

Law Society In-House Lawyers' Committee

Annual Conference – 24th September 2014

SPEECH

by the Hon. Mr Justice Fok PJ

1. It is a pleasure to address you today on the occasion of your annual conference. That pleasure is in no way diminished by the fact that I am only here because the Chief Justice is overseas this week and was therefore unable to accept the invitation to speak. On the contrary, the pleasure is enhanced by my association with the in-house legal community in my capacity as Patron of the Hong Kong Corporate Counsel Association. The HKCCA, established in 2003, complements the Law Society's In-House Lawyers' Committee in that it serves as a community for corporate counsel who are not necessarily members of the Law Society. More significantly, the existence of both the HKCCA and your Committee is a reflection of the increasingly important role played by in-house lawyers in today's corporate world.

2. Natural selection acts, we are told, by competition.¹ Although hardly yet an endangered species, lawyers are no different in this regard to other organisms that have had to adapt in order to prosper or even survive. Lawyers in Hong Kong are certainly no strangers to the need to adapt to change. These changes have sometimes been fundamental, such as the entirely new constitutional arrangements brought about by the transfer of sovereignty in 1997. Developments in our laws have also had significant practical consequences for in-house lawyers and the businesses in which they are employed. An obvious

¹ Charles Darwin, *The Origin of Species*, Chapter XIV

example of this is the Personal Data (Privacy) Ordinance.² In-house lawyers in Hong Kong are now faced with another significant new development in the law – appropriately enough in the context of evolutionary theory – in the form of the Competition Ordinance.³

The Competition Tribunal in the context of the Competition Ordinance

3. You will likely all be familiar with the legislative position so far. The Competition Ordinance was enacted in June 2012. Its avowed purpose is “to prohibit conduct that prevents, restricts or distorts competition in Hong Kong and to prohibit mergers that substantially lessen competition in Hong Kong”.⁴ That it does by the introduction of the three competition rules: namely, the First Conduct Rule, the Second Conduct Rule and the Merger Rule. The Ordinance also establishes a Competition Commission and a Competition Tribunal.

4. The Competition Commission is currently in the process of drafting guidelines on how it will enforce the Ordinance and its processes for considering applications. These are intended to be finalised by the first half of 2015 after which a formal implementation date for the commencement of the Ordinance will be fixed.

5. It is the latter body – the Competition Tribunal – that I wish to address today. Whilst the Commission is established to implement the competition rules and its role is to promote compliance with the Ordinance, it does not have power to adjudicate on whether the Ordinance has been contravened. Under the Ordinance it is for the Tribunal to adjudicate on that issue and to award penalties. In doing so, the legislation has adopted what is referred to as a

² Cap. 486 of the Laws of Hong Kong

³ Cap. 619 of the Laws of Hong Kong

⁴ Long Title to Cap.619

judicial system of enforcement, which is contrasted with the administrative system of enforcement (where, for example, the equivalent of the Competition Commission makes final competition law determinations).⁵ In this respect, the position in Hong Kong is different to that pertaining in the competition-law enforcement regime in, for example, the European Union, the United Kingdom and China but similar to that in Australia, Canada and, in relation to Department of Justice proceedings, the United States of America.

6. Time does not permit me to digress at any length into the merits and demerits of the two alternative enforcement regimes. A principal criticism of the administrative system is bias, which causes the personnel in competition authorities responsible for prosecution to be reluctant to depart from decisions reached by those investigating anti-competitive behaviour. Against this tendency to bias in an administrative system of enforcement, judicial systems of enforcement are criticised for delays and an inability to guarantee the same level of professional specialisation as exists within competition authorities. The competition law regime in Hong Kong has progressed beyond that debate and has chosen a judicial system of enforcement.⁶

7. Given the choice of a judicial system of enforcement under the Competition Ordinance, it is relevant to examine whether the Competition Tribunal will be able to constitute a fair, efficient and effective forum for the resolution of competition law issues. I start with an overview of its jurisdiction.

⁵ *Competition Law Enforcement: Administrative versus Judicial Systems*, Daniel Zimmer, paper presented at 9th ASCOLA Conference Warsaw on Procedural Fairness in Competition Proceedings, 26-28 June 2014

⁶ Under the Telecommunications Ordinance (Cap.106) an administrative system of enforcement is administered by the Communications Authority with appeals from decisions of the Communications Authority being made to the Telecommunications (Competition Provisions) Appeal Board. It is worth noting, in this context, that what might have been a dichotomy between the enforcement regimes respectively administered by the Competition Commission and the Communications Authority would appear to have been removed by the intended repeal of the prohibitions on anti-competitive conduct in sections 7K, 7L and 7N of the Telecommunications Ordinance.

