

RIGHTS OF APPEAL
TO THE COURT OF FINAL APPEAL IN CIVIL MATTERS

POSITION PAPER OF
THE HONG KONG BAR ASSOCIATION

Summary

1. The Hong Kong Bar Association supports the proposal set out in the Judiciary's paper dated 10 July 2012 that all appeals to the Court of Final Appeal ("the CFA") in civil matters should be subject to discretionary leave and for the abolition of the present as of right appeal by repealing section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance (Cap 484) ("the Ordinance").

The as of right appeal to the CFA should be abolished

2. The Bar agrees that the existing as of right appeal in civil matters is objectionable as a matter of principle. That right of appeal is available only in a limited class of cases in which the financial limit is satisfied, giving such litigants greater rights compared with all other litigants. The Bar observes that the Court of Final Appeal has construed section 22(1)(a) of the Ordinance in a restrictive manner which places some limit on the number of appeals which are allowed to be brought as of right.
3. The Bar therefore supports the proposal to amend the Ordinance to remove the as of right appeal in civil cases.

The discretionary grant of leave to appeal to the CFA

4. The removal of the as of right appeal will have the effect of reducing the number of appeals to the CFA. The Judiciary's paper refers to a benefit of the Proposal being that it will allow better use of judicial resources as the CFA can focus on hearing meritorious appeals involving questions of great general or public importance or otherwise. Therefore there would be no resource constraints to the grant of discretionary leave to appeal on the "*or otherwise*" ground in a wider range of cases.
5. The Bar is of the view that the primary role of the CFA should be to settle the principles of law to be applied by Hong Kong's lower courts. The Bar is therefore of the opinion that discretionary leave should continue to be granted in cases in which the CA or the CFA is of the

opinion that the question of law involved in the appeal is one which by reason of its great general or public importance or otherwise ought to be submitted to the CFA for decision.

6. The Bar also holds the view that an effective appellate system is a vital part of Hong Kong's civil justice system. The Bar therefore considers that discretionary leave to appeal to the CFA should be available in civil cases in which injustice would be caused by allowing decisions of the lower courts to stand.
7. In the time available, it has not been possible to compile full statistics relating to the number of cases in which the CFA has allowed appeals from decisions of the CA. It is, however, apparent that in the first 15 years of CFA's existence, a significant proportion of appeals from the CA have been allowed following the discretionary grant of leave to appeal. This indicates that a significant number of cases are being wrongly decided by the CA.
8. The Bar is of the view that leave to appeal to the CFA should be granted in order to avoid the possibility of injustice.
9. The possibility of an appeal to the CFA in such cases is provided for by the "*or otherwise*" limb in the present provision of section 22(1)(b) of the Ordinance. The Bar considers that there would be merit in a more liberal exercise of this residual discretion to grant leave to appeal to the CFA.
10. The Bar considers that the statutory bases for grant of leave in other common law jurisdictions set out in the Annex to the Judiciary paper, namely England and Wales, Australia and New Zealand that go beyond questions of great general or public importance may be appropriate bases for grant of leave in Hong Kong. The CFA may consider granting leave under the "*or otherwise*" limb in such cases in Hong Kong and so develop the jurisprudence for future guidance.
11. The Bar supports the proposal for the reasons set out in the Judiciary paper with a view to achieving the benefits at paragraph 20 of the paper. The adoption of the proposal would remove the anomaly created by the present legislation, whilst ensuring that Hong Kong's civil justice system achieves the fundamental objective of deciding cases justly.

Hong Kong Bar Association

Dated: 10th August 2012