Hong Kong

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Litigation

1 What is the structure of the legal profession?

Hong Kong's legal profession is divided into solicitors and barristers. Solicitors advise clients on all aspects of law but there are restrictions on their rights of audience in the Courts. Barristers can appear as advocates in all Courts, but have only limited rights to advise clients other than through a solicitor. Both professions have formal training and qualification requirements. The judiciary is appointed from solicitors and barristers of at least 10 years' standing (or five years' in some lower Courts). Judges can only be removed in cases of gross misconduct or incompetence.

2 What is the structure of the Court system?

Civil claims for less than HK$50,000 are brought in the Small Claims Tribunal. Claims for up to HK$1 million are brought in the District Court, and claims above that amount or claims that concern an important legal principle are brought in the Court of First Instance. Appeals, from both Courts lie as of right to the Court of Appeal from which further appeals may be made, in limited circumstances, to the Court of Final Appeal. Specialist tribunals, such as the Lands Tribunal and the Labour Tribunal, deal with matters described by their titles; some (such as the Labour Tribunal) do not permit legal representation. The Standing Committee of the National People's Congress of the People's Republic of China retains the ultimate power to rule on interpretation of Hong Kong's Basic Law.

3 What is the role of the judge (and, where applicable, the jury) in civil proceedings?

Judges take a passive role, ruling on matters of fact and law after hearing evidence and submissions from the competing parties. A strict doctrine of precedent applies. There are no juries in civil actions, except in defamation cases and other limited circumstances.

4 What are the time limits for bringing civil claims?

Civil claims must generally be brought within six years of the date when the legal cause of action accrued, except in personal injury claims, which must generally be brought within three years. The time limit for contract claims is extended to 12 years if the contract is made under seal. There are special rules extending the time limit in the case of latent defects and for claims based on allegations of fraud or breach of trust.

5 How are civil proceedings commenced, and what is the typical procedure which is then followed?

A civil action is started by the plaintiff filing a formal document (usually a writ of summons) at Court setting out the grounds of the claim. The plaintiff must serve a Court-sealed copy of the document on the defendant, together with an acknowledgement form which the defendant must return to the Court if they wish to defend the action. The defendant must prepare a formal defence (unless they wish to challenge the jurisdiction of the Court), and the plaintiff has an opportunity to reply. After this exchange of pleadings, the parties exchange lists of relevant documents and statements of factual and expert witnesses (see question 6, below). A trial date will not generally be fixed until this exchange of evidence is complete.

6 What is the extent of pre-trial exchange of evidence, and how is evidence presented at trial?

Parties are required to give discovery on the traditional common law basis. They must exchange lists of all documents in their possession, custody or power which are relevant to any issue in dispute, or which may identify a line of enquiry for their opponents. Parties must make copies of all documents available to their opponents unless any particular document is protected by legal or other privilege, or the document was created as part of a genuine attempt to settle

the dispute. The parties must also exchange written statements of the evidence of any factual or expert witnesses whom they wish to call at trial. The witnesses will then be prohibited from giving any evidence at trial which was not covered in substance in their statements, unless the other party agrees or the Court gives permission.

The primary source of evidence at trial is oral testimony from the individuals with direct knowledge of relevant facts. Parties may call expert witnesses to address matters of technical knowledge and opinion. The written statements of factual and expert witnesses will generally stand as their evidence in chief at trial. Witnesses may be cross-examined by the opposing party, with the party who called the witness being allowed to re-examine on issues raised in cross-examination. Relevant documents can be admitted into evidence when referred to by a witness or by counsel in the course of cross-examination.

7 To what extent are the parties able to control the procedure and the timetable? How quick is the process?

The procedures for the conduct of litigation are laid down by the relevant rules of Court. The rules for the District and High Courts are similar but not identical. These procedural rules have sufficient inherent flexibility to meet most reasonable requirements. The procedural directions that are made are relatively standard in most civil cases. These can be agreed between the parties, but must usually be approved by the Court, which is increasingly willing to impose its own time limits and directions on the parties. Parties requiring more time to comply with directions can apply to the Court for an extension.

Cases typically take at least two years to come to trial, although smaller matters may be tried more quickly and acceleration is possible where urgency is clearly demonstrated. Summary judgment may be obtained more quickly where the Court considers that there is no real defence to the claim.

