

# HONG KONG

## Law and Practice

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## 1. General

### 1.1 General Characteristics of the Legal System

Hong Kong's legal system is based on a combination of the common law and statute. The legal process follows an adversarial system, and is conducted through both written submissions and oral argument.

### 1.2 Court System

The structure of Hong Kong's court system comprises of:

- the Court of Final Appeal, ie, the highest appellate court in Hong Kong;
- the Court of Appeal, which hears appeals on all matters from the Court of First Instance, the District Court, the Competition Tribunal and the Lands Tribunal;
- the Court of First Instance, which has unlimited civil and criminal jurisdiction, and hears appeals from the Magistrates' Courts and a number of tribunals;
- the District Court, which hears civil disputes of a claim value between HKD75,000 and HKD3 million, and also has criminal jurisdiction;
- the Magistrates' Courts, which has criminal jurisdiction only;
- other courts for specific subject matters (which includes the Family Court, the Coroner's Court and the Juvenile Court); and
- tribunals set up by law with jurisdiction to adjudicate disputes in other specific subject matters (such as the Lands Tribunal, Labour Tribunal, Small Claims Tribunal, Competition Tribunal and Obscene Articles Tribunal).

### 1.3 Court Filings and Proceedings

Published judgments and writs of summons/originating summons are publicly accessible. Pleadings and other documents filed over the course of court proceedings are not publicly accessible, and can only be accessed with the court's leave.

Court hearings are generally open to the public with some statutory exceptions. By reason of their nature, certain types of civil proceedings are not open to the public, including (among others):

- ex-parte applications for injunctions or orders of a restraining or compulsory nature;
- matters relating to arbitrations;
- certain matters relating to companies winding up and bankruptcy;
- intellectual property;
- applications to obtain evidence for foreign court; and
- matters relating to children and financial provisions in matrimonial proceedings.

### 1.4 Legal Representation in Court

Barristers have unlimited rights of audience in all courts, as do litigants in person, although a company is generally required to be legally represented before the court.

Solicitors have rights of audience in the District Court and Magistrates' Courts and limited rights of audience in the High Court, but no such right in the Court of Final Appeal. However, solicitor advocates have higher rights of audience before the High Court and the Court of Final Appeal.

Foreign lawyers do not have any rights of audience in Hong Kong courts.

No legal representation is allowed in hearings before the Labour Tribunal and the Small Claims Tribunal.

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

Third-party funding for litigation is generally prohibited in Hong Kong as a tort and a criminal offence, save in exceptional areas as outlined in **2.2 Third-Party Funding: Lawsuits**.

### 2.2 Third-Party Funding: Lawsuits

Third-party funding of litigation is only allowed in three exceptional areas:

- a third-party has a legitimate common interest in the litigation;
- a party has a meritorious claim which they are unable to pursue for lack of sufficient financial resources (however, the court is very slow to allow third-party funding on such "access to justice" grounds for policy reasons, such as the endangerment of the integrity of the judicial process or trafficking in litigation); or
- insolvency proceedings.

Third-party litigation funding in practice is most commonly applicable to insolvency proceedings, in which the court may allow such funding arrangement if there is a legitimate commercial purpose for it.

However, third-party funding in arbitrations (including related court proceedings, see **13.1 Laws Regarding the Conduct of Arbitration**) is allowed under the Arbitration Ordinance (Cap 609) ("AO"). The funded party must promptly disclose the existence of a written funding agreement, under which (among other things) the third-party funder will receive a financial benefit only if the arbitration is successful within the meaning of the funding agreement. The third-party funder need not have an

interest in the arbitration other than under the funding agreement.

## 2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding can be available for both the plaintiff and defendant, namely where the defendant has a counterclaim (and is therefore the plaintiff in counterclaim).

## 2.4 Minimum and Maximum Amounts of Third-Party Funding

There is no minimum or maximum amount that a third-party funder can fund.

## 2.5 Types of Costs Considered under Third-Party Funding

Subject to the funding arrangement as allowed by the court, a third-party funder may fund any and all legal expenses associated with pursuing the claim or defence.

## 2.6 Contingency Fees

Solicitors and barristers are both, pursuant to their respective conduct rules, prohibited from accepting any contingency fee arrangement when acting in contentious proceedings.

## 2.7 Time Limit for Obtaining Third-Party Funding

There is no time limit for a party to the litigation to seek third-party funding.

# 3. Initiating a Lawsuit

## 3.1 Rules on Pre-action Conduct

Hong Kong courts do not impose any rules regarding the parties' pre-action conduct, although the courts have a general discretion to consider the parties' pre-action conduct in costs determinations.

The only exception is a pre-action protocol set out under Practice Direction 18.1 in relation specifically to personal injury claims, where:

- no later than four months prior to the commencement of proceedings, the plaintiff should send a letter of claim to the defendant following a prescribed format with reasonably required information;
- the defendant/insurer should serve a constructive reply within one month (a mere acknowledgement is not a constructive reply); and
- the parties should, over the next three months, communicate constructively and provide mutual disclosure of

information and documents regarding issues of liability and quantum.

Non-compliance with such Pre-Action Protocol without good reason may lead to adverse costs consequences and/or sanctions and the exercise of the court's power to stay proceedings.

## 3.2 Statutes of Limitations

The limitation periods in Hong Kong are prescribed in the Limitation Ordinance (Cap 347). Depending on the cause of action, the limitation periods generally vary from three to 12 years. Limitation periods for common causes of actions are as follows:

- breach of contract: six years from the date of breach;
- breach of a deed: 12 years from the date of breach;
- torts: six years from the date when damage occurs;
- personal injury: three years from the date of accrual of the cause of action;
- action on recovery of land: 12 years from the date of accrual of the cause of action (or 60 years if brought against the government); and
- enforcement of judgment: 12 years from the date when the judgment became enforceable.

For actions based on fraud, where the right of action was deliberately concealed, or for relief from the consequences of a mistake, the limitation period would not begin to run until such fraud, concealment or mistake is discovered or could have been discovered with reasonable due diligence.

