

**Revised Proposals for
Amendments to Subsidiary Legislation
under the Civil Justice Reform**

I. INTRODUCTION

- 1.1 In April 2006, the Steering Committee on Civil Justice Reform (“the Steering Committee”) published the “*Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform*” (“the Consultation Paper”) for a 3-month consultation. The Consultation Paper contained proposed amendments to both primary legislation and subsidiary legislation. A total of 30 responses, including responses from the two legal professional bodies, were received, commenting mostly on technical and drafting details.
- 1.2 The Steering Committee has finalized its proposed amendments to primary legislation in the Civil Justice (Miscellaneous Amendments) Bill 2007. The Bill was introduced in the Legislative Council in April 2007 and is now being scrutinized by a Bills Committee.
- 1.3 Taking into account the responses to the Consultation Paper, the Steering Committee has continued to deliberate on further changes to subsidiary legislation, mainly the Rules of the High Court (“the RHC”) (Cap. 4A) and the Rules of the District Court (“the RDC”) (Cap. 336H).
- 1.4 This Paper seeks comments (if any) on the revisions to the draft subsidiary legislation that have been made since the Consultation Paper. There has already been an extensive consultation on the previous draft RHC contained in that Paper (“the previous draft RHC”).
- 1.5 Most of the amendments to the previous draft RHC are relatively minor, comprising clarifications, tidying up provisions, logical extensions to the previous draft, amendments to periods of time and the correction of typographical errors. There are also consequential amendments to court forms and amendments made to transitional provisions. The major changes of any significance are to RHC Orders 11, 22, 24, 25, 38, 41A, 53, 59, 62 and 62A.

- 1.6 Annex I of the Consultation Paper comprises a chart highlighting changes to be made to the RDC. On the whole, the RDC follow the same content and format of the RHC but there are some differences. The main differences between the draft RDC and the latest draft RHC are identified in **Part IV** below.
- 1.7 The following documents are accordingly enclosed :-
- (1) **Annex A : Latest draft RHC** Orders 11, 22, 24, 25, 38, 41A, 53, 59, 62 and 62A, highlighted with the changes made to the previous draft RHC. **Annex A**
 - (2) **Annex B : Comparison table** between the latest draft RHC and the draft RDC. **Annex B**
 - (3) **Annex C : Draft RDC** Orders 1, 24, 25, 34, 37, 58 and the Schedules to Order 62. **Annex C**
- 1.8 The full extent of the changes made to the previous draft RHC and RDC can be seen on the Civil Justice Reform (“CJR”) website at <<http://www.civiljustice.gov.hk>>. (The changes to the previous draft RHC are highlighted.) It was felt unnecessary to provide hard copies in this document of all the changes since most of them were minor; only the more important changes have been provided in hard copy form.

II. THE RHC

- 2.1 The following are the major changes in the latest draft RHC compared to the previous draft RHC.
- 2.2 RHC Order 11 : Service of Process etc out of the Jurisdiction
RHC Order 73 : Arbitration Proceedings

O.11, rr.1 (oc) and (od) have been added to allow service out of the jurisdiction in relation to, respectively, claims for interim relief and the appointment of a receiver (proposed section 21M(1) of the High Court Ordinance (“HCO”), Cap. 4 in the Bill) and claims for costs against non-parties (proposed section 52A(2) of the HCO in the Bill). O.73, r.7(1B) has been added to allow for service out of the

jurisdiction for claim for interim relief and the appointment of receivers in arbitration proceedings (proposed section 2GC(1) of the Arbitration Ordinance, Cap. 341 in the Bill).

2.3. RHC Order 22 : Offers to Settle and Payments into Court

There are four main changes :-

- (1) Where there is in existence an application to withdraw or reduce a sanctioned payment or sanctioned offer, the leave of the court will be required before the offeree can accept the payment or offer : - O.22, rr.7(10) and 9(5).
- (2) Where the court dismisses the application to withdraw or reduce a sanctioned payment or sanctioned offer, it may order a new period within which the payment or offer may be accepted : - O.22, rr.7(11) and 9(6).
- (3) Where, in a fatal accidents claim, a sanctioned offer or sanctioned payment is made, it will be unnecessary to make an apportionment as between the claim under the Fatal Accidents Ordinance, Cap.22 and the claim under the Law Amendment and Reform (Consolidation) Ordinance, Cap.23 : - O.22, r.12(4).
- (4) Where a plaintiff's sanctioned offer is not bettered by a defendant, one of the consequences may be that the plaintiff will be entitled to interest on any award at a rate not exceeding 10% above "judgment rate" (rather than the imprecise term "prime rate" as in the previous draft) : - O.22, r.22(2).