The rules governing procedure in the High Court have been reviewed by the Chief Justice’s Working Party on Civil Justice Reform. The Working Party’s Final Report was issued in March 2004. The Report recommended significant changes to the High Court Rules, particularly in relation to case management, pleadings and costs. The implementation of these recommendations is underway, but they are not expected to take effect for another two to three years.

8 What interim remedies are available to preserve the parties’ interests pending judgment?

The District and High Courts have power to freeze a party’s assets pending judgment where there is *prima facie* evidence of a good arguable case against the owner of the assets and a credible risk that they may be dissipated to defeat a judgment. Where appropriate, the Court may also grant injunctions or make other prohibitory or mandatory orders in order to preserve the status quo until the trial. Interim orders may also be made (if appropriate, without notice to a defendant) permitting a party to trace the flow of funds through financial institutions, or to enter a defendant’s premises to search for and seize evidence. Where a foreign defendant comes to Hong Kong prior to trial and the Court is persuaded that they are about to leave the SAR permanently to avoid a judgment debt, it can order that they be refused permission to leave Hong Kong for a period of one month (extendable indefinitely on repeat applications) pending trial, subject to the defendant paying security into the Court.

9 What substantive remedies are available?

Both the District and High Courts have very wide powers to award remedies, including injunctive relief, declarations, orders for an account of profits and the transfer of property and, most commonly, a monetary award of damages to compensate for the loss suffered. Non-compensatory (“punitive” or “exemplary”) damages are awarded only rarely, in cases of particularly outrageous or oppressive conduct by the defendant. Multiple damages are not available. Where damages are not an appropriate or sufficient remedy, the Court may instead make whatever prohibitory or mandatory order seems most appropriate in order to give effect to its judgment on the underlying dispute.

10 What means of enforcement are available?

Judgments and orders are enforced by means of further Court procedures and, where necessary, by Court officials. There is no procedure for direct enforcement (ie, not involving the Court) by the judgment creditor against the debtor. The creditor must initiate the enforcement action, since the Court will not enforce a judgment automatically. Standard means of enforcement include:

(i) an examination of the debtor (or a corporate debtor's directors) under oath to require the debtor to identify all available assets;

(ii) an order empowering a Court official to seize the debtor's goods and possessions or to take possession of land;

(iii) an order requiring a third party who owes a debt to the judgment debtor (eg, a bank holding a debtor's funds) to pay that debt instead to the judgment creditor;

(iv) an order imposing a charge on land or certain other property in favour of the judgment creditor;

(v) an order appointing a receiver to manage the judgment debtor's property and/or business with a view to paying off the judgment debt;

(vi) an order committing a person (including the director of a company) to prison for wilful disobedience to an order of the Court affecting that person or company; and

(vii) an order empowering the judgment creditor or a third party to do some act which the judgment debtor should have done but has not.

This list is not exhaustive. The Court has wide powers to make such orders as appropriate under the circumstances to give effect to its orders.

11 Does the Court have power to order costs? Are foreign claimants required to provide security for costs?

The Court usually orders the losing party to pay the winning party's legal costs. However, the amount payable is assessed by the Court, and as a rule of thumb the winning party should not expect to recover more than half to two-thirds of its actual legal expenses. Prior to trial, the Court has the power to order that an overseas plaintiff should provide security for the defendant's costs, usually by depositing cash in Court, but this power is discretionary and will depend in part upon a preliminary assessment of the merits of the case. Domestic plaintiffs are not obliged to provide security, unless they are limited companies and there is credible evidence that they may be unable to pay whatever costs may be awarded against them. Security can only be ordered against a defendant in respect of a counterclaim.

12 On what grounds can the parties appeal, and what restrictions apply? Is there a right of further appeal? To what extent is enforcement suspended pending an appeal?

Appeals to the Court of Appeal generally lie as of right from all orders and judgments of the Court of First Instance except in various specified circumstances, but leave is usually required in the case of orders and judgments of the District Court. A party can appeal:

(i) against findings of fact if there is insufficient evidence to support the finding, or if the decision is clearly wrong; and

(ii) against decisions of law, on the basis that the decision is wrong.