## 3.3 Jurisdictional Requirements for a Defendant

Hong Kong courts' jurisdiction over a defendant can be conferred:

- by an express agreement between the parties to confer jurisdiction upon Hong Kong courts for resolving their disputes;
- where the defendant can be served with the proceedings in Hong Kong by the defendant being ordinarily domiciled in Hong Kong; or
- where the defendant took certain steps in proceedings before the Hong Kong courts which constitutes the defendant's submission to the courts' jurisdiction.

In the absence of the above, the court may nevertheless consider various factors to determine that Hong Kong is clearly the most appropriate and convenient forum for the proceedings against the defendant, even if it is a foreign defendant, see **3.5 Rules of Service**.

## 3.4 Initial Complaint

Civil proceedings in Hong Kong are usually commenced by the filing and service of a writ of summons (where the dispute

mainly relates to factual issues) or an originating summons (where the dispute mainly relates to points of law). Winding-up and bankruptcy proceedings are commenced by petition.

Writs, originating summons, petitions and pleadings generally may be amended at any stage of the proceedings with the court's leave. Pleadings may be amended once, without the leave of the court, at any time before the close of pleadings.

### 3.5 Rules of Service

The plaintiff is responsible for service of process papers, ie, the writ of summons, originating summons or petition (as the case may be).

#### Service within Hong Kong

If the defendant is an individual ordinarily domiciled in Hong Kong, the plaintiff may effect service personally on the defendant, alternatively by registered post, or by inserting the documents through the letterbox of the defendant's usual or last known address.

If the defendant is a company incorporated in Hong Kong, service may be effected by leaving the documents at its registered office.

If service in the above manner is impracticable, the court may, on the plaintiff's application, allow substituted service such as by way of newspaper advertisement, if the plaintiff can establish that the suggested mode of substituted service is likely to bring the proceedings to the defendant's attention.

#### Service outside of Hong Kong

The court's leave is required to serve process papers on a defendant out of the jurisdiction (including in Mainland China). The plaintiff is required to make an ex-parte application supported by an affidavit and satisfy the court that:

- there is a good arguable case that falls into one or more categories under Order 11, rule 1(1) of the Rules of the High Court (RHC);
- there is a serious issue to be tried on the merits of the claim; and
- Hong Kong is the most appropriate and convenient forum for the trial.

Once leave to serve out is granted, service must be effected in compliance with the local laws of the place of service.

#### Service in Mainland China

For effecting service on a party in Mainland China, the plaintiff must lodge with the Registry of the High Court of Hong Kong:

- a request for service;
- two copies of the documents to be served and two additional copies for the defendant; and
- certified Chinese translations of the documents.

The Registry will then send the documents to the relevant judicial authorities of the Mainland, which will arrange for service.

### 3.6 Failure to Respond

The defendant must file, within 14 days after service of writ or originating summons, an acknowledgement of service with a notice of its intention to defend the proceedings. Otherwise, the plaintiff is entitled to apply for default judgment to be entered against the defendant, where the claim is for liquidated sums or the recovery of land.

For such claims, default judgment may also be entered against a defendant who fails to file a defence within 28 days after the prescribed time for acknowledging service or service of the statement of claim is effected, whichever is later.

In claims for unliquidated sums, interlocutory judgment may be entered against a defendant who fails to respond to the proceedings in the above fashion, whilst the quantum of damages would still need to be subsequently assessed.

### 3.7 Representative or Collective Actions

Only representative proceedings are permitted in Hong Kong, as opposed to class actions. Where numerous persons have the same interest, one or several representatives can be nominated to conduct the proceedings if the court is satisfied that they have common interest, common grievance, and the remedy sought is beneficial to all.

### 3.8 Requirements for Cost Estimate

There is no requirement to provide clients with a cost estimate of the potential litigation.

Nevertheless, under the solicitors' conduct rules, a solicitor should give an estimate of the likely costs upon a client's request. Where an approximate estimate cannot be given, the solicitor should give their client a general forecast by indicating the calculation basis of their fees and keep the client informed about the costs.

## 4. Pre-trial Proceedings

### 4.1 Interim Applications/Motions

It is possible to make interim applications before trial. Such applications are not limited to case management issues but can

be made to obtain various remedies, including (among others) for:

- further and better particulars of another party's pleadings;
- requiring a party to answer interrogatories (ie, questions) on affidavit relating to any matter in question;
- amendment of pleadings;
- striking out a claim or part of another party's pleadings;
- extension(s) of time for complying with certain directions;
- injunctive relief;
- security for costs; or
- specific discovery, ie, disclosure of certain documents or classes of documents relevant to the issues in dispute.

## 4.2 Early Judgment Applications

### Summary Judgment

The plaintiff can apply for a summary judgment on the ground that there is no triable issue in the action, ie, the defendant has no credible or believable defence. However, summary judgment is not applicable for claims of libel, slander, and actions based on an allegation of fraud, among others.

Application for summary judgment is made by summons supported by affidavit. Such application may be made after the statement of claim has been served and the defendant has given notice of intention to defend.

### Striking Out

At any stage of the proceedings, a party may apply by summons supported by affidavit, or the court can order on its own motion, to strike out a case or parts of a pleading on the grounds that it:

- discloses no reasonable cause of action or defence;
- is scandalous, frivolous or vexatious;
- may prejudice, embarrass or delay the fair trial of the action; or
- is otherwise an abuse of the court's process.

### Default Judgment

See 3.6 Failure to Respond.

## 4.3 Dispositive Motions

See 4.2 Early Judgment Applications.

In addition, the court may, at any stage of the proceedings, on a party's application or of its own motion, determine any question of law or interpretation of any document relevant to the action where it appears to the court that such question is suitable for determination without a trial; such determination will dispose of the case or an issue therein.