An overview of its jurisdiction

8. The Tribunal is established under Part 10 of the Ordinance as a “superior court of record”.⁷ This distinguishes it from an inferior court, whose decisions are subject to the supervisory jurisdiction of the Court of First Instance. It is constituted by the judges of the Court of First Instance of whom one is appointed by the Chief Executive as President⁸ and one as Deputy President.⁹ There is no lay member of the Tribunal but the Tribunal may appoint one or more specially qualified assessors to assist in the disposal of proceedings, although the decision remains that of the members of the Tribunal only.¹⁰

9. Although a superior court of record, the Tribunal has limited subject matter jurisdiction as set out in the Ordinance.¹¹ The types of proceedings that will normally be encountered in the Tribunal are:

- (1) Applications for Review¹² – being reviews of determinations of the Commission as to whether particular activity contravenes the three competition rules;
- (2) Enforcement Actions¹³ – being applications by the Commission to enforce the rules or commitments accepted by the Commission to

⁷ Section 134(2)

⁸ Section 136 – the Hon. Mr Justice Godfrey Lam has been appointed as President of the Tribunal for a period of 3 years w.e.f. 1 August 2013

⁹ Section 137 – the Hon. Madam Justice Queeny Au-Yeung has been appointed as Deputy President of the Tribunal for a period of 3 years w.e.f. 1 August 2013

¹⁰ Section 141

¹¹ Section 142(1)

¹² Under Part 5 of the Ordinance, abbreviated as CTAR

¹³ Being applications for enforcement of commitments under Part 4 of the Ordinance and for enforcement of the competition rules under Part 6 of the Ordinance, abbreviated as CTEA

address concerns about possible contraventions of the rules and which may include disqualification orders and pecuniary penalties;

- (3) Direct Actions¹⁴, being private actions (referred to as follow-on actions) brought by persons who have suffered loss or damage as a result of an act determined to be a contravention of a conduct rule, or related matters arising out of the same or substantially the same facts¹⁵, or proceedings transferred from the Court of First Instance to the Tribunal¹⁶;
- (4) Miscellaneous Proceedings¹⁷, including (i) applications for the disposal of property under Part 3 (s.57) of the Ordinance, (ii) applications for a financial penalty under Part 12 (s.169) of the Ordinance or (iii) any other proceedings commenced in the Tribunal.

10. The Ordinance confers on the Tribunal the same jurisdiction to grant remedies and reliefs, equitable or legal, and the same powers necessary for the exercise of its jurisdiction, as the Court of First Instance.¹⁸

11. Having briefly described the jurisdiction of the Tribunal, it is now useful to look at the framework of the proposed procedural rules and practice directions. My comments today are, of course, subject to the important caveat that these are merely proposed rules and practice directions and they will most likely undergo amendment in the light of the comments received in the course of the recent consultation exercise to which I will refer in a moment. So the

¹⁴ These will be abbreviated as CTA

¹⁵ Pursuant to section 142(1)(g)

¹⁶ Pursuant to section 113

¹⁷ These will be abbreviated as CTMP

¹⁸ Sections 142(2) & 143

requirements of the rules and practice directions I shall be commenting on are all subject to change.

The framework of the proposed procedural rules and Practice Directions

12. In terms of its practice and procedure, the Tribunal is authorised to decide its own procedures and may, so far as it thinks fit, follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction.¹⁹ It is specifically required to conduct its proceedings with as much informality as is consistent with attaining justice.²⁰ Other than in proceedings for pecuniary or financial penalties, the Tribunal is not bound by the rules of evidence and may receive and take into account any relevant evidence or information.²¹

13. The Chief Judge has power, after consulting the President, to make rules for the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction and any matters incidental or relating to that.²² In July this year, the Judiciary issued a Consultation Paper on the proposed Rules and Practice Directions.

14. The consultation document, together with the proposed Rules and two draft Practice Directions have been circulated to the Bar Association, Law Society, Department of Justice, Competition Commission and members of the Competition Tribunal Users' Committee²³. Many of you may therefore have already seen or obtained copies of those documents.

¹⁹ Section 144(1)

²⁰ Section 144(3)

²¹ Section 147

²² Section 158

²³ In July 2014, the Chief Justice set up this Committee to advise and review the operation, practice, procedure and rules of the Competition Tribunal and appointed its Chairman (Mr Justice Lam) and Members and Secretary w.e.f. 1 August 2014. There are 8 members including the President.

