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Welcoming the Civil Justice Reforms: Hong Kong

After almost a decade of preparation and debate, the Civil Justice Reforms (CJR) are finally coming into effect on 2 April 2009. The CJR, modelled on the English Woolf reforms adopted in 2000, aim to improve the efficiency of litigation by allowing active case management by the courts and imposing new requirements at various stages of the proceedings. This article briefly highlights a number of major changes under the CJR.

Active case management

The new rules require the parties to complete a timetabling questionnaire within 28 days of the close of pleadings to disclose background information about the case and propose or agree on draft directions. If agreed, the directions can be made by the court on paper. Otherwise, a case management summons may be necessary to resolve any differences. In either case, the court will be responsible for setting the timetable and fixing dates for milestone events, including case management conferences, pre-trial reviews and trial dates. Once set, these milestone dates can be changed only under exceptional circumstances.

Under this new system, the parties will find it more difficult and costly to employ delaying tactics because the timetable is fixed to prevent unnecessary applications that waste time and resources for both parties.

Statement of truth

Under the CJR, all pleadings, witness statements and expert reports must be verified by a statement of truth. For corporations, this statement must be signed either by a person in a 'senior position' in the company or by its lawyers. The statement is designed to prevent the parties from making allegations that they cannot justify. False statements of truth are a contempt of court and the penalty can range from fines to imprisonment. The introduction of this requirement will act as a strong deterrent for those who seek to delay the claims by making untruthful statements.

Sanctioned offers and payments

Another novel feature introduced by the CJR is the concept of sanctioned offers and sanctioned payments. Under the new rules, the plaintiff or defendant can pay a sum of money into court as an offer or payment to settle the dispute. The other party may choose to accept the sum any time before the judgment is given. However, if the other party chooses not to accept the sum and subsequently obtains a lower amount in the judgment, then the court can require that other party to pay all the costs incurred after the time an offer or payment was made. Interestingly, the court can also order that party to pay interest up to the judgment date plus 10 per cent (which stands at 18.192 per cent per annum as of 1 January 2009).

Costs-only proceedings

Originally introduced under the Woolf reforms, costs-only proceedings are designed to deal with situations

in which the parties have resolved the substance of the dispute and have agreed on who will pay the costs. The only issue that remains outstanding is the amount to pay. Under the CJR, the parties can initiate a proceeding solely to resolve this issue. This is not possible under the existing rules.

The hearing

Other substantive amendments under the CJR relate to the hearing and include the court's power to order the appointment of a single joint expert, limit the number of witnesses giving evidence and limit the time taken by a party in presenting its case.

Conclusion

The reforms implemented by the CJR, along with the new underlying objectives and the promotion of proactive case management, are all long overdue changes to modernise Hong Kong's legal system. Despite the delays, these changes have come just in time for the expected surge in economic-crisis-related litigation. It will be interesting to see how effective the CJR amendments are in achieving their objectives in the light of the expected increase in the number of court cases.

Updates on the enforcement process in the PRC

Enforcing judgments in the People's Republic of China (PRC) is often considered both challenging and unpredictable. This is especially the case outside the main urban areas, where foreign parties may find that the courts tend to favour local parties.

In recent years, however, the PRC has taken steps to improve the legislative framework for enforcing judgments. The amendments to the PRC Civil Procedure Law in October 2008 (the CPL 2008) were viewed as a step in the right direction. However, since the amendments came into effect, the PRC courts have become aware of the need to further detail the procedures for dealing with the applications. The publication of the Interpretation of the Supreme People's Court on Several Issues Relating to Enforcement Procedures under the PRC Civil Procedure Law (the Interpretation) on 10 November 2008 has provided further guidance to the CPL 2008.

Two important clarifications are explained below.

Objections to enforcement

Under the CPL 2008, an application for enforcement of civil judgments is generally handled by the People's Court of First Instance (the lower court). A party, including – significantly – an interested third party, who wishes to challenge such an application may raise objections before the lower court and the lower court will have 15 days to examine the objection. If the objection is dismissed, the party may apply to a higher level People's Court to review the decision.

However, it was unclear under the CPL 2008 what procedures would be adopted by the higher court in reviewing the decisions. Under the Interpretation, the application to the higher court can now be forwarded by the lower court as well as submitted directly by the party. The higher court, comprised of a three-judge panel, must then make a decision within 30 days of the submission for review. In special circumstances, this period may be extended by up to another 30 days.