A defendant may, upon filing an acknowledgement of service, apply to challenge the jurisdiction of the Hong Kong courts over the action in favour of another jurisdiction that is clearly more appropriate and convenient for trial of the action.

## 4.4 Requirements for Interested Parties to Join a Lawsuit

Parties may be joined in one action as plaintiffs or as defendants, with the court's leave, where:

- if separate actions were brought by or against each of those parties, some common question of law or fact would arise in all the actions; and
- all rights to relief claimed in the action arise out of the same transaction or series of transactions.

## 4.5 Applications for Security for Defendant's Costs

The court may, on application by the defendant, order the plaintiff to make a payment to court as security for the defendant's costs of the action, commonly on the grounds that a foreign plaintiff who is ordinarily domiciled outside of the jurisdiction has no assets in Hong Kong.

In considering such application, the court may consider a range of factors including (i) the plaintiff's prospects of success in the action (where strong prospects of success reduces the likelihood of the court ordering security); and (ii) whether the plaintiff is unable to provide security and thereby the plaintiff's claim would be stifled if an order for security is made, although such stifling will not be readily inferred and the plaintiff must disclose detailed information of its available resources (or lack thereof) as well as its inability to raise funds from other resources.

Where the plaintiff is a company, its ordinary domicile is by reference to the location of its central management and control.

## 4.6 Costs of Interim Applications/Motions

The court has a wide discretion in determining costs orders for interim applications. The general rule is that costs should follow the event, ie, the losing party should pay the costs of the winning party.

All sorts of costs orders may be made by the court. For instance, the court may order that the amount of costs to be paid be determined by the court in a separate taxation process, or be summarily assessed and order the same to be paid forthwith. The court may also order costs in the cause, whereby the costs of an interim application will be awarded to the party who is ultimately successful in the action.

## 4.7 Application/Motion Timeframe

The timeframe for the court to deal with an application/motion is subject to (i) the time taken by the parties for filing their respective affidavit evidence relevant to the application/motion; and (ii) when the hearing date for the application/motion will be, which, in turn, is subject to the diaries of the court and the parties' legal representatives.

A party may request in writing with reasons to the Registrar of the High Court that the application/motion be dealt with on an urgent basis, for instance ex-parte applications for injunctive relief, including Mareva injunctions, ie, orders to restrain a defendant from dealing with its assets. The court may determine such applications on the same day as the application is made.

## 5. Discovery

### 5.1 Discovery and Civil Cases

Discovery is a mandatory obligation of the parties in civil cases, and is a continuing obligation throughout the course of proceedings. Discovery is administered by the parties, who must produce documents (whether physical or electronic) in their possession, custody or power that are relevant to any matter in question in the action.

There are two types of discovery: automatic discovery and specific discovery.

#### Automatic Discovery

The parties must, within 14 days after the close of pleadings (unless the court otherwise directs), file and serve a list (in a prescribed form) of the relevant documents in their possession, custody or power that they agree to produce, and those which they object to produce on stated grounds (such as the documents being privileged).

The documents agreed to be produced may be inspected, and copies of such documents may be taken.

#### Specific Discovery

If satisfied that discovery is necessary for disposing fairly of the cause or matter or for saving costs, the court may, on application by a party, order the other party to produce certain documents or classes of documents as identified by the applicant and which are relevant to any matter in question in the action.

#### Scope of Discovery

The scope of discovery is very broad. The parties must produce all documents that (i) are relevant to the matter in question regardless of whether the documents will advance or damage

their own case; or (ii) will fairly lead to a train of inquiry which may have either of the above consequences.

Any documents referred to in pleadings, affidavits, witness statements or expert reports shall be produced voluntarily or upon the other party serving a notice for production of such documents.

Presently, the parties' discovery obligations are discharged by producing documents in hard copy, save only as to high-value commercial cases before the High Court involving at least 10,000 documents to be searched for the purposes of discovery. In such cases, the High Court introduced a pilot scheme for discovery and provision of electronically stored documents (Practice Direction SL1.2).

### 5.2 Discovery and Third Parties

#### Disclosure Order against Third Parties to the Proceedings

The court may order discovery against a third party not named as a party to ongoing proceedings (Section 42 of the High Court Ordinance (Cap 4) (HCO) and Order 24, rule 7A of the RHC). The applicant for such order must show that the third party is likely to have in their possession, custody or power any documents which are relevant to an issue of that claim; "relevance" in this sense is limited to documents which affects a party's case in the proceedings, excluding those which may merely lead to a train of inquiry.

#### Norwich Pharmacal Order

Under common law, the court may make a Norwich Pharmacal order for discovery against a third party, an innocent party caught up in the tortious or wrongful acts of others and facilitated the wrongdoing. The scope of such discovery is limited to documents and information necessary for the purpose of obtaining the identity of the wrongdoers (and thereby commence proceedings against them) or tracing the passage of funds or other assets (for facilitating the preservation of assets).

A Bankers Trust order is a kind of Norwich Pharmacal order made upon banks holding or having dealt with the funds or other assets over which the applicant claims a proprietary interest, requiring banks to disclose information on the accounts of the wrongdoers third-party accounts, including account opening information and bank statements.

The applicant must be able to establish that:

- serious tortious or wrongful activities have taken place;
- the order will or will likely reap substantial and worthwhile benefits for the applicant;

- the discovery sought is specific, not unduly wide and necessary for identifying the wrongdoers or the tracing of assets; and
- the order will not cause considerable inconvenience to the third party.

## Order for Bankers' Records

A party to ongoing proceedings may also apply under Section 21 of the Evidence Ordinance (Cap 8) for an order to inspect and take copies of entries in a banker's records, such as account information, for the purpose of such proceedings (including the tracing and preservation of assets). Such banker's records could even be information on accounts of third parties, if it can be established that the account has a close connection with the wrongdoer or the subject matter of the proceedings.

## 5.3 Discovery in This Jurisdiction

See 5.1 Discovery and Civil Cases.

## 5.4 Alternatives to Discovery Mechanisms

This is not applicable in Hong Kong.

