Supplementary Consultation Paper on the Administration of Justice (Miscellaneous Provisions) Bill :

Rights of Appeal to the Court of Final Appeal in Civil Matters

PURPOSE

In March 2013, the Judiciary issued a consultation paper on the Administration of Justice (Miscellaneous Provisions) Bill which contains various legislative proposals relating to the court operation. This supplementary paper invites views on another proposal of the Judiciary that all appeals in civil matters to the Court of Final Appeal ("CFA") [1] would be subject to discretionary leave.

BACKGROUND

Present Position

2. According to sections 22(1)(a) and (b) of the Hong Kong Court of Final Appeal Ordinance (Cap 484) ("the Ordinance"), the present position on appeals in civil matters to the CFA is –

(a) an appeal lies to the CFA as of right from any final judgment of the Court of Appeal ("CA"), where the matter in dispute amounts to or is worth HK$1 million or more; and

(b) for other CA judgments, appeals to the CFA will only be allowed if, in the opinion of the CFA or CA, the question involved is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision.

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[1] The CFA is the highest appellate court in the Hong Kong Special Administrative Region. It hears appeals in civil and criminal matters from the High Court (which comprises the Court of First Instance and the CA).

Historical Origin

3. The historical origin of appeals as of right in civil matters lies in the system of appeals to the Judicial Committee of the Privy Council of the United Kingdom (the "Privy Council"), the highest appellate court of Hong Kong before 1 July 1997. This system applied not only to Hong Kong but also to all Commonwealth jurisdictions with rights of appeal to the Privy Council.

4. Before 1 July 1997, appeals in civil matters lay as of right to the Privy Council where the matter in dispute amounted to HK$500,000 or more. When the Hong Kong Court of Final Appeal Bill was introduced into the Legislative Council in 1995, the as of right appeal mechanism was preserved so that the then prevailing appeal system would continue unchanged as far as possible[2], but the threshold was raised to HK$1 million to reflect the inflation factor.

INADEQUACIES OF THE PRESENT SYSTEM

Objectionable as a Matter of Principle

5. The present system is objectionable as a matter of principle. Linking a right of appeal to an arbitrary financial limit means that litigants involved in litigation beyond the threshold limit in effect have more rights than other litigants with smaller claims, regardless of the merits of their cases. For claims above the limit, appeals are as of right; for claims under the limit, discretionary leave is required.

Ineffective System of Appeals

6. Allowing appeals to be lodged to the CFA as of right leads to situations whereby unmeritorious appeals have to be heard by the CFA. This leads to uncertainty, delay and worst of all, justice being denied (or delayed) to the party who has the merits in a case.

7. As stated by the CFA in *China Field Ltd v Appeal Tribunal (Buildings)* in 2009, it is in principle oppressive to allow unmeritorious appeals being dealt with by the CFA –

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[2] Legislative Council, *Official Record of Proceedings*, 26 July 1995, page 6036.

> *"The role of the Court of Final Appeal is not to permit a third bite of the cherry to any litigant who wishes to have another go. An appeal to the Court as of right is in principle oppressive to the party who has won in the Court of Appeal where the further appeal is without substance. Unless the appeal involves a point of law of public importance or unless grievous injustice would be done if the final court does not intervene, a successful litigant should not be dragged before a third tier of court. This approach does not, of course, argue against the Court retaining discretion to grant leave to appeal in appropriate cases."*[3]

8. In other words, allowing unmeritorious appeals to lie as of right to the CFA is not conducive to an effective system of appeals. Unmeritorious appeals do not benefit the appellants either, not to mention the respondents. Such appeals serve only to saddle the litigating parties with more legal costs to pay[4].

Waste of Judicial Resources

9. As observed by the Chief Justice in *Champion Concord Ltd and Another v Lau Koon Foon and Another* in 2010 –

> *"The experience of this Court has been that appeals brought [as of right] are a drain on resources, waste time and hinder in a very tangible way the resolution of other, far more meritorious proceedings."*[5]

10. Unmeritorious appeals thus prevent the CFA from hearing in good time genuine and much more meritorious appeals (often in the public law sphere). This is highly undesirable, not to mention a waste of public resources.