One important point to note from the Interpretation is that even while the enforcement is being challenged, the enforcement process is not suspended. It can be suspended only if a party provides security and the applicant counterparty does not provide similar security to continue the enforcement. If matching security is provided, the enforcing court must continue with the enforcement.

Timelines for handling applications

To speed up the enforcement process, the CPL 2008 provides for a six-month deadline for the lower court to deal with enforcement applications. If the lower court fails to do so within the timeframe, the applicant is free to apply to a higher court for enforcement. However, the CPL 2008 does not state whether the higher court has the power to determine the enforcement process itself or to order the lower court to complete the enforcement.

The Interpretation helpfully addresses these ambiguities by listing the circumstances under which the higher court may order an enforcing court to carry out the enforcement. In general, these apply only if enforcement is still possible. If the original lower court fails to complete the enforcement without reasonable cause by a new deadline, the higher court must transfer the enforcement application to another lower court or may itself deal with the application.

Conclusion

Given the difficulty of obtaining accurate statistics on enforcement rates, it has been fashionable to criticise the PRC's enforcement record. Although some of the criticisms remain valid, the amendments in the CPL 2008 and the recent Interpretation have demonstrated the PRC's determination to improve its enforcement regime. It remains to be seen how closely the PRC courts will adhere to the Interpretation.

More details on the recent Interpretation can be found in an article published in the December 2008 issue of Asialaw, contributed by Freshfields Bruckhaus Deringer lawyers.

Case reports

Hong Kong court rejects misselling claim

In a recent case, the Hong Kong High Court rejected a claim against a bank for negligent advice over the sale of bills of exchange to a customer company. The court stressed that the individual factual circumstances of each case will be paramount in determining whether there has been misselling.

Background

A sales manager for the bank sent a portfolio list to bank customers, detailing the investments offered by the bank, including bills of exchange in a Thai listed company. A customer representative telephoned the sales manager to negotiate an increased offer yield rate and then ordered a first tranche of bills of exchange for US\$5m. Later that same month, a similar call occurred and the customer's representative ordered a further tranche of bills of exchange for US\$5m.

The customer alleged that during those conversations the sales manager made certain representations about the structural and financial situation of the Thai company and that the sales manager recommended that the customer buy the bills of exchange. The Thai company later dishonoured the bills of exchange and the customer lost the money it had invested.

The customer claimed that the bank had voluntarily assumed a responsibility to advise it on the purchase of the bills of exchange (without excluding such responsibility). The customer said that the sales manager had breached that duty by negligently advising the

customer to purchase the bills of exchange. On the basis of that advice, the customer had purchased the bills of exchange and had, as a result, incurred loss.

Judgment

The High Court found that the customer was an experienced and adept investor who was aware of the risks involved with investing in emerging markets paper. The bank was conducting business with the customer on an arm's-length basis in the normal commercial course. The sales manager dealt with the customer's representative in her capacity as sales manager and there was no element of 'private banking' involved. In providing an opportunity to the customer to purchase the bills of exchange, the sales manager had not advised the customer to purchase those products. The decision to purchase the products was solely that of the customer.

The High Court noted that the roles and responsibilities of an advisor and a seller are different. The seller's duty of care is to ensure that no false or inaccurate information is conveyed to the purchaser about the products in question if the purchaser was not aware of such falsity or inaccuracy. It is not easy to determine when a seller becomes or is to be equated with an adviser and is to be burdened with the additional obligations of that role. Whether a bank has assumed that role will depend on what would reasonably be inferred from the bank's conduct against the background of the circumstances of the case.

The High Court considered that in the circumstances of the case and the telephone conversations between the sales manager and the customer's representative, there had not been any assumption of responsibility on the part of the bank and the customer's claim failed.

Commentary

In the context of potential misselling claims connected to the sale of Lehman Brothers-related structured financial products it is important to remember that not all cases are the same.

In evaluating any claim for negligent advice or misselling, clients should examine the nature of the relationship with the customer and the services provided to that customer. The actual circumstances of the sale of a product will also be very important. An early evaluation of the available records and the evidence of

salespeople will be of enormous assistance in deciding whether to defend or settle claims.