2.4 RHC Order 24 : Discovery and Inspection of Documents

Following the latest proposal to adopt the same test for pre-action discovery in personal injury cases as in any other case (see proposed section 41 of the HCO in the Bill), Order 24 has been amended accordingly : see O.24, rr.7A(3)(b) and (3A).

2.5 RHC Order 25 : Case Management Summons and Conference

- (1) It would be confusing to have in existence both a summons for directions and a case management summons. It is therefore proposed that there be only one procedural summons - the case management summons - and the relevant hearing will be the case management conference only. Order 25 (and some other orders where the term appears such as Orders 24 and 34) are amended to substitute “case management summons” for “summons for directions”.
- (2) The transitional provision in O.25, r.11 has been amended to apply the new O.25 to all existing actions as at the date the new Rule comes into effect.

2.6 RHC Order 38 : Evidence

This Order has been amended to : -

- (1) allow the court of its own motion to appoint a single joint expert : deletion of O.38, r.4A(3) in the previous draft; and
- (2) set out the relevant factors which the court may take into account in deciding whether or not to appoint a single joint expert : O.38, r.4A(4).

2.7 RHC Order 41A: Statements of Truth

O.41A, r.9 of the previous draft has been removed as it is considered that the provision would undermine the requirements of O.41, r.5(2) regarding the content of affidavit evidence.

2.8 RHC Order 53 : Applications for Judicial Review

The court should have the power to deal with applications for leave notwithstanding that the proposed respondent has neither been served nor entered an acknowledgment of service : O.53, rr.3(3A) and (3B). This would enable the court to deal with unmeritorious applications. If, however, the court is of the view that the granting of the leave may be reasonably justified, it can then adjourn the hearing

to allow the proposed respondent or any interested party to make submissions : - O.53, r.3(3C).

2.9 RHC Order 59 : Appeals to the Court of Appeal

- (1) This Order has been substantially amended in order to achieve the following : -
 - (a) The provisions for leave to appeal to the Court of Appeal ought to be standardized irrespective of the type of proceedings or the level of court. O.59, rr.2A and 2B deal, respectively, with applications for leave to appeal to the Court of Appeal, and applications for leave to appeal against interlocutory and other orders of the Court of the First Instance (on the latter, see the proposed section 14AA in the Bill and sections 14(3)(e) & (f) of the HCO).
 - (b) There should no longer be ex parte applications for leave to appeal. These are potentially time wasting and costly. Instead, all applications for leave should be inter partes (unless of course the relevant hearing below was ex parte) : O.59, rr.2A(2) and 2B(5).
 - (c) Where the Court of Appeal makes a determination on paper, an aggrieved party may request that the court reconsider the matter at an oral hearing, but the Court of Appeal may refuse to do so where it is of the view that the application is without merit : - O.59, rr.2A(5), (7) and (8). (cp. CPR 52.3(4) of the English Civil Procedure Rules).
 - (d) Where a single judge of the Court of Appeal makes a determination on an application for leave to appeal, an aggrieved party may make a fresh application within 7 days to the Court of Appeal (cf. section 35(3) of the HCO) : - O.59, r.2C.
 - (e) In granting leave to appeal, the Court of Appeal may give such directions or impose such conditions as it deems fit : - O.59, r.2A(5).

- (f) Provision is now made for the time within which applications for leave to appeal must be made. Such time starts to run from the date of the order or decision appealed against and not from the date of perfection of the order : - O.59, r.2B(1).
- (2) The time for appealing (in cases where leave is not required) will be calculated from the date the relevant judgment, order or decision is made and not (as now) from the date of perfection : - O.59, rr.4(1)(b) and (c). References to the date of perfection are deleted : - O.59, rr.4(1) and 5(1).
- (3) Any party affected by an ex parte order of the Court of Appeal may apply to set it aside within 7 days of service : - O.59, r.14(3A).
- (4) For the avoidance of doubt, it is provided that a judge of the Court of First Instance may sit as a judge of the Court of Appeal : - O.59, r.14A(3) (cf. section 5(2) of the HCO).
- (5) The first sentence of the existing O.59, r.19(4) is deleted. There are 2 reasons for this. First, the lodging of the sealed judgment or order as well as the transcript of the relevant evidence (in the absence of which, the judge's note) is already provided for in Rules 5(1)(a) and 9(1)(f) & (g). Secondly, as regards the transcript of the relevant evidence, in practice nowadays, there will be an official transcript from the court's recording system.