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[3] *China Field Ltd v Appeal Tribunal (Buildings)* (2009) 12 HKCFAR 68, at paragraph 16 (Ribeiro PJ).

[4] *Wealth Duke Ltd and Others v Bank of China (Hong Kong) Ltd*, unreported, FACV 2/2011 (Court of Final Appeal, 23 November 2011), at paragraph 1 (Bokhary PJ).

[5] *Champion Concord Ltd and Another v Lau Koon Foon and Another*, unreported, FACV 16 and 17/2010, (Court of Final Appeal, 23 November 2011), at paragraph 6 (Ma CJ).

An Anomaly in a Modern Judicial System

11. Almost every other common law jurisdiction to which Hong Kong has the closest affinity requires that "leave" be obtained before appeals can be made to their highest appellate court. These include appeals to the Australian High Court, the Supreme Court of New Zealand, and appeals from English and Wales to the Supreme Court of the United Kingdom. As for appeals to the Canadian Supreme Court, leave to appeal is required in most cases.

12. Details of the common law jurisdictions that we have looked at are shown at **Annex**[6].

Raising the Financial Limit is not an Option

13. Raising the financial limit of HK$1 million would not be able to remove the anomaly of linking the rights of appeal to an arbitrary financial limit (see paragraph 5 above), and therefore should not be an option. In any event, it is doubtful whether raising the financial limit could in practice significantly reduce the number of unmeritorious appeals to the CFA, let alone eliminating them.

14. In this regard, the Canadian experience may be a useful reference for us. In 1973, the Canadian Bar Association ("CBA") found that the overloading of cases at the Supreme Court was not acceptable as a result of the sharp increase in the number of appeals as of right. The CBA then recommended abolishing appeals as of right in civil cases to the Supreme Court. Consideration was given to simply raising the monetary minimum for such cases from C$10,000 to some higher figure, but this solution was ultimately decided to be objectionable in principle. Money or property alone, at any figure of monetary value, was simply not acceptable as the basis of an exclusive privilege to appeal as a matter of right to the Supreme Court[7].

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[6] In Singapore, appeals in civil matters above a certain monetary threshold lie as of right from their High Court to the Court of Appeal (being its highest appellate court). Appeals as of right to the highest appellate court is also allowed in Ireland.

[7] Anne Roland, "Appeals to the Judicial Committee of the Privy Council: A Canadian Perspective", *Commonwealth Law Bulletin* Vol 32 No. 4 (December 2006), 569, at 580.

PROPOSED LEGISLATIVE AMENDMENTS

15. For the reasons highlighted above, the existing as of right appeal mechanism to the CFA is highly undesirable. The Judiciary considers it important and timely to amend the law so that all appeals in civil matters to the CFA become subject to discretionary leave.

16. It is proposed that all appeals in civil matters, whether or not the matter in dispute amounts to or is worth more than HK$1 million, should only lie at the discretion of the CFA/CA. All such appeals should be heard by the CFA only if the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. This can be achieved by repealing section 22(1)(a) of the Ordinance.

17. It is important to note that the Judiciary's proposal is to repeal the "as of right" limb, without affecting other existing aspects of the leave requirement in section 22(1)(b) of the Ordinance. As such, there would be no question of any substantive erosion of the rights of appellants under the proposal.

18. It has also to be emphasized that the CFA is the final appellate court in Hong Kong. It does not operate as a second court of appeal operating on the same basis as the CA. While the CFA primarily deals with questions of "great general or public importance", there is also an "or otherwise" provision. Existing case law has established the "or otherwise" limb as an exceptional one with a limited scope of application. However, like all case law, the jurisprudence on this limb is capable of further development.

19. Where neither the "great general or public importance" nor the "or otherwise" grounds are engaged, leave will not be granted. This is to achieve the intention of the statutory provisions. The questions of merits should be seen in this context. In other words, where an application for leave is made, not only that sufficient merits must be demonstrated, but the statutory provisions also have to be satisfied.

