relief or appoint a receiver in aid of foreign proceedings which are capable of giving rise to a judgment that is capable of being enforced in Hong Kong. Under the new section, the interim relief or the appointment of a receiver may be sought as an independent,

free-standing form of relief without being ancillary or incidental to substantive proceedings in Hong Kong.

7. Recommendations 45 to 48 in section 12 of the Report relate to foreign proceedings and foreign arbitrations. Amendments to the Arbitration Ordinance (Cap. 341) are thus also necessary. Clause 10 amends section 2GC of that Ordinance to clarify that the power of the Court of First Instance to grant interim relief under that section applies in relation to arbitration proceedings in or outside Hong Kong. But the power may only be exercised in relation to arbitration proceedings outside Hong Kong if those proceedings are capable of being enforced in Hong Kong (new section 2GC(1A)). Clause 11 adds a new section to the Arbitration Ordinance (Cap. 341) to empower the Rules Committee to make rules of court relating to the making of applications for interim relief under that section 2GC and the service out of the jurisdiction of such applications and orders for interim relief.

Part 5 – Vexatious Litigants

8. Clause 12 implements Recommendations 67 and 68 in section 14 of the Report. The existing section 27 of the High Court Ordinance (Cap. 4) is replaced by a new section 27 which introduces the following changes –

- (a) it allows a vexatious litigant order to be made not only on the application of the Secretary for Justice but also on the application of any person who is or has been a party to the vexatious proceedings instituted by the respondent or who has directly suffered adverse consequences resulting from such proceedings;
- (b) it raises the threshold for granting leave to a vexatious litigant to issue fresh proceedings, requiring the Court of First Instance to be satisfied that the proceedings are not an abuse of the process and that there are reasonable, not just prima facie, grounds for the proceedings;
- (c) it makes it clear that a vexatious litigant order may be made for a specific period or remain in force indefinitely; and
- (d) it also makes it clear that there is no appeal against a refusal of leave.

Part 6 - Discovery

9. Clause 13 implements Recommendations 75 and 77 in section 16 of the Report. Section 41 of the High Court Ordinance (Cap. 4) presently provides for pre-action disclosure in cases where the plaintiff is suing for personal injury or in respect of someone's death. Clause 13 adds a new section 41A to the Ordinance to widen the jurisdiction of the Court of First Instance to order disclosure before commencement of proceedings to cover cases other than those in relation to personal injury and death claims. It should be noted that an order granted under the new section 41A only relates to disclosure and inspection of documents which are directly relevant to an issue

in the anticipated proceedings, i.e. documents which would likely be relied on by the parties themselves and documents which affect adversely or support any party's case in the anticipated proceedings.

10. Clauses 14 and 15 consequentially amend sections 43 and 45 of the Ordinance upon the addition of the new section 41A.

11. Clauses 16, 17 and 18 make similar amendments to the District Court Ordinance (Cap. 336).

12. Clause 19 implements Recommendation 78 in section 16 of the Report. It amends section 42(1) of the High Court Ordinance (Cap. 4) so that the jurisdiction of the Court of First Instance to order post-commencement, pre-trial disclosure applies to all types of cases (and not merely to personal injury and death claims). Clause 20 makes similar amendments to the District Court Ordinance (Cap. 336).

Part 7 – Wasted Costs

13. Clause 21 relates to Recommendations 94 to 97 in section 18 of the Report. As these Recommendations concern wasted costs orders against counsel and solicitors, clause 21 empowers the Court of First Instance to make such an order against them. Clause 22 makes similar amendments to the District Court Ordinance (Cap. 336).

14. Clause 23 amends the Schedule to the Small Claims Tribunal Ordinance (Cap. 338) to make it clear that the Small Claims Tribunal does not have jurisdiction to hear and determine costs-only proceedings.

Part 8 – Leave to Appeal

15. Clause 24 amends section 14 of the High Court Ordinance (Cap. 4) and clause 25 adds a new section 14AA to that Ordinance to implement Recommendations 110, 111, 112, 113 and 115 in section 22 of the Report. Under section 14(1) of the Ordinance, an appeal lies as of right to the Court of Appeal from every judgment or order of the Court of First Instance in any civil matter. The new section 14AA introduces a requirement that an interlocutory appeal to the Court of Appeal be brought only with leave of the Court of First Instance or the Court of Appeal. Under the new section, rules of court to be made under section 54 of the Ordinance may however specify judgments or orders of the Court of First Instance to which the requirement does not apply.

16. Clause 26 relates to Recommendation 112 in section 22 of the Report. It adds a new paragraph (aa) to section 34B(4) of the Ordinance to provide that the Court of Appeal comprising 2 Justices of Appeal has jurisdiction to hear or determine an application for leave to appeal.

17. Clause 27 amends section 63(3) of the District Court Ordinance (Cap. 336) so that a person against whom an order prohibiting him from leaving Hong Kong is also entitled to appeal to the Court of Appeal without leave.

Part 9 - Appeals

18. Clause 28 relates to Recommendation 120 in section 22 of the Report. It adds a new paragraph (ab) to section 34B(4) of the High Court Ordinance (Cap. 4) to clarify that the Court of Appeal comprising 2 Justices of Appeal has jurisdiction to hear or determine an application that is interlocutory to an appeal pending before it.