2.10 RHC Order 62 : Costs

- (1) The reference in O.62, r.5(2) to the court not taking into account pre-action conduct when exercising a discretion as to costs, has been deleted. The original wording was too wide in attempting to deal with the position of pre-action protocols. As it stood, it was also contrary to established principles: see *Town Planning Board v Society for Protection of the Harbour (No. 2)* (2007) 7 HKCFAR 114, at 124F-H; *Choy Yee Chun v Bond Star Development* [1977] HKLRD 1327, at 1338F-H. The addition of Rule 5(2)(d) is in line with principle and incidentally also follows the position in England (c.f. CPR 44.3(5)(a)).

- (2) The procedure for review of taxation is clarified so that the time to review starts to run from conclusion of a taxation and ceases upon the taxing master's signing of a final certificate : – O.62, r.33.
- (3) There will be no more costs awarded for mechanical preparation of documents. Photocopying fees are revised to \$4 per page for the first bundle of copy documents and \$1 per page for other copies : - O.62, Part 1 to First Schedule.
- (4) The scale of costs in the Second Schedule are generally revised –
 - (a) There is a new item for fixed costs, namely, judgments on admission entered under the new O.13A;
 - (b) The Law Society's proposals for a fixed sum of \$10,000 for profit costs in cases where default judgments (O.13 & 19) are entered are set out. Whilst the Steering Committee has no objection in principle to this proposal (and considers that the same sum should apply to O.13A judgments on admission), as they suggest important changes which may have significant impact on solicitors and their clients, the Law Society has been requested to conduct wider consultation with all the relevant stakeholders concerned; and
 - (c) Costs for a litigant in person in such situations are also provided for.

These provisions do not prevent a plaintiff from seeking, in an appropriate case, other costs orders from the Court. See O.62, r.32(4) and Part II to the Second Schedule.

- (5) The scale costs in relation to an applicant's costs in proceedings for garnishee and charging orders have been repealed. Costs in those proceedings will now be subject to taxation or summary assessment by the Court. The rest of the scale costs have been revised upwards. See O.62, Part III to the Second Schedule.

2.11 RHC Order 62A : Costs Offer and Payments into Court

This Order has been amended as follows:

- (1) An offer for costs must include the costs of taxation : - O.62A, r.1(1).
- (2) The definition of “relevant date” has been added to clarify the time for the making of and acceptance of sanctioned offers and sanctioned payments: - O.62A, r.1(1) (see also O.62A, rr.5(4),(5)&(6), 9(1)&(2), 10(1)&(2)).
- (3) A receiving party is permitted to make a sanctioned offer. The form and contents are provided for. See O.62A, rr.4 and 5.
- (4) The time for acceptance of a sanctioned offer or sanctioned payment is provided for. No leave of the Court is required if acceptance is within 14 days of the offer. If acceptance is beyond those 14 days or if a sanctioned payment or offer is made less than 14 days before the relevant date, leave of the court is required: - O.62A, rr.9 and 10.

III. OTHER CHANGES TO THE PREVIOUS DRAFT RHC

3.1 As stated in paragraph 1.5 above, the other changes to the previous draft RHC are relatively minor.

3.2 Clarifications

For example : -

- (1) RHC O.11, r.1(ob) has been reworded to make clear that it is intended to cover costs-only proceedings (proposed section 52B(2) of the HCO in the Bill).
- (2) It is made clear in RHC O.12, r.8(6) that where a defendant has been unsuccessful in an application to set aside the writ on the basis of lack of jurisdiction, he is treated to have given a notice of intention to defend.

- (3) The restriction of disclosure of a sanctioned payment or sanctioned offer as far as masters are concerned, is clarified : - O.22, r.23(2).
- (4) The situations in which the court can order payment out of monies paid in as sanctioned payments are identified : - O.22A, r.1(2).
- (5) In O.41A, r.4(1)(b), it is made clear that a statement of truth in the case of an expert report means that his opinion is honestly held.
- (6) In relation also to statements of truth, the position of public officers is clarified : - O.41A, rr.3(3) and (4).

