

**The 2018 Hong Kong International Commercial Law Conference
Wise Counsel: Litigation and Arbitration in the Asia-Pacific Region
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**Modern Case-Management of Commercial Disputes (Plenary
Session)**

A Hong Kong Perspective

Ms Harris, QC, Hon Justice Alstergren, Hon Justice Riordan, distinguished guests, ladies and gentlemen,

1. It is a pleasure and an honour to have been invited to speak at The 2018 Hong Kong International Commercial Law Conference.

Introduction

2. We are now living in the Information Age. Artificial intelligence, big data, cloud-computing and other advanced forms of digital and information technology have made an immense and profound impact on businesses and markets, local and international alike. The commercial environment has become more diverse and complex, and is changing at an ever-swifter pace. The potential is huge. But the challenges are equally great. Against such a backdrop, this Conference provides an excellent platform and timely opportunity for judges and practitioners specialised in commercial law and dispute resolution from different jurisdictions to come together to share their insights and experiences to address some of the challenges faced by us all. I must congratulate the Organizing Committee for making this Conference possible and a success.

3. The topic that we will discuss this morning is “Modern case-management of Commercial Disputes”. The focus, I am given to

understand, is on the methods by which case-management in the conduct of commercial litigation can be improved for the benefit of the parties, practitioners and the courts by undertaking a comparative approach to how case-management is currently undertaken in different specialist jurisdictions and more saliently in Hong Kong and Australia. To kick off the discussion, I would like to give an overview of the case management now adopted by the commercial court in Hong Kong. I will then briefly describe the Integrated Court Case Management System, an initiative introduced by the Hong Kong Judiciary to enhance the operation of our courts, including the commercial court, by greater application of information technology.

Case Management – a brief overview

4. We all know how important procedure is. It is central to the delivery of substantive justice. It affects access to court and conduct of cases from the time they reach the judicial system until conclusion, including enforcement. It should ideally enable the court to secure a just decision upon the merits according to the substantive law at the lowest practicable costs within a reasonable time. However, like other major common law jurisdictions, Hong Kong's civil justice system had over decades faced tremendous pressures caused by adversarial excesses, including excessive costs, unnecessary delay and excessive procedural complexity. The pressures put on the system were so great that they had to various extents impeded the courts in performing their functions.

5. In April 2009, Hong Kong implemented the Civil Justice Reform to tackle the problems by extensive amendments to the rules of the court. The CJR is underpinned by a set of underlying objectives:¹

- (1) to increase the cost-effectiveness of any practice and procedure to be followed in relation to the proceedings before the court;
- (2) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
- (3) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
- (4) to ensure fairness between the parties;
- (5) to facilitate the settlement of disputes; and
- (6) to ensure that the resources of the court are distributed fairly.

6. These underlying objectives establish the basic principles to guide the courts in managing cases. The rules further imposes a duty on the courts to further the underlying objectives by actively managing cases.² And active case management includes:

- (1) encouraging the parties to co-operate with each other in the conduct of proceedings;
- (2) identifying the issues at an early stage;
- (3) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- (4) deciding the order in which the issues are to be resolved;

¹ Order 1A, rule 1 of the Rules of the High Court.

² Order 1A, rule 4 of the Rules of the High Court.

- (5) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such a procedure;
- (6) helping the parties to settle the whole or part of the case;
- (7) fixing the timetables or otherwise controlling the progress of the case;
- (8) considering whether the likely benefits of taking a particular step justify the cost of taking it;
- (9) dealing with as many as aspects of the case as practicable on the same occasion;
- (10) dealing with the case without the parties needing to attend at court;
- (11) making use of technology;
- (12) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

7. Of course these imperatives can only be achieved if the courts have the necessary powers to do so. So the rules provides the courts with a host of extensive case management powers to facilitate them in discharging the duty to actively managing cases.³ Most of the powers listed already exist, but somewhat patchily, scattered in various provisions of the rules or to be found in the courts' inherent jurisdiction. The rules now draw these powers together and place them on a clear and transparent statutory

³ Order 1B, rule 1 of the Rules of the High Court sets out the court's general powers of management; rule 2 provides that the court may make order of its own motion; and rule 3 empowers the court to give procedural directions by way of order nisi.

footing, thereby creating a scheme for active case management by the court in pursuit of the underlying objectives.