TABLE

Recommendation 9

A procedure should be introduced to enable parties who have settled their substantive dispute to bring costs-only proceedings by way of originating summons and subject to practice directions, for a party-and-party taxation of the relevant pre-settlement costs.

Recommendation 25

The defence of tender before action should be extended to apply to claims for unliquidated damages.

Recommendation 45

Proposal 17 (for introducing Mareva injunctions and incidental relief in aid of foreign proceedings) should be adopted as modified and supplemented by Recommendations 46 to 51.

Recommendation 46

The jurisdiction to grant a Mareva injunction in aid of foreign proceedings or arbitrations should be confined to proceedings and arbitrations capable of leading, in the ordinary course, to a judgment or arbitral award which can be enforced in Hong Kong.

Recommendation 47

Section 21L of the HCO should be amended to make it clear that a Mareva injunction can be sought in aid of foreign proceedings and arbitrations as an independent, free-standing form of relief, without being ancillary or incidental to substantive proceedings commenced in Hong Kong, followed by relevant amendments to O 29.

Recommendation 48

Section 21L or some other appropriate provision of the HCO should be amended to give the Rules Committee clear authority to amend O 11 with a view to making applications for free-standing Mareva injunctions an eligible category for the grant of leave to effect service of process abroad, followed by relevant amendments to O 11.

Recommendation 67

Section 27 of the HCO should be amended to introduce enhancements equivalent to those introduced by section 42 of the Supreme Court Act 1981 in England and Wales.

Recommendation 68

The HCO should furthermore make provision for vexatious litigant orders to be made not only on the application of the Secretary for Justice but also on the application of any person who is or has been party to vexatious proceedings presently instituted by or with the participation of the respondent or who has directly suffered adverse consequences resulting from such proceedings or from vexatious applications made by the respondent in such proceedings.

Recommendation 75

The HCO should be amended to broaden the jurisdiction of the court under section 41 to order disclosure before commencement of proceedings to encompass all types of cases (and not merely cases involving personal injury and death claims).

Recommendation 77

Orders for pre-action disclosure should relate to disclosure and inspection of specific documents or classes of documents which are "directly relevant" to the issues in the anticipated proceedings, being documents which would be likely to be relied on by the parties themselves or documents directly affecting adversely or directly supporting any party's case in the anticipated proceedings, the procedure for such applications being that prescribed by O 24 r 7A, subject to any necessary modifications.

Recommendation 78

Section 42(1) of the HCO should be amended so that the court's jurisdiction to order post-commencement, pre-trial disclosure from persons who are not parties to the proceedings applies to all types of cases (and not merely to personal injury and death claims).

Recommendation 94

Rules along the lines of paragraphs 53.4 to 53.6 of the CPR Practice Direction on Costs, modified to exclude reference to liability based on negligence, should be issued providing guidance for the exercise of the court's discretion and discouraging disproportionate satellite litigation in relation to wasted costs orders.

Recommendation 95

Applications for wasted costs orders should generally not be made or entertained until the conclusion of the relevant proceedings.

Recommendation 96

Rules should be issued making it clear (i) that it is improper to threaten wasted costs proceedings with a view to pressurising or intimidating the other party or his lawyers; and (ii) that any party who wishes to put the other side's lawyers on notice of a potential claim for wasted costs against them should not do so unless he is able, when doing so, to particularise the misconduct of such lawyers which is alleged to be causing him to incur wasted costs and to identify evidence or other materials relied on in support.

Recommendation 97

Barristers should be made subject to liability for wasted costs under O 62 r 8.

Recommendation 110

Interlocutory appeals from the CFI judge to the Court of Appeal should be subject to a condition of leave to appeal save in relation to (i) defined classes of interlocutory decisions which are decisive of substantive rights; and (ii) certain other defined categories of decisions, including those concerning committal, habeas corpus and judicial review.

Recommendation 111

Where leave to appeal is required, the court should have power to limit the grant of such leave to particular issues and to grant leave subject to conditions designed to ensure the fair and efficient disposal of the appeal.

Recommendation 112

A procedure designed to avoid separate oral hearings of applications for leave to appeal should be adopted, generally requiring any application before the CFI judge to be made at the original hearing and, if refused, for any further application for leave to be made in writing and usually dealt with by the Court of Appeal comprising two Justices of Appeal, on the papers and without an oral hearing. Where considered necessary, the Court of Appeal should be able to direct that there be an oral hearing before the original two judges or before a panel of three judges.

Recommendation 113

A refusal of leave to appeal by the Court of Appeal in relation to such purely interlocutory questions should be final. Where, however, the Court of Appeal hears the appeal, it should be open to the parties to apply for leave to appeal to the Court of Final Appeal in accordance with section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance.

Recommendation 115

Leave to appeal from the CFI judge to the Court of Appeal should only be granted where the court considers that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

Recommendation 120

Applications which are interlocutory to pending appeals should be dealt with on paper by two Justices of Appeal, who should have power to make any orders necessary without a hearing, giving brief reasons for their decision; or, alternatively, to direct that there be a hearing before themselves or before a panel of three judges (the last option being dictated where the two judges are unable to agree).