3.3 Tidying up

For example : -

- (1) The word “motion” has been removed from provisions where this term is used, such as O.20, r.11 and O.29, r.1(2).
- (2) A writ is to be endorsed with a statement that the defendant can make an O.13A admission : - O.6, r.2(1)(c).

3.4 Logical extensions

For example : -

- (1) Where a defendant admits a claim but asks for time to pay by instalments, there will be a stay of execution but if the defendant defaults, the plaintiff may enforce the whole amount that is outstanding or the balance of it : - O.13A, rr.9(7) and (8).
- (2) Offers to settle a mixed claim (that is, a claim comprising both money and non-money claim) can be made by both the plaintiff and the defendant : - O.22, r.6.

- (3) Where sums of money have been paid into court other than as security for costs, these can be included in any sanctioned payment made by a party : - O.22, r.9(2)(f).
- (4) The stated costs consequences following an acceptance of a sanctioned offer or a sanctioned payment are subject to any contrary order of the court : - O.22, rr.18(1), 19(1).

3.5 Periods of time

Amendments have also been made as to the period of time within which acts are to be done, for example, time for service of the defence and the reply (O.18, r.2).

3.6 Transitional provisions

There have also been amendments made to transitional provisions. For example –

- (1) The transitional provision relating to the mode of commencement of proceedings has been simplified – O.5, r.7.
- (2) A general transitional provision has been added to make clear that any pending application, request or appeal by originating motions or other motion will be dealt with as if the amendments have not been made – O.8, r.6.
- (3) Amendments are made to the transitional provisions consequential to the changes made to the time limits for certain acts to be done relating to pleadings – O.18, rr.23 and 24.
- (4) The transitional provision relating to the repeal and replacement of O.22 is clarified – O.22, r.26.
- (5) Amendments are made consequential to the changes regarding case management summons – O.25, r.11. The new provisions will apply to all actions existing at the time the new Rule comes into effect.

- (6) Amendments are made to clarify that all taxation proceedings with a bill of costs filed before the commencement of the Amendments Rules will follow the pre-amendment (i) taxation procedures, (ii) scale of costs and (iii) court fees under the High Court Fees Rules (“HCFR”) (Cap. 4D) – O.62, r.37, First Schedule and Rule 5 of HCFR.
- (7) Work undertaken before commencement of the Amendment Rules will attract costs under the pre-amendment scales of costs – O.62, r.37, O.62, First and Second Schedules.

3.7 Forms

The following forms have been amended : - see Forms 1, 10, 14, 15, 15A, 16, 16A-E, 17, 23, 24, 25, 25A, 27A, 81, 85, 86, 86A, 86B, 87, 93 and 93A in Appendix A to the RHC.

3.8 Typographical errors

These have been corrected.

IV. THE RDC

- 4.1 **Annex B** is the comparison table between the latest draft RHC and **Annex B** the draft RDC.
- 4.2 As set out in the Consultation Paper, since the practice and procedure in civil proceedings in the District Court largely mirror those in the High Court, it was considered appropriate for the two levels of court to have the same set of procedures consequent on the CJR. The RDC should therefore follow the RHC unless there was justification in differences between the two sets of Rules.
- 4.3 The major differences between the two sets of Rules are as follows (some of these were already identified in the Consultation Paper) : -
 - (1) The right of a director to represent a limited company is preserved : RDC O.5A.

- (2) The present position is that leave is generally required to appeal against any decision made in the civil proceedings in the District Court. This is to be preserved. It will be different from the High Court, where leave to appeal is only required for interlocutory decisions. The provision for appeals as of right will be extended to cover the imprisonment of debtors under Order 49B and the new wasted costs proceedings : - RDC O.58, r.2(2A).
- (3) For taxation proceedings, the District Court will continue to follow its existing requirement of obtaining a certificate for counsel. The “two-thirds cap” under RDC O.62, r.32(1A) will also be preserved.
- (4) The judge shall retain the power to frame the issues in lieu of pleadings under RDC O.18, r.22.
- (5) Interrogatories will continue to be administered only with leave under RDC O.26.
- (6) The judge may, in the exercise of his discretion, excuse a party from compliance with any rule under section 72(5) of the District Court Ordinance (“DCO”), Cap. 336 as at present.

4.4 The Steering Committee decided to retain the provisions referred to in paragraphs 4.3(4) and (5) above in the light of the comments received during consultation.