15. The proposed rules – the Competition Tribunal Rules (CTR) – have been grouped into five substantive parts consisting of a general part and specific parts corresponding to the types of proceedings that may be brought in the Tribunal under the Ordinance.²⁴ Forms are provided (and set out in the Schedule to the CTR).²⁵

16. Since proceedings before the Tribunal are procedurally similar to High Court proceedings – for example, reviews of the Commission’s determinations are similar to judicial reviews in the Court of First Instance²⁶ and follow-on actions are similar to private actions in that court – the CTR have provided generally that the Rules of the High Court (RHC) apply to all proceedings before the Tribunal except when any provision of the RHC is expressly excluded by the CTR or is inconsistent with the Ordinance or CTR.²⁷ This is a broad and general provision but decisions by the Tribunal to dispense with provisions of the RHC will almost invariably be case management decisions and therefore only subject to challenge in exceptional circumstances.²⁸

17. The general rules applicable to all proceedings before the Tribunal in Part 2 of the CTR include rules as to: the service of documents; the publication of notices of application, intervention and addition of parties; case management; hearings; the jurisdiction of the Registrar; appeals; transfer of proceedings from the Tribunal to the Court of First Instance; and supplementary provisions such

²⁴ Part 2 being general rules applicable to all proceedings before the Tribunal; Part 3 being specific rules applicable to reviews; Part 4 being specific rules applicable to enforcement actions; Part 5 being specific rules applicable to follow-on actions; and Part 6 being specific rules applicable to proceedings transferred from the CFI.

²⁵ For: the commencement of proceedings (Form 1); interlocutory applications (Form 2); witness summonses (Forms 3 and 4); appeals to the Tribunal from interlocutory decisions of the Registrar (Form 5); applications for leave to apply for review (Form 6); and originating notices of claim for follow-on actions (Form 7)

²⁶ But, it should be noted, with a considerably shorter time limit of 30 days to make the application and an absolute 3 year limit: section 88

²⁷ Rule 4

²⁸ See Hong Kong Civil Procedure (2014 Ed.) Vol.1 at Note 59/0/55 citing *Cheung Yee-mong v So Kwok-yan* [1996] 2 HKLR 48 and see also *Wong Kar Gee Mimi v Severn Villa Ltd* [2012] 1 HKLRD 887 at §31

as time, sittings, language, translations and amendments of documents. Particular Practice Directions of the High Court will apply to the Tribunal and a list of these is identified in draft Practice Direction No.1.²⁹

18. The transfer provisions which are contained in sections 113 to 116 of the Ordinance may well give rise to interesting issues of practice and procedure. For example, where contravention of a conduct rule is raised as a defence in an action in the Court of First Instance, the Court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are within the jurisdiction of the Tribunal. But how does the transfer operate in practice? Do new Tribunal proceedings need to be commenced? Does the Court of First Instance judge transfer it to himself as a member of the Tribunal? What is to happen to the Court of First Instance proceedings in the meantime? The answers to these questions are not obvious and there may be a case for further clarification either in the CTR or in a practice direction.

19. A more detailed review of the CTR would require more time than is available now so I shall instead seek to draw attention to their more important features which are also highlighted in the two draft Practice Directions: PD No.1 dealing in general with proceedings before the Tribunal and PD No.2 dealing with the important topic of confidential information.

Particular features of Tribunal procedure likely to be of relevance

20. It is clear from the CTR and draft Practice Direction No.1 that proceedings before the Tribunal will be distinguished by three particular hallmarks: first, active case management will be an integral part of the procedure; secondly, the Tribunal will aim to conduct proceedings flexibly

²⁹ PD No.1 §22

according to the facts of the particular matter before it; and thirdly, the Tribunal will conduct proceedings with as much informality as is consistent with attaining justice.

21. The first two of these hallmarks of active case management and flexibility are in substance no more than the consequence of the application of the underlying objectives of the Civil Justice Reform set out in RHC Order 1A. Neither is therefore new and parties and their legal representatives will know what is expected of them, namely a duty to assist the Tribunal and to cooperate with both the Tribunal and their opponents to further the underlying objectives and, in particular, to ensure that cases are disposed of as efficiently, inexpensively and expeditiously as is consistent with fairness.