## 5.5 Legal Privilege

Legal privilege is a recognised ground for protecting documents from being disclosed in proceedings.

Legal advice privilege applies to communications between client and lawyer for the purpose of giving or receiving legal advice, regardless of whether litigation was contemplated or pending. Such privilege also attaches to internal confidential documents created by a company for the dominant purpose that it will be used for obtaining legal advice.

In the context of legal advice privilege, there is no distinction between external or in-house counsel, so long as the in-house lawyer was acting as a lawyer and giving legal advice within a relevant legal context.

Litigation privilege applies to communications between client and lawyer, or either of them and a third party, for the dominant purpose of giving or receiving legal advice in relation to, or for collecting evidence for, pending or contemplated litigation.

## 5.6 Rules Disallowing Disclosure of a Document

In addition to 5.5 Legal Privilege, documents may be protected from disclosure if they are:

- communications made in a genuine attempt to settle a dispute (ie, without prejudice communications);
- self-incriminating documents; or
- privileged on the grounds of public interest or public policy.

## 6. Injunctive Relief

### 6.1 Circumstances of Injunctive Relief

Injunctive relief of a restrictive or mandatory nature may be awarded before trial if the court is satisfied that:

- there is a serious question to be tried;
- irreparable harm will incur to the applicant if the injunction is not granted; and
- the balance of convenience favours the grant of injunctive relief.

### Mareva Injunctions

Mareva injunctions, ie, orders to restrain a defendant from dealing with its assets, may be made where the applicant can establish that:

- it has a good arguable case in the proceedings;
- the defendant has assets in the jurisdiction; and
- there is a real risk that the defendant will dissipate their assets unless restrained.

### Section 21M HCO

Under Section 21M HCO, an injunction order may be granted over assets held by a defendant in Hong Kong in aid of substantive proceedings that:

- have been or are to be commenced outside Hong Kong; and
- are capable of giving rise to a judgment enforceable in Hong Kong.

Accordingly, the court may make such order even though the dispute has no connection with Hong Kong but only that the defendant has assets in Hong Kong.

### Section 45 AO

Under Section 45 AO, the court may grant an injunction in relation to arbitral proceedings which have been or are to be commenced in or outside Hong Kong; if outside Hong Kong, the arbitration must be capable of giving rise to an arbitral award enforceable in Hong Kong. The court may decline to grant such injunction if it considers it more appropriate for the arbitral tribunal to determine the interim measure application.

### “Anti-suit” Injunctions

“Anti-suit” injunctions may be made under common law, Section 45 AO or Section 21L HCO, restraining a party from pursuing any foreign proceedings based on a jurisdiction agreement between the parties in favour of Hong Kong courts, or from pursuing local or foreign court proceedings based on an arbitration agreement in favour of arbitration in Hong Kong.



## **Anton Piller Orders**

Anton Piller orders are used for the preservation of evidence in order to prevent their destruction. Such orders permit a party to enter the wrongdoer's premises (but not forcibly) to search for and seize documents that are relevant to the infringement of the applicant's rights. However, such orders are not granted lightly.

## **6.2 Arrangements for Obtaining Urgent Injunctive Relief**

In case of urgency, injunctive relief can be obtained on the same day of the application, ie, upon the filing of the summons together with affidavit evidence in support and the draft order. It is possible to have such an urgent hearing within or after-hours before a duty judge.

## **6.3 Availability of Injunctive Relief on an Ex Parte Basis**

Injunctive relief such as Mareva injunctions are usually obtained on an ex-parte basis where the case is one of urgency or secrecy, since prior notice to the respondent may prompt the respondent to take steps which may defeat the purpose of the application.

In an ex-parte application, the applicant must make a full and frank disclosure of all material matters relevant to the application, including matters which may adversely affect the merits thereof.

## **6.4 Liability for Damages for the Applicant**

The injunction applicant (whether applying ex-parte or not) can be held liable for damages suffered by the respondent if the court later finds that the injunction ought not to have been granted in the first place.

Such liability likely arises from the applicant having provided an undertaking as to damages in such circumstance. Such undertaking is given to the court and is required to be given as part of the injunction application. If the court directs, the injunction applicant may also be required to give security to fortify such undertaking.

## **6.5 Respondent's Worldwide Assets and Injunctive Relief**

Mareva injunctions may be granted to restrain the respondent from dealing with their assets worldwide, where it can be shown that the respondent has assets outside Hong Kong and has insufficient assets within Hong Kong to meet the judgment.

## **6.6 Third Parties and Injunctive Relief**

The court may invoke its Chabra jurisdiction under common law to make orders for freezing the assets of a third party if it is satisfied that there is good reason to suppose (ie, a good arguable case) that the third party's assets are in truth the assets of

the defendant, for instance if they are held as nominee or trustee for the defendant as ultimate beneficial owner; this is often established by showing the substantial control the defendant has or is entitled to have over the third party's assets.

## **6.7 Consequences of a Respondent's Non-compliance**

A respondent failing to comply with the terms of an injunction may be liable for contempt of court and be subject to imprisonment, a fine or seizure of assets.

# **7. Trials and Hearings**

## **7.1 Trial Proceedings**

Trials in Hong Kong are conducted by oral arguments and witness/expert examinations. Written submissions may be submitted pre and post-hearing.

## **7.2 Case Management Hearings**

Interim or interlocutory applications are predominantly determined on affidavit evidence alone, ie, without witness/expert examination, and on written and oral arguments presented to the court.

### **Case Management**

The courts are empowered to actively manage the conduct of the parties and the timetable leading up to trial.

Within 28 days after close of pleadings, parties must file a Timetabling Questionnaire informing the court their past conduct and intended future conduct in the case. The parties may thereafter agree on directions and timetable for future conduct up to a subsequent Case Management Conference (CMC), or request a case management summons for the court to give such directions.

Before the CMC, the parties must file a Listing Questionnaire setting out their intend future conduct (if any) up to trial, and the court will give directions for the same at the CMC, including directions for a pre-trial review (PTR).