The Court of Appeal has power to receive new evidence if such evidence could not have been obtained with reasonable diligence prior to trial, may have had an important influence on the outcome of the case, and is inherently credible.

Leave of the Court of Appeal or Court of Final Appeal is required if a party wishes to appeal a decision of the Court of Appeal. If the dispute on the appeal amounts to HK$1 million or more and the judgment is final, leave is still required, but such leave must not be refused. Leave will be at the discretion of the Court for any other judgment, final or interlocutory, and will be granted where the appeal involves a question of general or public importance.

An appeal does not operate as an automatic stay of execution, but the Court may grant a stay if persuaded that the appeal has a real prospect of success and that it would be rendered pointless if the stay was refused.

13 To what extent can domestic and/or foreign state entities claim immunity from civil proceedings?

Before the change of sovereignty, Hong Kong recognised a doctrine of restrictive state immunity, whereby the immunity of a foreign state (or state entity) from action is restricted to acts of a governmental nature. Immunity does not extend to acts of a commercial nature that could be performed equally well by a private individual or trading corporation. It is unclear whether the same approach still applies. As the basic law excludes foreign affairs from the jurisdiction of the Hong Kong Courts, the Courts may require a certificate from the Chief Executive when adjudicating relevant cases.

14 What procedures exist for recognition and enforcement of foreign judgments?

The enforcement in Hong Kong of civil and commercial judgments from foreign jurisdictions with which Hong Kong has reciprocal agreements is dealt with by registration under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319). These may be judgments from Commonwealth or non-Commonwealth jurisdictions. In cases where there is no reciprocal agreement, the enforcing party must begin new proceedings in Hong Kong in which the foreign judgment is pleaded as a debt. In such cases, summary judgment may be granted. In either event, enforcement can be challenged on specified grounds, such as where the foreign Court did not have jurisdiction, or where the foreign judgment is not final or conclusive.

15 Is it permissible for lawyers to charge contingency or conditional fees, or other fee arrangements based on the result of the litigation/arbitration?

Solicitors in Hong Kong are expressly prohibited for entering into contingency fee arrangements in litigious proceedings. In September 2005, the Law Reform Commission released a consultation paper in which it recommended that the existing restrictions on conditional fees be removed for certain kinds of litigation. It is not known at this stage whether this recommendation will be implemented.

Arbitration

16 Is the arbitration law based on the UNCITRAL Model Law?

The Arbitration Ordinance applies the Model Law to international arbitrations. The Ordinance itself prescribes the law applicable to domestic arbitrations. The Ordinance is available online at http://www.justice.gov.hk/home.htm (go to Chapter 341).

17 What are the main national arbitration institutions?

The main arbitration institution is the Hong Kong International Arbitration Centre (http://www.hkiac.org).

18 Are there any restrictions on who may represent the parties to an arbitration?

No. Parties may represent themselves or be represented by any advocate of their choice, whether or not legally qualified.

19 What are the formal requirements for an enforceable arbitration agreement?

A purely oral arbitration agreement is rare but would be valid as a matter of common law. However, such an agreement would not fall within the ambit of the Arbitration Ordinance, depriving the parties of the support and supervision provided by the Ordinance. To fall within the ambit of the Ordinance, an arbitration agreement must be “in writing”, a term which is given a wider definition under the Ordinance than would be the case under Article 7(2) of the Model Law. For example, under the Ordinance, an agreement is “in writing” if evidence of the agreement is in writing, even if the agreement itself is not written.

20 Can the Court refuse to stay litigation if there is a valid arbitration clause?

Article 8 of the Model Law applies. The Court must stay proceedings in favour of arbitration unless satisfied that the arbitration agreement is null, void, inoperative or incapable of being performed. There is a possible exception in relation to claims for fraud in domestic arbitrations, which may be determined by the Court.

21 If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed, and who is the appointing authority?

In domestic arbitrations, the Ordinance provides that references are deemed to be to a single arbitrator unless the arbitration agreement provides otherwise. In international arbitrations, the appointing authority will decide whether to appoint one or three arbitrators in default of an agreement between the parties. In both cases, the appointing authority is the HKIAC in default of agreement between the parties.