20. Separately, it should be noted that at present, all criminal appeals are subject to the discretionary leave granted by the CFA. There is no as of right ground for criminal appeals. To abolish the as of right ground for civil appeals will bring such appeals in line with the criminal appeal process. All appeals to the CFA should be on the basis of their merits, and all litigants or parties should be treated equally.

Benefits of the Proposal

21. In short, the Judiciary's proposal will –

(a) address the fundamental question of principle with the existing as of right statutory provisions, which distinguish litigants by an arbitrary amount of claim;

(b) be conducive to an effective system of appeals as unmeritorious appeals to the CFA will be eliminated, thereby saving all parties from uncertainty, delay and unnecessary costs arising from unmeritorious appeals;

(c) allow better use of judicial resources as the CFA can focus on hearing meritorious appeals involving questions of great general or public importance or otherwise, irrespective of the monetary value involved; and

(d) bring our appeal system in line with those in other comparable common law jurisdictions.

VIEWS SOUGHT

22. The Judiciary would be grateful for views on the above proposal by **close, 23 May 2013**.

Judiciary Administration
April 2013

Annex

Appeal in Civil Matters to the Highest Appellate Court in other Comparable Common Law Jurisdictions

Australia

The High Court of Australia is the highest court in the Australian judicial system, and is the final court of appeal in Australia. The High Court has both original and appellate jurisdiction.

2. The appellate jurisdiction of the High Court originates from section 73 of the Australian Constitution, which stipulates that the High Court can hear appeals from the Supreme Courts of the States and from any federal court or court exercising federal jurisdiction. Section 73 allows the High Court's appellate jurisdiction to be limited "with such exceptions and subject to such regulations as the Parliament prescribes".

3. There is no automatic right to have an appeal heard by the High Court, and an appeal shall not be brought from a judgment, whether final or interlocutory, unless the High Court gives special leave to appeal.[8] Parties need to persuade the court that there are special reasons. In considering whether to grant special leave to appeal, the High Court may have regard to any matters it considers relevant but must have regard to:

> *"(a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:*
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> *(i) that is of public importance, whether because of its general application or otherwise; or*
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> *(ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and*
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> *(b) whether the interests of the administration of justice, either generally or in the particular case, require*

[8] Section 35AA, Judiciary Act 1903.

> *consideration by the High Court of the judgment to which the application relates."*[9]

Canada

4. The Supreme Court of Canada is the highest court in Canada. Its jurisdiction embraces both the civil law of the province of Quebec and the common law of the other nine provinces and the territories. In most cases, appeals are heard by the court only if leave to appeal is given. Such leave is given when a case involves a question which the Supreme Court is of the opinion that:

> "*by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it*."[10]

England and Wales

5. The Supreme Court of the United Kingdom is the final appellate court in almost all cases in England and Wales. The Supreme Court came into being on 1 October 2009 by virtue of Part III of the Constitutional Reform Act 2005. The Supreme Court has replaced the House of Lords in its judicial capacity,[11] and assumed the jurisdiction of the House of Lords. Apart from appeals from England and Wales, the Supreme Court also deals with appeals from Scotland's Court of Session etc.

6. Section 40(2) of the Constitutional Reform Act 2005 stipulates that an appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings. However, an "appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court",[12] subject to any other enactment

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[9] Section 35A, Judiciary Act 1903.

[10] Section 40, Supreme Court Act 1985 (Canada).

[11] See Constitutional Reform Act 2005. Before the Act, the House of Lords was the highest court of appeal. (See section 37).

[12] Section 40(6).

restricting such an appeal.[13] An application for permission to appeal must be made first to the Court of Appeal. If that Court refuses permission, an application may be made to the Supreme Court.[14]

Ireland

7. The Supreme Court is the court of final appeal in all constitutional and civil matters in Ireland.[15] The High Court is a court of first instance with full original jurisdiction in all civil and criminal matters.

