

# HONG KONG

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## **LAW AND PRACTICE:**

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.



# Law and Practice

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**Gall** is a leading, independent Hong Kong law firm focusing primarily on dispute resolution. The firm's lawyers, including six partners and one consultant, specialise in handling highly complex disputes, many of which involve multi-jurisdictional litigation. Gall's partners come from international firms and have practised in Hong Kong or overseas for many years. They have a wealth of experience in a wide variety of litigation, mediation and arbitration and use a partner led, team-based approach to complex

litigation. As an independent firm, Gall is regularly referred work by law firms in other countries. The firm's instructions come from all over the world with clients including foreign governments, banks and other financial institutions, hedge funds, listed companies, law and accounting firms, land and property owners and high net-worth individuals. The firm works closely with clients to help them understand Hong Kong's legal and business culture, finding solutions that will best match their business objectives.

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## 1. General

### 1.1 General Characteristics of Legal System

Hong Kong follows the common law system with a combination of statutory laws as well as laws developed through judgments. The system of stare decisis prevails where lower courts are bound by the decision of higher courts. Court proceedings are carried out in an adversarial manner where counsel of both parties present their respective cases (by way of both written submissions and oral arguments) and the judge decides.

### 1.2 Court System

Under the principle of “One Country, Two Systems”, Hong Kong SAR has its own judiciary which is separate from the Mainland. The jurisdiction of the non-appellate courts is limited by subject-matter, monetary value of the claim or nature and severity of the sentence.

The structure of the courts is as follows:

- The Court of Final Appeal is the ultimate appellate authority with jurisdiction on all matters.
- The High Court consists of the Court of Appeal and the Court of First Instance. The Court of Appeal can adjudicate upon civil and criminal appeals from the Court of First Instance, District Court and other specialised tribunals. The Court of First Instance has in all civil and criminal matters.
- The District Court has limited civil (claims not more than HKD3 million) and criminal jurisdiction (up to seven years of imprisonment) and family matters are commenced in the Family Court within the District Court.
- The Magistrates’ Court has exclusive criminal jurisdiction of offences punishable by up to two years’ imprisonment and/or a fine of HKD100,000.
- Family Courts deal exclusively with matrimonial and custody matters.
- Further, there are several tribunals with specialised subject-area jurisdiction such as the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal, etc.

### 1.3 Court Filings and Proceedings

Regarding filings, the writ of summons and published judgments are open to the public. To access any other document, the leave of court is required.

Generally, court proceedings are open to the public unless statute provides otherwise (see **7.6 Extent to Which Hearings are Open to the Public**). The court may order the whole or part of the public hearing to be in camera upon application or on its own motion.

### 1.4 Legal Representation in Court

The following category of legal professionals have rights of audience that vary as per their qualifications:

- Solicitors: solicitors have rights of audience before a Master in chambers and chambers proceedings. Only upon qualification as Solicitor Advocates do they have higher rights of audience before the High Court and the Court of Final Appeal.
- Barristers: barristers are governed by the codes prescribed by the Bar Council of the Hong Kong Bar Association. They have unlimited rights of audience in all the courts.

Foreign Lawyers, who are registered with the Law Society, can only advise on the law of the jurisdiction in which they are qualified. Foreign lawyers do not have rights of audience in the courts and are not entitled to practice the laws of Hong Kong.

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

## 2. Litigation Funding

### 2.1 Third-Party Litigation Funding

The legal system in Hong Kong allows third-party funding in limited areas.

The rationale against third-party funding arrangements is the prohibition against maintenance and champerty. The courts in Hong Kong are prepared to grant leave in certain circumstances. The principle is to balance public policy with access to justice and legitimate interest of parties.

### 2.2 Third-Party Funding: Lawsuits

Third-party funding is permitted in arbitration proceedings, liquidators of an insolvent company can assign the cause of action to third-party funders and trustees in bankruptcy proceedings are also permitted to enter into third-party funding arrangements.

### 2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is available to both plaintiff and defendant.

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

There is no statutory limit of the amounts of third-party funding. The entire cause of action can be assigned to a third-party funder.

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

The funding agreement is required to stipulate the type and extent of the costs that a funder is liable for. The costs could vary depending on the stage at which the agreement is executed. Some of the probable costs include:

- pre-action costs and expenses;
- fees and expenses of the arbitration body;
- adverse cost orders against the assigning party or against the funder;
- security for costs;
- insurance premiums to obtain cost insurance;
- costs of indemnifying the assignee; and
- other financial liabilities.

## 2.6 Contingency fees

Contingency fee arrangements are prohibited in Hong Kong.