At the PTR, the court will give further directions for setting down the case for trial.

## **7.3 Jury Trials in Civil Cases**

Jury trials are not available in civil cases, save for limited circumstances such as defamation claims.

## **7.4 Rules That Govern Admission of Evidence**

Any evidence, whether direct, circumstantial or hearsay, is admissible at trial so long as it is:

- relevant to the issues in question (ie, it assists in proving or disproving a fact);
- lawfully obtained; and
- not prejudicial to the interests of justice.

## 7.5 Expert Testimony

Expert testimony is permitted at trial. Parties can introduce expert testimony upon establishing that the expert is qualified in a relevant area to an issue in dispute and the expert evidence would assist in the court's determination of that issue. The court may order the parties to appoint a single joint expert.

## 7.6 Extent to Which Hearings are Open to the Public

See 1.3 Court Filings and Proceedings.

## 7.7 Level of Intervention by a Judge

During a hearing or trial, whilst a judge may intervene and ask questions addressed to counsel and/or witnesses, the hearing is largely driven by the parties' legal representatives pursuant to adversarial nature of Hong Kong's legal process (see 1.1 General Characteristics of the Legal System).

Judgment or decisions are usually reserved to a later date after trial or the hearing, and will be reduced to writing with reasons. Decisions on simple interim or interlocutory applications may be given at the hearing, with or without a reasoned written decision.

## 7.8 General Timeframes for Proceedings

It generally takes at least one year from commencement of proceedings to trial for commercial disputes. The length of trial depends on the complexity of the case and the number of witnesses to be examined, whilst the timeframe for the entire proceedings depend also on the parties' conduct (eg, the number of interlocutory applications made) and the court's availability for hearings and trial.

# 8. Settlement

## 8.1 Court Approval

Generally, court approval is not required to settle an action, save for limited circumstances such as where:

- the parties settled pursuant to a sanctioned offer or payment made under Order 22 of the RHC less than 28 days before trial;
- the action involves liquidation or receivership;
- a party is a person under disability; and
- both parties act in person in the action.

## 8.2 Settlement of Lawsuits and Confidentiality

Terms of the parties' settlement agreement would generally remain confidential if such terms are set out in a separate agreement.

If such terms are set out in a Consent Order, the order (and thus the settlement terms) is publicly accessible.

The parties may also choose to suspend the proceedings save for the purpose of enforcing the terms of settlement, in which case the parties would enter into a Tomlin Order and the settlement terms would be set out in a schedule appended to the order; only the order itself, and not the schedule, would be publicly accessible.

## 8.3 Enforcement of Settlement Agreements

Settlement agreements may be enforced as a contract by way of civil action, ie, a party may be sued for breach of a settlement agreement, and a judgment of such action may then be enforced by applicable mechanisms set out in 9.4 Enforcement Mechanisms of a Domestic Judgment.

## 8.4 Setting Aside Settlement Agreements

A settlement agreement, as a contract, may be set aside by the court if it is satisfied that there are vitiating factors such as mistake, misrepresentation, undue influence, duress, fraud, incapacity or illegality.

# 9. Damages and Judgment

## 9.1 Awards Available to the Successful Litigant

A wide range of remedies are available to, and may be sought by, a litigant including (among others):

- damages;
- specific performance;
- restitution of assets/funds;
- account of profits;
- injunctions, mandatory or restrictive;
- declaratory relief; and/or
- costs and interest.

## 9.2 Rules Regarding Damages

In civil actions, a damages award is compensatory by nature, ie, to compensate the plaintiff's direct or consequential loss suffered.

Punitive damages (ie, exemplary damages), which are intended to punish rather than to compensate, are rarely granted and are only available in extreme cases of outrageous conduct by the wrongdoer such that compensatory damages are inadequate.

Aggravated damages may be awarded to compensate for additional injury to the plaintiff's feelings, and are thus unavailable to corporate plaintiffs.

There is no rule limiting the maximum damages, but the aggrieved party is obliged to mitigate their loss. Where liquidated damages are imposed as a term in a contract, the enforceability of such term depends on whether:

- any legitimate business interest is served and protected by the clause; and
- the liquidated amount is extravagant, exorbitant or unconscionable in the circumstances.

### 9.3 Pre and Post-Judgment Interest

#### Pre-judgment Interest

Under sSection 48 HCO, the court may award pre-judgment interest for recovery of debt or damages, at a rate of simple interest as the court thinks fit (eg, at a rate of 1% above the prime rate, or at a rate as agreed between the parties by contract), from the date of breach until the date of judgment.

#### Post-judgment Interest

Under Section 49 HCO, post-judgment interest accrues from the date of the judgment, at a rate of simple interest as the court thinks fit, and the court would usually adopt the "judgment rate" as determined by the chief justice from time to time, which is currently 8% per annum.

### 9.4 Enforcement Mechanisms of a Domestic Judgment

The following common mechanisms are available for the enforcement of a domestic judgment:

- charging orders, which imposes a charge over assets for securing the satisfaction of the judgment, followed by an application for an order for sale;
- garnishee orders, which requires third parties (eg, a bank) to pay to the judgment creditor the amount which the third party owes to the judgment debtor (eg, the balance in the judgment debtor's bank account);
- examination of the judgment debtor as to the details and whereabouts of their assets;
- a writ of execution for the seizure of the judgment debtor's goods;
- a stop order to prohibit the judgment debtor from dealing with his funds or securities until satisfaction of the judgment; and
- winding-up or bankruptcy proceedings against the judgment debtor.

### 9.5 Enforcement of a Judgment from a Foreign Country

Foreign judgments may be enforced under:

- the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (FJREO);
- the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (MJREO); and
- common law.