8. There is no equivalent intermediate court of appeal for civil matters between the High Court and the Supreme Court. Instead, the Supreme Court is the court of final appeal and hears civil appeals from decisions of the High Court. As such, there is generally an automatic right of appeal to the Supreme Court from the decisions of the High Court for civil matters. There are however a limited number of exceptions to this right of appeal where a certificate is required from the trial judge certifying that the appeal involves a point of law of public importance.[16]

Singapore

9. The Supreme Court of Singapore is made up of the Court of Appeal and the High Court. The High Court is a court of first instance with full original jurisdiction in all civil and criminal matters. The Court of Appeal hears appeals against the decisions of the High Court in both civil and criminal matters. The Court of Appeal is also the final court of appeal in Singapore. There is no intermediate court of appeal between the High Court and the Court of Appeal.

10. There is in general an automatic right of appeal from the High Court to the Court of Appeal for civil matters for claims above a

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[13] For civil appeals, relevant statutes are:

- the Administration of Justice (Appeals) Act 1934;
- the Administration of Justice Act 1960;
- the Administration of Justice Act 1969;
- the Judicature (Northern Ireland) Act 1978;
- the Court of Session Act 1988; and
- the Access to Justice Act 1999.

[14] www.supremecourt.gov.uk ("A guide to bringing a case to the Supreme Court").

[15] Article 34 of the Constitution.

[16] Website of the Supreme Court of Ireland.

monetary threshold (S$250,000). This is set out in section 34(2)(a) of the Supreme Court of Judicature Act (Cap 322) which reads:

> "(2) *Except with the leave of a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:*
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> *(a) where the amount in dispute, or the value of the subject-matter, at the hearing before the High Court (excluding interest and costs) does not exceed $250,000 or such other amount as may be specified by an order made under subsection (3);*
>
> …".

11. As stated by the Court of Appeal in one of its decisions, as the monetary threshold of S$250,000 was the upper limit of the District Court's jurisdiction, the objective of section 34(2)(a) was to ensure that where appeals from the decision of the District Court had been heard and disposed of by the High Court, there should be no further appeals therefrom to the Court of Appeal unless (on sufficient grounds shown) leave of either the High Court or the Court of Appeal was obtained. What was contemplated by the legislature was that there should be only two tiers of hearing – the first instance hearing and an appeal. A further appeal to the Court of Appeal, Singapore's final court of appeal, is only possible with leave.

12. The Court of Appeal in another decision explained that, as a general rule, it was intended that there should only be one tier of appeal as a matter of right.[17]

New Zealand

13. The Supreme Court of New Zealand is the highest court and the court of last resort in New Zealand.

14. There is no automatic right of appeal to the Supreme Court.[18] All would-be appellants are first required to apply to the court for leave to

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[17] *IW v IX* [2006] 1 SLR 135 at [22].

[18] Section 12, Supreme Court Act 2003 (New Zealand).

appeal, which will be granted only if it is necessary in the interests of justice.[19]

15. A number of factors for determining whether an appeal is "necessary in the interests of justice" are listed in section 13 of the Supreme Court Act 2003. An appeal is necessary in the interests of justice if:

- it involves a matter of general or public importance
- a substantial miscarriage of justice may have occurred, or may occur if the appeal is not heard
- it involves a matter of general commercial significance
- it involves a significant issue relating to the Treaty of Waitangi

16. It has been pointed out that a question of general or public importance may arise even though there is only a very small amount at stake in financial terms. In *Jeffries v Attorney General*,[20] the Supreme Court granted leave to appeal on the question whether the Court of Appeal's order requiring the appellant to pay costs of NZ$750 was properly made. In granting leave, the Supreme Court was satisfied that the case raised a point of general importance despite the very small amount at stake in financial terms. The Court however urged the parties to reflect on whether the matter in issue is capable of resolution without the cost of a full hearing.

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[19] Section 13, Supreme Court Act 2003, cited above.

[20] [2009] NZSC 6. Date of judgment : 4 Feb 2009.