8. The rules further set out a new case management procedure to be followed after the close of pleadings.⁴ Very briefly :

- (1) The parties are (a) required to complete a Timetabling Questionnaire giving specified information and estimates concerning the case with a view to facilitating case management by the court; and (b) to propose directions or a timetable.⁵
- (2) Upon receipt of the Questionnaires, depending on the needs of the case and the reasonable requests of the parties, the court may (a) without a hearing, give directions to the management of the case and fix a timetable for all steps in the action up to trial; (b) fix a Case Management Conference, at which the court will hear the parties and give directions leading up to the trial of the action; (c) direct the plaintiff to take out a Case Management Summons.
- (3) The court-determined timetable will usually map out the milestone dates, including the Case Management Conferences; Pre-trial Review and the trial dates or trial periods. The timetable will also contain non-milestone dates, such as deadline for discovery, expert directions⁶ and exchange of witness statements.

⁴ Order 25, Rules of the High Court, augmented by Practice Direction 5.2 on Case Management.

⁵ In legally represented cases, each party must file a mediation certificate at the same time as the Timetabling Questionnaire.

⁶ Leave from the court is required for adducing expert evidence at trial: see Order 38, Part IV on Expert Evidence, Rules of the High Court.

9. The benefits of a firm timetable are obvious. To name a few, it would set the pace at which the parties and their legal advisers need to work and make deliberate procrastination more difficult. Everyone would be able to assess the progress of the case and to plan and prepare for the next phase. The parties would be better able to consider settlement, knowing where they have to go, how much further there is to go and when the next major tranche of litigation costs has to be incurred. The court would be able to deploy judicial resources more efficiently too.

10. If these benefits are to be enjoyed, the court must be resolute in holding the parties to the essentials of the timetable, hence the innovative concept of “milestone dates”.⁷ As the name suggests, they cannot be moved save in very exceptional circumstances.⁸ They ensure that the parties would duly comply with the overall procedural timetable and at every phase of the timetable, complete all the preparatory steps without warehousing the case. The court would also be able to effectively exercise control and oversee the progress of the case by holding the parties to the milestone dates.

11. Failure to comply with the case management directions are serious matters. The court may impose severe sanctions in the defaulting party, including costs sanctions, payment into court as security for the other parties’ claim or its costs; self-executing unless orders which take effect

⁷ Order 25, rule 1A(a) of the Rules of the High Court.

⁸ Order 25, rule 1B(3)

automatically upon non-compliance;⁹ and wasted costs orders against the legal representatives.¹⁰

12. All these new CJR measures are all available to the commercial court. The judge in charge of the commercial court may, by a practice direction, determine the extent to which they apply to an action in the commercial court.¹¹

13. Further, to cater for the specific needs of commercial cases, two practice directions tailored for the commercial court were promulgated in November 2009.¹² In essence, they further streamline the procedure of the commercial court; regulate various aspects of the procedure such as discovery, witness statement and expert evidence; allow speedy disposal of interlocutory applications by the judge (as opposed to the master); expedite the preparatory steps for trial by standard directions given at the early stage of the proceedings; and enable the court to exercise tighter control on the proceedings overall. In sum, at the very beginning of the proceedings, the parties are already expected to consider all the possible issues which may be contested and need to be determined, frame these issues, and give a realistic estimate of the length of trial for dates to be fixed. It is also the established practice of the commercial court, at the first Case Management Conference, to set the case down for trial.