#### FJREO

A foreign judgment is registrable under the FJREO, if the foreign judgment:

- is for a sum of money (but not in respect of taxes, fines or penalties);
- was rendered by a superior court of one of the countries stipulated under the FJREO (ie, Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, New Zealand, Singapore, Sri Lanka and the Netherlands);
- is final and conclusive;
- has not been wholly satisfied; and
- is enforceable in the country that rendered the foreign judgment.

A registration application under the FJREO must be made within six years of the date of the foreign judgment, supported by an affidavit which must provide evidence and particulars in satisfaction of the requirements stated above.

#### MJREO

A judgment rendered by designated courts in Mainland China are registrable under the MJREO, if the Mainland judgment:

- is for a sum of money (but not in respect of taxes, fines or penalties);
- was rendered by the Supreme People's Court, a higher or intermediate court, or other recognised Mainland courts;
- relates to commercial contract entered into on or after 1 August 2008, and where the contract stipulates that the Mainland courts shall have exclusive jurisdiction over the dispute;
- is final and conclusive; and
- is enforceable in the Mainland.

A registration application under the MJREO must be made within two years from the date from which the Mainland judgment take effect, supported by an affidavit which must provide evidence and particulars in satisfaction of the requirements stated above.

## Common Law

A foreign judgment for which neither the FJREO nor MJREO applies can be recognised at common law, if the foreign judgment is:

- for a fixed sum of money;
- final and conclusive;
- rendered by a foreign court with jurisdiction to adjudicate the matter; and
- not contrary to public policy or natural justice of Hong Kong.

The judgment creditor will need to commence fresh proceedings by way of writ of summons before the High Court, with the enforcement of the foreign judgment being the cause of action, which would not require the underlying merits on which the foreign judgment is based to be revisited.

Once a foreign judgment is registered or recognised pursuant to the above, it may be enforced in the same way as a Hong Kong judgment.

## 10. Appeal

### 10.1 Levels of Appeal or Review to a Litigation

See 1.2 Court System.

In addition, a party may apply for judicial review to the Court of First Instance (CFI) for the review of decisions made by various government/statutory authorities, tribunals and inferior courts. The review pertains to the way in which a decision was made, for instance if the decision-maker:

- acted illegally which renders the decision manifestly unreasonable;
- acted beyond its powers; or
- failed to act within the minimum standards of procedural fairness and natural justice in accordance with law and legitimate expectations of a public body.

### 10.2 Rules Concerning Appeals of Judgments

#### CFI

Leave from the CFI is required for appealing against decisions of certain tribunals before the CFI. The appellant may file an application for leave to appeal within the time limit specified in the respective ordinances. A hearing will be fixed before a judge of the CFI, and the refusal of the judge to grant leave to appeal is final.

Appeals against decisions made by a master of the High Court or District Court may be made as of right (ie, without first requiring leave to appeal) to a judge of the respective court.

#### Court of Appeal (CA)

Leave is required for appealing against judgments of the District Court or Lands Tribunal before the CA. The application for leave should be made within 28 days (or within 14 days for interlocutory judgments) of the date of judgment, and made firstly to the District Court judge who rendered the judgment. If leave is refused, the appellant may then apply, within 14 days from the date of refusal, to the CA for leave to appeal.

Appeals against judgments of the CFI or Competition Tribunal before the CA may be made as of right, save where the judgment pertains to an interlocutory matter or costs, in which case an application for leave should be made within 14 days of the judgment to the judge who rendered the judgment, and if leave is refused, the appellant may then apply, within 14 days from the date of refusal, to the CA for leave to appeal.

Where an appeal before the CA may be made as of right, the appellant should file and serve a notice of appeal within 28 days of the date of judgment.

#### Applications for Leave to Appeal

Applications for leave to appeal must be made, pursuant to Section 14AA(4) HCO, by summons and supported by a statement setting out the reasons why leave should be granted; if the application is filed out of time, the statement should also set out the reasons why the application was not made within time. The application should also be accompanied by a draft grounds of appeal, and written skeleton arguments in support of leave.

Leave will be granted if the court is satisfied that (i) the appeal has a reasonable prospect of success; or (ii) there is some other reason in the interests of justice why the appeal should be heard.

If leave is granted, the appellant should file and serve a notice of appeal within seven days of the grant of leave.

#### Court of Final Appeal (CFA)

Appeals against judgments of the CA and CFI may be heard by the CFA. However, such appeals are subject to leave being firstly granted by the CA or the CFA, and such leave will only be granted if, in the opinion of either court, the question involved in the appeal is one which, because of its general or public importance, or otherwise, ought to be submitted to the CFA for decision.

Application for leave to appeal to the CFA must be filed within 28 days from the date of the judgment to be appealed from. If such application was made to the CA and the CA refuses to

grant leave, the appellant may further apply for such leave from the CFA within 28 days from the date of refusal.

### 10.3 Procedure for Taking an Appeal

See 10.2 Rules Concerning Appeals of Judgments.

### 10.4 Issues Considered by the Appeal Court at an Appeal

Parties may appeal against a judgment/decision to challenge:

- questions of law;
- findings of fact; and/or
- the court's exercise of its discretion, within the judgment/decision.

Generally, an appeal is not a re-hearing in the sense of a fresh trial, but rather a review of the judgment being appealed and the evidence relevant to the grounds of appeal (which could comprise of all evidence that were before the court/tribunal below). An exception is where appeals are made against decisions of a master of the High Court or District Court, for which the judge of the respective court will hear all of the evidence afresh in a re-hearing.

In limited circumstances, fresh evidence may be allowed to be adduced on appeal where the party seeking to adduce such evidence can satisfy the “Ladd v Marshall test” and establish that the fresh evidence:

- could not have been adduced earlier with reasonable diligence;
- would probably have an important influence on the determination of the case; and
- must be apparently credible.

### 10.5 Court-Imposed Conditions on Granting an Appeal

The court, in considering the grant of leave to appeal, may:

- restrict the grounds of appeal;
- in special circumstances, order security to be provided for the costs of the appeal; and/or
- stay the execution of the judgment pending the outcome of the appeal or the application for leave to appeal, if the court is satisfied that the appeal is meritorious and that the appeal will be rendered nugatory if the judgment is not stayed.