22. The Practice Direction provides that the Tribunal will indicate, as early as practicable, a target date or range of dates for the substantive hearing of a matter. Realistic timetables leading towards that date or those dates will be laid down and are expected to be strictly observed. This approach is to be commended: focusing the parties' minds and, more importantly, those of their legal representatives on such target dates reinforces expectations and the need to justify any modifications to them on substantial grounds. In applications for enforcement actions and private follow-on actions, case management conferences will be used to identify necessary directions.³⁰ In private follow-on actions, in particular, PD No.1 encourages practitioners to consider alternative methods of dispute resolution such as mediation and notes the Tribunal's adoption of Practice Direction No.31 of the High Court on mediation.³¹

³⁰ PD No.1 §§81 & 93
³¹ PD No.1 §§96 & 97

23. Flexibility is also catered for by the Tribunal's discretion to depart from the RHC in order to conduct the proceedings before it expeditiously and informally or to save costs or where it is in the interests of justice to do so.³²

24. The third hallmark of Tribunal procedure – informality – is specifically mandated by the Competition Ordinance – the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice.³³ Here there is a balance to be struck.

25. There is necessarily a degree of formality simply by virtue of the nature of the Tribunal and its work. The Tribunal is constituted by the Ordinance as a superior court of record, with the same powers as the Court of First Instance and will sit in the High Court Building. The business of the Tribunal is serious and includes making findings of contravention of the law³⁴ and the imposition of financial penalties. The consequences of its decisions may have far-reaching ramifications for business practices in Hong Kong and for individual businesses themselves. In addition, being a court of record, the Tribunal has power to fine or imprison for contempt of itself.³⁵

26. On the other hand, given the injunction to conduct its proceedings with as much informality as is consistent with attaining justice, what might the Tribunal do? In accordance with PD No.1 proceedings before the Tribunal will take place in open court or in chambers and members of the Tribunal are to be addressed in the same way as a judge of the Court of First Instance is addressed.³⁶ PD No.1 does however expressly state that the Tribunal will seek

³² CTR rule 4(3)

³³ Section 144(3)

³⁴ Although criminal proceedings for an offence under the Competition Ordinance may not be brought in the Tribunal: section 171(1)

³⁵ Sections 144(2) and 171(2)

³⁶ PD No.1 §§32-34

to avoid formality in the conduct of hearings³⁷ and it goes on to provide that legal representatives are not required to be robed in the Tribunal³⁸ (nor, as I understand it, will the Tribunal be robed). In effect, although retaining the form of proceedings in the Court of First Instance, proceedings in the Tribunal will, at the very least, immediately appear to be less formal than in court. One can therefore hope that this small concession to informality will infect other respects in which Tribunal proceedings are conducted. There is, of course, a limit to informality since it must not be forgotten that the business of the Tribunal is, as I have already observed, serious. It needs hardly be said that informality that trivialises the proceedings is not to be encouraged – so advocates are unlikely to be welcome to appear in shorts and flip flops or to put their feet up on the bar table during hearings. That said, I see no objection to the Tribunal adopting practices that are commonly adopted in arbitration proceedings, such as: the practice of allowing advocates to remain seated when questioning witnesses and making submissions to the Tribunal; or making refreshments available during the course of a hearing.

27. The rights of audience before the Tribunal are the same as those for the Court of First Instance sitting in its civil jurisdiction. Unless a party acts in person, only barristers and those solicitors with higher rights of audience may appear before the Tribunal in open court. As an audience made up of solicitors, this restriction on legal representation may seem unwarranted or indeed even anti-competitive. However, it seems to me that this is not really surprising given the constitution of the Tribunal as a superior court of record, that is to say a court not subject to the supervision of the Court of First Instance. In effect, it is exercising jurisdiction and powers at the same level of the court hierarchy as the Court of First Instance.

³⁷ PD No.1 §35
³⁸ PD No.1 §36

28. I should add that, although the Tribunal has discretion to give leave to “any other person ... to appear on the party’s behalf”³⁹, this provision is obviously not intended to be used to permit solicitors without higher rights of audience and other in-house counsel to appear before the Tribunal. It is tolerably clear that it is instead meant for situations in which a party acting in person would be entitled to the benefit of a *McKenzie* friend.⁴⁰

29. In keeping with the less formal nature of the Tribunal proceedings, PD No.1 provides that except for private actions where general discovery may be required, there will be no automatic general discovery in proceedings in the Tribunal.⁴¹ In essence, this means that RHC O.24 rr.1 to 6 do not apply to applications for review or for enforcement actions and this has the potential to considerably simplify and reduce the costs of these Tribunal proceedings.

