31 August 2012

Mr Rimsky Yuen, SC, JP
Secretary for Justice
Department of Justice
4th Floor, High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Rimsky,

Class Action in Hong Kong

The Hong Kong General Chamber of Commerce would like to share with you our concerns about the recommendations put forward in the Law Reform Commission's ("LRC") report on class action lawsuits released earlier this year.

We continue to have strong misgivings over the suitability of a class action regime in Hong Kong and are doubtful about the benefits that such a legal scheme would bring. Despite the LRC's detailed report and the arguments put forth, we remain unconvinced that a case has been adequately made to support the introduction of class actions in Hong Kong.

As pointed out in our earlier response to the 2009 consultation, adequate avenues already exist for pursuing claims, from special courts for small claims to labour and equal rights tribunals. A new regime would therefore be superfluous and wasteful.

We are also wary of the risks inherent to class action. If overseas experience such as the United State is of any indication, such an arrangement could have the undesirable effect of introducing uncertainty into the operating environment while encouraging abuse.

A paper setting out our views is attached for your consideration.

We hope you will give our comments due consideration and would be more than happy to engage you and your office in further discussions on the issue as appropriate.

Sincerely,

C K Chow
Chairman

Att.

Proposed Class Action Regime for Hong Kong

We refer to the report issued by the Law Reform Commission ("LRC") on 28 May 2012 entitled "Class Actions" ("the Report"). The Report recommends – albeit in heavily qualified terms – a new "regime" for class actions in Hong Kong.

2. The Chamber is of the view that the Report provides no credible case for the introduction of a new class action regime in Hong Kong. If any changes to the existing judicial system are needed, that conclusion can only be reached after conducting a proper evaluation of benefits and costs in Hong Kong, which is noticeably absent in the Report.

3. The proposed selection of one particular sector- i.e. consumer claims- as a "guinea pig", is not supported by any logical argument, is of dubious legal validity, and exemplifies what is conveyed by so much of the report, that the LRC appears to be grasping at justifications for legislation which is neither established as necessary nor presented as adequately considered.

4. In our letter dated 12 February 2010 to the LRC Class Actions Sub-Committee, in response to its Consultation Paper which preceded the Report, we pointed out that there appeared to be insufficient evidence to justify such a regime in Hong Kong. Given the danger of fostering a "litigation culture" through the encouragement of such actions and the other risks identified in the Report itself, we recommended that there should be strong evidence of benefits to the public interest in Hong Kong, and overwhelming support amongst the parties concerned, for the introduction of any new regime on class actions. Regrettably, such evidence is noticeably lacking in the Report, and it is clear from the Report that there is no universal support for the proposals. On the contrary, opinions are highly divided, even amongst the legal profession itself.

Should a class action regime be introduced?

5. As regards evidence, the Report contains a generic list of potential benefits and risks of class actions only, relying heavily on a book by Professor Rachael Mulheron, but there is no proper attempt to evaluate these benefits and risks in the Hong Kong context. This is worrying, because it is exactly such largely academic assessment which forms the basis for the Report's "recommendation" that there is a "good case for the introduction of a comprehensive regime for multi-party litigation". Clearly, there ought to be a proper, detailed evaluation of the costs and benefits of such a regime in Hong Kong before any further steps should be taken.

6. As regards support, it is clear from the Report that opinions are highly divided on both the concept of the proposed regime itself, and specific aspects of the proposals. In particular, there is strong opposition, on both, from significant segments of the legal profession itself. Given that the legal profession would seem to be obvious beneficiaries of such a regime in financial terms, if (as is the stated intention of the proposals) it results in increased litigation (whether acting for plaintiffs or defendants), any criticism of the proposals from the legal profession should be taken particularly seriously.

The existing facility for representative actions

7. As a matter of fact, the Report itself acknowledges that the Rules of the High Court already provide a facility for representative actions. The Report refers to the fact that a

Report by the Chief Justice's Working Party on Civil Justice Reform eight years ago criticised the existing Rules as "inadequate and restrictive", but does not explain whether this is still the case, and if it is, why the Rules cannot be amended to make them adequate and less restrictive, as opposed to introducing a new legislative regime. If change is needed, and the Report as noted above has produced no convincing evidence that this is the case, we agree with the Hong Kong Bar Association that incremental change using the existing Rules would be preferable.

8. In supporting the introduction of legislation rather than using the existing Rules of the High Court, the Report again places heavy reliance on Professor Mulheron's book, rather than the specific costs and benefits of the Rules versus legislation in the Hong Kong context.

The Report discriminates against the retail sector, small investors, employees and other potential claimants

9. The Report recommends that the class action regime be introduced first for consumer cases, before being extended more generally. It gives three reasons for this proposal: (a) consumer cases "would constitute a large segment (or probably the majority) of cases suited to class actions"; (b) there is an existing mechanism for publicly-funding consumer actions, namely the Consumer Legal Action Fund ; and (c) an incremental approach could reassure those with reservations about a class action regime. These reasons are questionable, to say the least:

- No empirical evidence is provided to show that consumer cases (as opposed to, say, claims by small investors, employees, hospital patients, or victims of environmental damage such as discharge of plastic pellets) constitute the majority of cases "suited to class actions";
- To justify starting with the consumer actions because there is existing funding is not a valid reason. It is equivalent to the "tail wagging the dog" or "putting the cart before the horse". There should be real evidence that class actions are necessary for consumer actions over other claims before any proposal to introduce class actions is implemented, irrespective of whether funding is available; and
- To say that an incremental approach will satisfy concerns about the introduction of a class action regime does not make sense, when the Report is saying that consumer claims probably constitute the majority of cases. That is hardly an incremental approach!