### 10.6 Powers of the Appellate Court after an Appeal Hearing

After hearing an appeal, the appellate court may allow or dismiss the appeal, as well as grant appropriate relief and costs orders.

## 11. Costs

### 11.1 Responsibility for Paying the Costs of Litigation

Generally, the court will order the losing party in an action to pay the winning party's costs incurred in the action, which may include fees of solicitors, barristers and expert witnesses, court fees, copying charges and other expenses.

Absent of the parties agreeing on the amount of costs to be paid, the amount of costs will be assessed by the court (ie, by a taxing master) in a separate taxation process. The taxing master will adopt a “broad-brush” approach in the exercise of his discretion to determine a reasonable amount of costs payable under a costs order, on the basis of (among other things) the standard allowable hourly rates for solicitors' fees as approved and updated by the court from time to time.

The taxing process is adversarial in nature, where the receiving party of the costs will submit a bill of costs, which the paying party may challenge by submitting a list of objections to the bill, and there will usually be a hearing before the taxing master where the parties may argue items within the bill.

Whilst a taxing master's assessment of the amount of costs to be paid may be appealed, the court will rarely interfere with the exercise of discretion in such costs assessments, save where the exercise of discretion was clearly wrong as a matter of law or principle.

### 11.2 Factors Considered When Awarding Costs

The court may consider a wide range of factors when awarding costs, including (among others):

- relative success of the parties (if neither side was wholly successful in their respective case);
- the parties' conduct in the course of the proceedings, including whether either side unreasonably
  - (a) pursued or defended a claim or an issue in the proceedings; or
  - (b) refused to engage in mediation (see 12.1 Views of Alternative Dispute Resolution within the Country); and
- the existence of any settlement offers made “without prejudice save as to costs” (also known as Calderbank offers), or where a sanctioned offer or payment was made under Order 22 of the RHC.

### 11.3 Interest Awarded on Costs

Unless stipulated otherwise, simple interest on costs is awarded, at the “judgment rate” as determined by the chief justice from

time to time (which is currently 8% per annum), from the date of the costs order.

## 12. Alternative Dispute Resolution

### 12.1 Views of Alternative Dispute Resolution within the Country

Mediation is a popular and, by now, an established form of alternative dispute resolution (ADR) in Hong Kong.

A regulatory framework for the conduct of mediation in Hong Kong, and protection of the confidentiality of mediation communications, is provided under the Mediation Ordinance (Cap 620).

The RHC requires the courts, as part of its active case management powers, to encourage parties to consider whether it is appropriate to attempt mediation. Under Practice Direction 31, legal representatives are also expected to advise their clients to consider the same, and the consequences of any unreasonable failure to engage in mediation.

The parties are also required under the RHC to stipulate, during the course of proceedings, whether they are willing to attempt mediation for settling the proceedings. Although mediation is not compulsory, a party's unreasonable refusal to attempt mediation may lead to adverse costs consequences being imposed against the party by the court.

### 12.2 ADR within the Legal System

See 12.1 Views of Alternative Dispute Resolution within the Country.

### 12.3 ADR Institutions

The major institutions offering and promoting ADR in Hong Kong, including the Hong Kong International Arbitration Centre:

- publishes and administers their respective mediation rules in accordance with the Mediation Ordinance, which litigants may adopt or refer to;
- provides training for accreditation as a mediator; and
- maintains their respective panels of accredited mediators with various areas of practice/expertise for litigants to appoint.

## 13. Arbitration

### 13.1 Laws Regarding the Conduct of Arbitration

The legislation governing arbitration in Hong Kong is the AO, which is based upon the UNCITRAL Model Law.

Regarding the conduct of arbitrations, the AO:

- protects the confidentiality of arbitral proceedings by providing that court proceedings relating to arbitrations are generally not to be heard in open court (Section 16);
- enshrines that parties to arbitrations should be free to agree on procedural matters of the arbitration;
- provides that arbitral tribunals may rule on its own jurisdiction, and that a party may appeal to the court against the tribunal's ruling that it has jurisdiction, within 30 days of the ruling, and the court shall determine the matter afresh (Section 34); and
- empowers the court to:
  - (a) stay court proceedings and refer the parties to arbitration (Section 20);;
  - (b) grant interim measures including injunctions (Section 45); and
  - (c) set aside an award (Section 81, see **13.3 Circumstances to Challenge an Arbitral Award**).

- Under the AO, arbitral awards made in domestic or foreign arbitrations are enforceable as a judgment of the High Court, with the court's leave, and the award debtor may apply to court to set aside such leave (see **13.3 Circumstances to Challenge an Arbitral Award**).

Emergency relief granted by an emergency arbitrator, whether in or outside Hong Kong, are also enforceable as an order of the High Court with the court's leave.

### 13.2 Subject Matters Not Referred to Arbitration

Certain matters may not be referred to arbitration, such as:

- criminal cases;
- family law matters; and
- administrative matters.

### 13.3 Circumstances to Challenge an Arbitral Award

Under Section 81 AO, the court may only set aside an arbitral award on limited and exclusive grounds, as follows:

- a party to the arbitration agreement was under some incapacity;

- the arbitration agreement was not valid under the law applicable to that agreement, or in the absence of which, under Hong Kong law;
- the applicant was not given proper notice of the arbitration or the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case;
- the award contains decisions on matters beyond the scope of the parties' submission to arbitration;
- serious irregularities with respect to the composition of the arbitral tribunal or the arbitral process;
- the award has not yet become binding on the parties, or has been set aside/suspended in the country where the award was made;
- the subject matter of the arbitration was not capable of settlement by arbitration under Hong Kong law; and
- the award is contrary to the public policy of Hong Kong.