30. Similarly, parties are enjoined by PD No.1 to ensure that they serve no more expert evidence than is necessary and to expect that their experts will be directed to communicate with each other and produce a joint report.⁴²

31. Another useful feature of the procedure which PD No.1 imposes is a requirement for the applicant or plaintiff, upon filing the originating application in various types of case or on transfer of a matter to the Tribunal, to lodge a case summary, being a summary of the proceedings not exceeding 200 words. This will be used by the Tribunal for publication on the Tribunal’s website or elsewhere as the President thinks fit to indicate that proceedings have been commenced in or transferred to the Tribunal and giving a brief description of

³⁹ CTR rule 25(1)(b)

⁴⁰ *McKenzie v McKenzie* [1971] P 33

⁴¹ PD No.1 §51

⁴² PD No.1 §§55 & 56

the proceedings.⁴³ The website to be launched will, I would hope, provide a user friendly and intuitive space explaining the work and procedures of the Tribunal. It should certainly be a significant tool in assisting the Tribunal to operate consistently with the principle of open justice.

32. In addition to general procedures, PD No.1 also specifically addresses other types of applications and actions in the Tribunal, namely applications for review of reviewable determinations, application for enforcement actions, private follow-on actions under Part 7 of the Ordinance, and proceedings transferred to the Tribunal from the Court of First Instance under section 113 of the Ordinance.

33. Finally, I should mention confidentiality. Here again there is a balance to be struck. In proceedings before the Tribunal parties may wish to adduce evidence or file documents which might contain highly confidential commercial information. A party wishing to do so should be protected against that confidential information being disseminated and used for improper or ulterior purposes. Equally, a party should not be able to put pressure on an opposite party by threatening to disclose confidential information by deploying, or requesting discovery of, a document in proceedings before the Tribunal.

34. PD No.2 seeks to set out the Tribunal's practice relating to confidential information in proceedings before it. Sensibly, the Tribunal will decide in the circumstances of the individual case if particular information is to be regarded as confidential and to be accorded confidential treatment.⁴⁴

⁴³ PD No.1 §§40-43
⁴⁴ PD No.2 §2

35. Confidential treatment will only be accorded to information that genuinely requires to be protected and PD No.2 makes the obvious point that, in general, confidentiality cannot be claimed for the entire or whole sections of a document as it is normally possible to protect confidential information with limited redactions.⁴⁵ PD No.2 addresses the manner in which redactions should normally be made.⁴⁶

36. PD No.2 goes on to specify in more detail the procedures for claiming confidentiality for information in an originating process and in documents to be filed and served after the commencement of proceedings. The common theme is that a party will be able to submit or file a redacted copy of the relevant document along with an unredacted version on which the notation “Confidential Treatment Claimed” is marked to indicate that a claim to confidentiality is being made. The Tribunal will then resolve the requesting party’s claim to confidentiality.⁴⁷

37. It appears that PD No.2 does not address the situation of a party wishing to prevent the disclosure of confidential information by way of an opposite party filing that document in Tribunal proceedings.⁴⁸ This may need to be addressed because in principle it would seem right that protection for this confidentiality should be available.

38. Lastly, PD No.2 addresses other procedural aspects in which confidentiality may be relevant including: the annotations to be included on

⁴⁵ PD No.2 §5

⁴⁶ PD No.2 §6

⁴⁷ PD No.2 §§12 (originating process) and 17 (documents to be filed and served after the commencement of proceedings, where there is no consent to the application)

⁴⁸ PD No.2 §14 only applies to documents to be filed and served by the party who wishes to claim confidentiality, not by his opponent

documents for which confidentiality claims are granted⁴⁹; and how hearing bundles are to be prepared where confidentiality is asserted in relation to documents to be included and also how requests for hearings to take place in private should be made⁵⁰.

Conclusion

39. The CTR and Practice Directions are not anticipated to come into force until some time in 2015 and the Tribunal's first case awaits to be heard in the future. It is clear though that much thought has gone into the drafting of this procedural framework. The procedures seek to strike a balance between open justice and the protection of confidential information. Likewise, an attempt is made to promote procedural efficiency and informality. It therefore remains to be seen how well these will serve the Tribunal and whether it will achieve the goal of providing, in the context of competition law in Hong Kong, a means for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.⁵¹ Based on the consultation materials so far made available, there is every reason to think that it will.

40. Thank you.

Joseph Fok
24 September 2014

⁴⁹ PD No.2 §§26-27

⁵⁰ PD No.2 §§29 & 30

⁵¹ This being the 6th of the 8 principles identified by Lord Bingham as constituting the ingredients of the Rule of Law: Tom Bingham, The Rule of Law (2010) at pp.37 and Chapter 8 (Dispute Resolution).