Ex-employees' non-compete obligations

On 13 February 2009, the Court of Final Appeal dismissed an appeal by PCCW in which PCCW was seeking an injunction to restrain a former employee not only from disclosing confidential and privileged information belonging to PCCW but also from working for a new employer in a particular area or field of activity to which the confidential information related. The case is interesting because it raises for the first time the extent to which the principles that the courts have applied in restraining solicitors from acting for a new client whose interests are adverse to those of a former client can apply in the employer-employee context.

Background

Mr Aitken was employed by PCCW, a fixed-network operator, as a general manager, regulatory compliance. During his employment, he was privy to certain information, including legal advice given by PCCW's solicitors, relating to fixed-mobile interconnection (FMIC) issues.

In March 2008, Mr Aitken left his employment with PCCW and began employment with CSL, a mobile-network operator. Significantly, PCCW had agreed to waive Mr Aitken's non-compete obligations under his contract of employment.

In June 2008, PCCW began proceedings before the High Court to restrain Mr Aitken from disclosing certain confidential and privileged information to CSL and from having any involvement in FMIC issues at CSL. PCCW sought an interim injunction, pending the hearing of the proceedings, which was granted.

In July 2008, Mr Aitken and CSL applied for the interim injunction to be set aside, on the basis that preventing him from working on FMIC issues amounted to a restraint of trade that was not reasonable in the public interest. The judge agreed and granted a narrower injunction restraining Mr Aitken from disclosing certain specified pieces of confidential information that he identified based on the evidence that had been adduced.

In August 2008, PCCW appealed to the Court of Appeal, seeking an injunction in the original, wider terms. The

appeal was dismissed and, in December 2008, PCCW sought and was granted leave to appeal to the Court of Final Appeal. The appeal was heard by the Court of Final Appeal in early February 2009 and judgment was handed down on 13 February 2009.

The Court of Final Appeal's Decision

PCCW argued that it was entitled to an injunction restraining Mr Aitken from having any involvement in FMIC issues on the basis that he was privy to information that was subject to legal professional privilege. Accordingly, although he was not employed as a solicitor, PCCW argued that the public interest in protecting the inadvertent disclosure of privileged information entitled PCCW to restrain Mr Aitken from working for CSL on FMIC issues. The English case *KPMG v Bolksiah* was relied on as an example in which a person who was not a solicitor (in that case, a firm of auditors) but who obtained privileged and confidential information from a client was restrained from acting for a subsequent client if that client's interests were adverse to those of the former client's. The Court rejected PCCW's arguments.

In doing so, the Court drew a clear distinction between employee-employer cases and solicitor-client cases. In the case of the former, it will generally refuse an injunction to restrict an employee's field of activity unless the restriction flows from an enforceable restrictive covenant. In the latter case, there is a fiduciary relationship and the Court will readily prevent the solicitor from acting for a new client with interests adverse to those of its former client unless it is satisfied that there is no risk of misuse or disclosure of the former client's confidential information. The Court held that this case fell into the former category, because Mr Aitken was not a solicitor while at PCCW. He was therefore simply an ex-employee.

Accordingly, the Court held that an injunction restraining Mr Aitken from involvement in FMIC issues would amount to a restraint of trade that was not reasonable in the public interest and should not be granted. If PCCW were entitled to put an embargo on Mr Aitken's post-employment activities in the manner proposed, that would cut across the well-established principles on the protection of trade secrets and the prevention of restraint of trade that apply in employer-employee cases. In other words, it would allow PCCW

greater protection than it ordinarily would have been entitled to under the relevant employment contract.

Conclusion

The case re-affirms the principle that in the absence of an enforceable covenant, the courts will not prevent a former employee from working for a new employer whose interests may be adverse to those of the former employer even if the ex-employee possesses legally privileged information that is potentially relevant to those interests. In line with a long line of cases concerned with the protection of trade secrets, the courts will only grant an injunction to restrain the former employee from disclosing such information. In doing so, it is noteworthy that the Court expressly left open the question of possible relief against, for example, in-house lawyers who change jobs to take up a position with a company on the other side of a contentious issue or in-house lawyers who move to private practice as solicitors to act on the other side of a contentious matter.

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