14. In June 2014, a further practice direction was issued. Practice Directions SL 1.2 addresses one of the most serious problems that haunts

⁹ Order 2, rules 4 and 5 of the Rules of the High Court.

¹⁰ Order 62, rule 8, Rules of the High Court.

¹¹ Order 25, rule 10, Rules of the High Court.

¹² Practice Directions SL 1 and SL 1.1.

commercial cases, especially in heavy and complex ones – discovery of documents.

15. In this Information Age, the ease of instantaneous communication has swamped the performance of the discovery obligation to provide all documents relevant to a case. The problems are most acute in heavy and complex cases. PD SL 2.1 implements a pilot scheme for discovery and provision of electronically stored documents in commercial cases. It applies where the claim exceeds HK\$8 million and there are at least 10,000 documents to be searched for the purposes of discovery; or the parties agree to be governed by it; or the court directs the parties to follow it. The purpose of the practice direction is to provide a framework for reasonable, proportionate and economical discovery and supply of electronic documents for the purpose of discovery. It also seeks to encourage and assist the parties to reach agreement in relation to the discovery of such documents in a proportionate and cost-effective manner. It reminds the parties to observe the following general principles :

- (1) the cost discovering electronic documents must be proportionate to the amounts claimed in the proceedings;
- (2) electronic documents should be managed efficiently in order to minimise the cost to be incurred;
- (3) technology should be used in order to ensure that document management activities are undertaken efficiently and effectively;
- (4) discovery should be given in a manner which gives effect to the underlying objectives of the rules;
- (5) electronic documents should generally be supplied in a form which allows the party receiving the electronic documents the

same ability to access, search, review and display the electronic documents as the party giving discovery; and

- (6) discovery of electronic documents which are of no relevance to the proceedings may place an excessive burden in time and cost on the party to whom discovery is given.

16. The scheme is rather comprehensive and I will not trouble you with the details. The only point that I wish to highlight is that it seeks to make the best use of the available technology on storage, preservation, search, identification and retrieval of electronic documents, with the aim to reducing the burden, time and costs of discovery. The benefits of the scheme are self-evident in heavy and complex cases involving voluminous documentation.

Integrated Court Case Management Scheme

17. While PD SL 1.2 is designed for the commercial court specifically, the Hong Kong Judiciary has been implementing by phases the Integrated Court Case Management System (“iCMS”) across all levels of court. The iCMS is an electronic and digitalised system, aiming at providing more effective and efficient services to the court and court users through the application of information technology in its operation. The scheme will be implemented at the District Court and part of the Magistrates’ Courts first. It will be rolled out at other levels of court, including the commercial court, in due course.¹³

¹³ Legislative amendments are needed to implement various aspects of the iCCM.

18. Very briefly, under the iCMS, court-related processes will generally be given an electronic option, unless it is not viable because of, say, the need to preserve the rules of evidence or impracticability. Various types of electronic services, including filing of court documents, issuance of documents by the court, accepting delivery of documents from the court, conducting search and inspecting documents filed with the court and effecting payment to the court will be available. Electronic inter-party service of documents will also be enabled.

19. Hopefully, the efficiency in the litigants' interaction with the court, case management and resource management will further improve with the application of the iCMS.

Conclusion

20. The iCMS is our first major initiative to improve our courts' operation based on information technology. This must be the right direction for the way forward. For as confirmed by the experiences in other common law jurisdictions, in this Information Age, an approach to procedure that can cope adequately with the demands and meet timely the needs of the ever-changing commercial and legal landscape must be based on digital technology. I am aware of the steps and plans already undertaken by other jurisdictions, such as England, to deploy digital technology to enhance and even reform their procedure. I am sure that there are valuable lessons that we can learn from their experiences. And I look forward to further exchanges of views and sharing of insights at forums such as the present to inform us as to how to improve case management of modern commercial disputes in Hong Kong.

21. Thank you.