22 Are restrictions placed on the right to challenge the appointment of an arbitrator?

Articles 12(2) and 14 of the Model Law apply to international arbitrations. A challenge is permissible:

(i) in circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence;

(ii) if the arbitrator does not possess the qualifications agreed to by the parties;

(iii) if they are unable to perform their functions; or

(iv) if they fail to act without undue delay.

In domestic arbitrations, the Ordinance provides that the Court may remove an arbitrator:

(i) if they fail to use all reasonable dispatch in proceeding with the reference;

(ii) in cases of actual or perceived bias; or

(iii) for serious misconduct.

23 Does the domestic law contain substantive requirements for the procedure to be followed?

No, save that an arbitrator:

(i) must act fairly and impartially as between the parties;

(ii) must give the parties a reasonable opportunity to present their cases and deal with the cases of their opponents;

(iii) must use procedures appropriate to the particular case; and

(iv) must avoid unnecessary cost and delay.

An arbitral tribunal is not bound by the rules of evidence. It can receive such evidence as it considers relevant and must give it such weight as it considers appropriate.

24 On what grounds can the Court intervene during an arbitration?

The Court has supportive powers and may assist by making orders for interim protection (see below) and for production of evidence. However, the arbitral tribunal has similar powers and therefore the Court will generally only intervene on *ex parte* applications or where a third party is involved over whom the tribunal has no jurisdiction. The Court may also rule on questions arising under Article 16(3) of the Model Law concerning the tribunal's jurisdiction.

25 Do arbitrators have powers to grant interim or conservatory relief?

The Arbitration Ordinance and Article 17 of the Model Law give arbitrators powers to make such interim protective orders as they consider necessary, specifically including the power to grant injunctions (see below for enforcement). Arbitrators also have the power (unless the agreement provides otherwise) to make an interim award that is final and binding for the issues it addresses and which cannot therefore be re-opened. By contrast, they may not make provisional awards, these being awards which may be varied on the final determination of the dispute, unless the agreement specifically provides.

26 When and in what form must the award be delivered?

Awards must be delivered within the time specified in the agreement (if any), failing which there is merely the general prohibition against unnecessary delay. Article 31 of the Model Law provides that an award must:

(i) be in writing and signed by the arbitrator;

(ii) state the reasons on which it is based; and

(iii) state the date and place of the arbitration.

That aside, the law merely provides that an award must be cogent, complete, certain and final.

27 On what grounds can an award be appealed to the Court?

In international arbitrations, the parties' rights to appeal an award are essentially limited to those set out in Article 34 of the Model Law. In domestic arbitrations, the grounds for appeal are more extensive. An award may be remitted for reconsideration by the arbitrator if, for example, the award is incomplete, made in excess of the tribunal's jurisdiction, or fails to comply with the general formalities mentioned above. Further, and more generally, a domestic award may be appealed on a question of law with the consent of both parties or with the leave of the Court. The Court is generally reluctant to grant leave and will judge cases by their place on a notional scale where the presumption of finality is greatest in relation to one-off cases (where the appellant must show that the arbitrator was obviously wrong), and weakest in relation to standard forms of contract in regular use in Hong Kong with facts or events that are likely to recur (where the appellant must show that the arbitrator's decision is open to serious doubt).

28 What procedures exist for enforcement of foreign and domestic awards?

An award made in Hong Kong may be enforced in the same way as a judgment of the Court, subject to the leave of the Court. Where leave is granted, judgment will be entered in the terms of the award in favour of the successful party.

In the case of foreign awards, China has acceded to the New York Convention on behalf of Hong Kong, allowing awards made in other contracting states to be recognised and enforced in Hong Kong. Awards from non-contracting states (relevantly, Taiwan) may also be recognised and enforced in Hong Kong, subject to leave of the Court.

Procedures for reciprocal enforcement of awards have been agreed between the Hong Kong and Chinese authorities on grounds that mirror the New York Convention.

29 Can a successful party recover its costs?

The tribunal's award may include directions with respect to costs, including the parties' legal fees and disbursements and the tribunal's own charges. The usual rule is that costs follow the event.

Alternative dispute resolution

30 Are the parties to litigation or arbitration required to consider or submit to any alternative dispute resolution before or during proceedings?

Parties to cases assigned to the Court's Construction and Arbitration List are obliged at an interlocutory stage of proceedings to consider the possibility of mediation, but they are not required to submit to it. There are no other relevant requirements.

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