

By Andrew Dale and Janie Wong

Litigation and Arbitration, Hong Kong

This article appears in the March 2009 issue of Asian-Counsel Magazine.

From 2 April 2009, Hong Kong will experience the effects of important changes to its civil procedure. The Civil Justice Reforms ("CJR") are designed to make civil procedure more efficient, less costly and encourage settlement. In particular, the Courts should be managing cases more actively.

This article focuses on some key points that in-house counsel should be aware of to equip themselves for the implementation of the CJR. More than ever, in-house counsel will need to be an intrinsic part of the litigation team and understand the relevant rules and procedure.

Forewarned is forearmed

As part of their duty to manage cases actively, the Courts are likely to be stricter with the procedural timetable, particularly in relation to "*milestone dates*". These include dates for a case management conference, pre-trial review, the trial, or a period in which a trial is to take place. Once the "*milestone dates*" are fixed, they will be very difficult to change.

Consequently, plaintiffs may have an advantage at the start of litigation as they could have plenty of time to prepare before commencing proceedings. On the other hand, defendants will be at a disadvantage as the Courts are likely to be more reluctant to grant time extensions or extensions will be much shorter. Therefore, potential defendants need to be anticipating and preparing for the launch of proceedings.

Litigation culture will need to change. Changing solicitors or acting in person will not be an excuse for seeking an extension or adjournment. Writs cannot just be left for a few days. They need to be dealt with straightaway. Every day is going to be crucial.

Before the commencement of formal proceedings, disputes involving companies will need to be referred earlier at least to in-house counsel if not to external lawyers. Companies should be prepared, among other things, by having appropriate knowledge of their documents and use of efficient internal reporting systems.

No more bare denials

It will no longer be possible to muddle through pleadings with the expectation they can be simply amended later. Plaintiffs will need to state their cases with great care from the start. The Courts will be less inclined to allow amendments to pleadings unless they are necessary either for disposing fairly of the cause or matter or for saving costs.

Defendants will be expected to prepare substantive defences. Gone are the days of "*denied, denied, denied*". Parties who wish to deny any allegation in a statement of claim or counterclaim must state reasons and provide their own version of events, if appropriate. At present, parties are also free to plead inconsistent and alternative facts. After the CJR, parties will only be able to do this where they have reasonable grounds for

doing so.

Ensuring that a party's case is off to the right start and continues in this fashion will require significant contribution and assistance from in-house counsel.

Statements of truth

After the CJR, pleadings, witness statements and expert reports must be verified by a "*statement of truth*".

Failure to verify the pleadings or making false statements without an honest belief may lead to serious consequences.

Although legal representatives will be allowed to sign a statement of truth for pleadings on behalf of a client, a solicitor must do so in his/her own name in addition to the name of the firm to which he/she belongs. It is therefore likely that most solicitors will require clients to sign the statement of truth.

In-house counsel or those signing the documents will need to be fully informed and up to speed on cases before putting pen to paper.

Increased use of mediation

The Courts will be encouraging parties to use alternative resolution procedures to facilitate the settlement of disputes. Among other things, this will be achieved through a new Practice Direction 31 on mediation. The Practice Direction will require legal representatives to explain fully to clients about mediation and the consequences of their company's conduct. Although this Practice Direction is not due to come into effect until 1 January 2010, even now, the Courts are taking the view that a party who chooses to ignore the Courts' suggestion of mediation should not be surprised if the Courts seek an explanation from that party

for not making attempts in mediation when it deals with the question of costs.

In-house counsel are well advised to familiarise themselves with mediation processes and the consequences of failure to participate in them, so that they are ready to ask questions (and perhaps even push their legal representatives) regarding mediation for their case(s). Additionally, companies will need to identify the appropriate person(s) who will have the authority to deal with the mediation and agree any settlement.

Front loading of costs

In-house counsel should be aware that despite the intention of the CJR to lower costs, in some circumstances, costs may be increased or there may be some front loading of costs. As well as the need to plead cases substantively which may require more detailed work, another example is the need for the involvement of the trial advocate at an earlier stage (higher rights of audience for solicitors in the High Court are not yet in place, so this means instructing barristers earlier). Contingency fees and conditional fees are still not allowed after the CJR, although consideration is being given to the latter.

The above could nevertheless contribute to settlement in two ways: (1) parties will be in a position earlier to know the strengths and weaknesses of cases; and (2) in-house counsel's need to budget for and justify the payment of potentially significant fees at the beginning of a case may encourage early settlement or the use of mediation.

Conclusion

The CJR will require quicker action, more involvement and personal responsibility for in-house counsel. Solicitors, barristers and judges have had and are undergoing

extensive training to prepare for the changes. It is equally important for in-house counsel, particularly those without a litigation background, to be aware of the changes and the consequences it will have for them.

In fact, the Judiciary has already begun implementing the spirit of the CJR. Therefore, in-house counsel would be wise to try to attend training sessions and/or speak with their current legal representatives now. Failure to do so may lead to frustration and financial pain at a time when it is least needed.

For more information about the CJR, please contact:

Robert Pé

Partner, Hong Kong
COUDERT BROTHERS in association with
ORRICK, HERRINGTON & SUTCLIFFE
LLP
+852 2218 9191
rpe@orrick.com

Adrian Yip

Partner, Hong Kong
COUDERT BROTHERS in association with
ORRICK, HERRINGTON & SUTCLIFFE
LLP
+852 2218 9175
ayip@orrick.com

Andrew Dale

Of Counsel, Hong Kong
COUDERT BROTHERS in association with
ORRICK, HERRINGTON & SUTCLIFFE
LLP
+852 2218 9178
adale@orrick.com

www.orrick.com