4.5 Further, the provision relating to revocation of interlocutory orders upon cause shown under RDC O.32 and the provision regarding the charging of partnership property in RDC O.50, r.16 are also retained. The introduction of leave to appeal in Employees’ Compensation cases is no longer pursued.

4.6 The major differences between the new and existing RDC are : -

- (1) The repeal of automatic directions and filing of memorandum of agreed directions under the existing RDC O.23A. The new RDC O.25 will enable the court to have greater case management. However, parties will still be able to agree directions through the questionnaire to be filed prior to the case management conference. (cp. RHC O.25). Note also the effect of the transitional provisions: see RDC O.25, r.13.

- (2) The court will have the power to strike out an action where the plaintiff fails to appear at the pre-trial review : - RDC O.25, r.4(1). (cp. RHC O.25, r.1C(1))
- (3) The master will be given a general power to conduct an assessment of damages : RDC O.37. (cp. RHC O.37)
- (4) Pre-action discovery will apply to all actions rather than just those involving personal injuries or death : RDC O.24, r.7A. (cp. RHC O.24, r.7A)
- (5) The new RDC O.62 will follow the amendment to RHC O.62 with the addition of costs-only proceedings covering an amount of or under \$1 million.
- (6) The procedure for appeals to the Court of Appeal (in particular the seeking of leave to appeal) will be aligned with those in the High Court and the application for leave will be inter partes (unless the relevant hearing below was ex parte): RDC O.58. (cp. RHC O.59)
- (7) Further evidence can only be adduced on special grounds in appeals from master to judge in chambers, as in the High Court : RDC O.58, rr.1(4). (cp. RHC O.58, r.1(5))

4.7 Draft RDC Orders 1, 24, 25, 34, 37, 58 and Schedules to Order 62, highlighted with the amendments, are at **Annex C**.

Annex C

V. OTHER RELATED SUBSIDIARY LEGISLATION

5.1 High Court Fees Rules (“HCFR”) (Cap. 4D) District Court Civil Procedure (Fees) Rules (Cap. 336C)

The circumstances under which the fees for taxation of costs under the HCFR will be charged are clarified. The fee level for an application by a person subject to a vexatious litigant order for leave to institute or continue proceedings will be prescribed after consultation with the Administration and relevant parties – Items 19,

19a and 25 of the HCFR. Similar amendments will be made to the District Court Civil Procedure (Fees) Rules (Cap. 336C).

**5.2 High Court Suitors' Funds Rules (Cap. 4B)
District Court Suitors' Funds Rules (Cap. 336E)**

Having regard to the amendments to O.22 of the RHC to provide that a plaintiff will have 28 days to accept a Sanctioned Payment or Sanctioned Offer, consequential amendments will be made to rule 16 of the High Court Suitors' Funds Rules. Similar amendments will be made to the District Court Suitors' Funds Rules.

5.3 Lands Tribunal Rules ("LTR") (Cap. 17A)

(1) Rule 14(2) of the LTR will be amended to make it clear that the powers conferred by that rule are in addition and without prejudice to the general case management powers of the Tribunal (cf. paragraph 3.7 of the Consultation Paper).

(2) Meanwhile, the Steering Committee is consulting the two legal professional bodies on the proposed introduction of a leave requirement for interlocutory and final appeals from the Lands Tribunal to the Court of Appeal. If the proposal is to be pursued, further amendments to the LTR will be made.

5.4 The amendments to be made in the above draft Rules can be seen on the CJR website.

VI. COMMENTS SOUGHT

6.1 The Steering Committee would welcome any comments on the revisions to the draft subsidiary legislation. As can be seen above, the major differences between the latest draft RHC and the previous draft RHC have been highlighted. The major differences between the draft RDC and the latest draft RHC have also been detailed.

6.2 The Steering Committee would be grateful for comments by 16 November 2007. Having regard to the tight legislative timetable, adherence to this deadline for comments is essential so as to enable

the Steering Committee to take forward this legislative exercise without delay. Please send your comments to the Steering Committee by any of the following means : -

Mail : Secretary,
Steering Committee on Civil Justice Reform
LG2, High Court Building,
38 Queensway

Fax: 2501 4636

E-mail: secretary@civiljustice.gov.hk

- 6.3 It may be useful for the Steering Committee to be able publicly to refer to and attribute comments received in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Steering Committee will assume that the response is not intended to be confidential.