All of such grounds relate to the structural integrity of the arbitral proceedings, or the procedural fairness in the arbitral process. Consistent with the court's strong pro-enforcement bias, the party seeking to set aside the award must show a real risk of prejudice and that his rights have been violated in a material way, and the conduct complained of must be serious, even egregious, so as to have undermined due process. The court is not concerned with the merits of the underlying arbitration.

The award debtor may also apply to set aside the court's grant to leave to enforce the award, on substantially similar grounds as those set out above.

Under Section 34 AO, a party may apply to the court to hear an appeal against an arbitral tribunal's ruling that it has jurisdiction, and the court will conduct a re-hearing and determine the matter afresh, including the consideration of any fresh evidence.

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

The AO provides a simplified procedure for enforcement of domestic and foreign arbitral awards, as consistent with the object of the AO to facilitate the fair and speedy resolution of disputes by arbitration.

The applicant for enforcement would make an ex-parte application to court for leave to enforce the award, supported by an affidavit which will include:

- the original award or a certified copy;
- the arbitration agreement or a certified copy;
- the name and usual place of abode or business of the applicant;
- details of the party against whom enforcement is sought; and

- information on whether the award has been complied with or the extent it has not been complied with.

Since this is an ex-parte application, the applicant has a duty to make full and frank disclosure of points which may be adverse to the grant of leave; failure to make full and frank disclosure may result in the ultimate refusal of leave.

The court applies a presumption that leave to enforce should be permitted, and generally will only refuse leave where there are real grounds for doubting the validity of the award. The court's aim is to be "as mechanistic as possible" with respect of enforcement of arbitral awards and treat it as "almost a matter of administrative procedure".

The order granting leave to enforce the award must be served on the award debtor by the usual modes of service under the RHC. Upon such service being effected, the award debtor will have 14 days to apply to court for setting aside the order.

## 14. Recent Developments

### 14.1 Proposals for Dispute Resolution Reform Awaiting Enactment of a New Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of Hong Kong and Mainland China (the "New Arrangement")

Whilst the New Arrangement was signed in January 2019 between the Supreme People's Court and the HKSAR Government, it has not yet been enacted into law in Hong Kong, such that the previous similar arrangement from 2006 (enacted as the MJREO, see **9.5 Enforcement of a Judgment from a Foreign Country**) remains in force.

Whilst only money judgments on disputes arising from commercial contracts may be enforced under the MJREO, the New Arrangement (once enacted into law) allows both monetary and non-monetary judgments (eg, an award of property, or an order for specific performance) to be enforced. That said, the New Arrangement does not cover judgments from certain types of matters, such as:

- arbitration matters;
- insolvency and bankruptcy cases;
- administrative and regulatory matters;
- certain intellectual property matters; and
- matrimonial, family or probate matters.

The New Arrangement (once enacted into law) will also relax the requirement under the MJREO that the Mainland judgment must only relate to a commercial contract which desig-

nates either Hong Kong or the Mainland courts as the exclusive jurisdiction for resolving such disputes. The New Arrangement only requires some connection between the place where the Mainland judgment was rendered and the defendant (eg, the defendant's place of residence or business) or the dispute itself (such as the place of performance of the contract, or where the infringing act was committed).

## **Electronic Filing of Court Documents Soon to Come**

In July 2020, the Court Proceedings (Electronic Technology) Bill (the "Bill") was passed before the Legislative Council. However, there is no information as yet on when the Bill will become law.

The Bill provides for the implementation of an integrated court case management system where (among other things) court documents may, if the parties choose, be filed or served electronically through the use of electronic signatures.

## **Case Settlement Conference (CSC) Pilot Scheme**

The CSC Pilot Scheme will be launched in January 2021 at the District Court. The CSC Pilot Scheme, which will form a part of the requisite procedure in civil proceedings, introduces the concept of assisted settlement as part of the court's active case management powers.

At a CSC (ie, a hearing before a CSC master), the court will attempt to narrow down the disputed issues in the proceedings, as well as review any settlement negotiations that may be taking place. The CSC is intended to be a platform for parties to engage in communications for the purpose of achieving a settlement of the proceedings.

## **14.2 Impact of COVID-19**

As a result of COVID-19, the Hong Kong courts implemented various precautionary measures to manage health risks, most notably a period during which the courts adjourned all court proceedings (known as the General Adjournment Period, which lasted from late-January to early-May 2020), save for urgent and essential hearings and/or matters. This caused further backlog to the courts' already saturated diaries.

Consequently, the courts issued guidance notes on the use of remote hearings for civil business, such as hearings for interlocutory applications and appeals at various levels of court which are determined without oral testimonies from witnesses, as well as trials or parts thereof. Parties may apply for a remote hearing to be held, or the courts may on its own volition decide as to which hearings will be held remotely.

In addition, the courts also expanded its use of telephone hearings, particularly in respect of short hearings and for giving routine directions to the parties.

The HKSAR government has also launched a COVID-19 Online Dispute Resolution Scheme, providing small-to-medium sized enterprises in particular with speedy and cost-effective means to resolve disputes, where the claim amount is below HKD500,000 arising directly or indirectly from the COVID-19 outbreak, through a mechanism where the parties will only pay a HKD200 registration fee and:

- first attempt to negotiate their disputes within three days;
- followed by mediation within three days; and
- if the matter is not settled, arbitration is conducted within seven days, upon which a final and binding award will be rendered.

No legislation has been passed, or orders issued, to suspend the operation of limitation periods as a consequence of COVID-19.



**Fangda Partners** has a dispute resolution practice group in Hong Kong that regularly represents multinational companies as well as both state-owned and privately owned Chinese conglomerates in Hong Kong court litigation proceedings, arbitrations, and other dispute resolution proceedings in Asia and beyond. The group draws upon Fangda's expertise in corporate, finance, trade, and investment law, as well as in dispute

resolution proceedings in mainland China, forming seamlessly integrated teams that handle matters related to a wide range of cross-border and multi-jurisdictional contentious matters in various industries, including banking, energy, financial services, healthcare, manufacturing, media, pharmaceutical, real estate, retail, technology and telecommunications.

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