10. Therefore, we think it is unfair and discriminatory to single out one sector as a "guinea pig" to test out this highly controversial proposal. In fact, the retail sector is already struggling to comply with new, broad and vaguely worded prohibitions and offences in the recently adopted competition and unfair trade practices legislation.

Specific proposals: public funding and "opt-out"

11. Although it is difficult to ascertain from the Report exactly what the envisaged regime would look like, there are two aspects which would certainly be new, namely the proposals that class actions would be publicly funded, and that there would be an "opt-out", as opposed to "opt-in", approach. Nonetheless, it is clear from the Report that on these two aspects, the proposals have attracted limited public support, and that opinions, even within the legal profession, are highly divided.

(a) Funding of Class Actions

12. The Report reviews various options for funding class actions, in particular the choice of private funding through litigation funding companies ("LFCs"), or public funding. The Report notes strong support for the private funding model from several major law firms, and that the Hong Kong Bar Association opined that a further, more detailed consultation on this issue was needed before reaching any conclusion. And yet, it is remarkable that the Report recommends, without any proper reasoning, that the public funding model should be adopted, through injecting extra public resources into the Consumer Legal Action Fund as a first step. On the private funding model, the Report merely states that:

> "We have come to the conclusion that it is not appropriate to permit LFCs to operate in Hong Kong at this juncture, as the community at large do not accept the idea of funding litigation for profit. In any event, any adoption of LFCs would be premature without changes to the law relating to maintenance and champerty."

. The flaws in this reasoning are obvious, one could equally say, based on responses to the consultation, that the community at large does not accept that public resources should be used for private litigation.

13. The Report itself acknowledges that a complimentary costs regime is essential to the functioning of a class action regime. Private litigation funding is going on in Hong Kong; the law on champerty and maintenance is unclear; the courts have attempted to tackle the issue several times in recent years; yet the Report seeks to introduce a new class action regime whilst avoiding these important issues, favouring instead simply an expanded the role for the Consumer Council.

14. In fact, the proposal for public funding is highly controversial, and raises the following issues of principle:

1) Is it fair on taxpayers as a whole, the vast majority of whom have no need or wish to resort to litigation, to be required to fund private litigants (beyond the existing Legal Aid Scheme), instead of their tax contributions being used for matters which will benefit a much larger group of people, such as the provision of financial assistance for the elderly, public housing or environmental protection?

2) In particular (regarding the Consumer Legal Action Fund), is it fair that taxpayers should be required to help purchasers of non-essential or luxury products or services (such as cosmetic surgery) to seek redress if things go wrong? This is not a theoretical question: it has been a live and controversial issue in the UK recently as to whether taxpayers should be required to help women with (privately- commissioned) cosmetic breast implants pay for the cost of remedial surgery when they turned out to be contaminated.

3) Is it fair to make the assumption that only plaintiffs need financial help and access to justice, and that defendants always have "deep pockets" and do not deserve equal access to justice? What about businesses with thin margins or low turnover which might be on the receiving end of such litigation, and actually be innocent? The Report does not explain why this proposal is compatible with the principle enshrined in Article 10 of Hong Kong's Bill of

Rights that all persons are equal before the courts- or indeed the presumption of innocence.

15. These are highly important issues on which further consultation would clearly need to take place, if any proposal on class actions is to be progressed.

(b) "Opt-out"

16. We note that the majority of respondents to the consultation (including significant segments of the legal profession) actually opposed the opt-out approach, and yet the Report still proposes this approach. The arguments are unconvincing. For example, the idea that "opt-out" is better for defendants because it would give them "closure and finality" over the risk of being sued is hypothetical and unrealistic. Clearly, defendants would be much more concerned about the adverse financial impact on them and their shareholders that "opt-out" would have, in artificially inflating the damages awards that would otherwise be available, by the inclusion in the class of members who might have no interest in litigating or cannot even be located.

17. We strongly believe as a matter of principle that any person who wishes to litigate should make a conscious decision to do so. To force them to litigate unless they make a positive decision to opt out is the wrong way round. What happens if they were absent or did not open mail? Is it fair that they should be precluded from litigating in their own right? Such an outcome would seem to conflict with the right of access to the courts under Article 35 of the Basic Law, as the Report itself acknowledges. The Report states that this interference is permitted because it pursues a legitimate aim and is proportionate. We can see no support in the Basic Law for such an exception, and the Report points to no other basis for such an exception.

18. We recognise the importance of access to justice for all, including those who are less educated or advantaged. But if a claimant cannot be located or will not come forward at the outset of an action, why should they be any more likely to come forward or be found later when an award/settlement has been made? The answer implicit in the Report is: because they were not interested when there was no money on the table, but only legal bills and the risk of adverse costs; yet when victory is won, they suddenly want to share in the spoils. And if they can truly never be found, they do not benefit from the class action anyway. This begs the further question: how do you quantify a claim when you do not know how many claimants there are?

19. In conclusion, we do not subscribe to the recommendations in the LRC Report favouring the introduction of class action in Hong Kong. We do not think a plausible case has been demonstrated on the benefits that such a system would bring or and question whether this would be in the best interest of Hong Kong. We therefore strongly advocate against the introduction of class action, which we view as an inefficient legal facility that will ultimately result in Hong Kong becoming worse off economically and socially.

HKGCC Secretariat

August 2012