## 2.7 Time Limit for Obtaining Third-Party Funding

There is no statutory limitation of time for obtaining third-party funding.

# 3. Initiating a Lawsuit

## 3.1 Rules on Pre-action Conduct

In Hong Kong, a specific Pre-Action Protocol is prescribed only in personal injury cases under Practice Direction 18.1. The requirements are as follows:

- no later than four months prior to commencing proceedings, the claimant must send a “letter of claim”, in the prescribed form, to the proposed defendant with enough information, as reasonably required, for a constructive reply;
- the defendant must provide a constructive reply within a month and not a mere acknowledgement; and
- the parties should, over the next three months, communicate constructively and provide mutual disclosure of information and documents with respect to issues of liability and quantum.

There are consequences of non-compliance. If the defendant fails to respond constructively within one month, the claimant is entitled to commence proceedings without the risk of adverse costs consequence arising from non-compliance.

In exercising its discretion on costs, the court takes into account all relevant circumstances. These would include any unreasonable failure of a party to comply with the Pre-Action Protocol. A defendant who fails to respond constructively may experience adverse costs consequence.

## 3.2 Statutes of Limitations

The Limitation Ordinance (Cap. 347) prescribes the time limits beyond which commencement of proceedings would be barred. The cause of action is vital to determine the application of the limitation period. The accrual of the cause of action triggers the limitation period. The limitation period stops running when the action is commenced. A limitation period may be shortened or extended by agreement between parties.

Limitation periods applicable to civil suits are as follows:

- torts (excluding personal injuries): six years from date of accrual of cause of action;
- action for damages for negligence (except personal injuries): three years from date of actual or constructive knowledge or six years (whichever is later);
- personal injuries: three years from date of accrual of cause of action;
- contract (excluding under seal): six years from date of accrual of cause of action;
- contract (under seal): 12 years from date of accrual of cause of action;
- recovery of land: 12 years from the date of adverse possession or 60 years where the claim is against the Government;
- fraud, mistake, or concealment: the limitation period does not begin till the fraud, mistake, or concealment is discovered or could have been discovered with reasonable due diligence;
- enforcement of a judgment (except for the below): 12 years from the date on which the judgment became enforceable; and
- recovery of arrears of interest in respect of a judgment debt: six years from the date on which the interest became due.

## 3.3 Jurisdictional Requirements for a Defendant

Courts in Hong Kong can exercise jurisdiction (hear and determine a matter) against a defendant.

If a defendant is present in Hong Kong such that it can be served with the proceedings within Hong Kong (even if the person is on transit at the airport), the courts can exercise jurisdiction. However, such jurisdiction would not vest in courts if the defendant was defrauded to be present in Hong Kong just for the purpose of service.

If the parties to a dispute have entered into an jurisdictional agreement conferring jurisdiction on courts in Hong Kong, jurisdiction can be exercised.

Jurisdiction can be established if the defendant by conduct accepts the jurisdiction of courts in Hong Kong courts. Thus, challenges to jurisdiction must be made cautiously to avoid submission to jurisdiction.

Forum conveniens if it can be shown to the court that Hong Kong is the most appropriate place to bring an action against the defendant. If the defendant is not present in Hong Kong, the plaintiff is required to seek the leave of the Court of First Instance to serve outside jurisdiction. Amongst other specific factors, the court would grant leave if it finds a sufficient connection with Hong Kong.

The above-mentioned basis of jurisdiction applies to all courts. However, whether the court has jurisdiction or not depends on the subject matter and the pecuniary value of the claim.

### 3.4 Initial Complaint

A civil proceeding is initiated most typically by a writ or an originating summons. In specific types of cases, a motion or a petition may be used.

Proceedings are commenced by a writ of summons when the dispute primarily pertains to factual issues. A writ may be indorsed generally or specifically. A generally indorsed writ would be accompanied with at least the relief sought. A specifically indorsed writ contains a Statement of Claim setting out all material facts.

An originating summons is issued when the principal issue in the dispute involves construction of law, or instrument made under law, or deed, will, contract or other document.

Proceedings can be begun by motion only when authorised or required by law. They must contain a concise statement of the nature of the claim.

Petition can be used to initiate proceedings when the law so requires or authorises (eg, winding up proceedings). They must contain a concise statement of the nature of the claim.

Amendment of writ, originating summons, motion or petition is possible at any stage of the proceedings with the leave of the court.

### 3.5 Rules of Service

The plaintiff is responsible for service (unless it is a counterclaim). Some general rules of service are that an originating process must be served personally, or by registered post, or by insertion through letter box at the usual or last known address within jurisdiction or, if the service of an originating process by the above means is impracticable, the court may make an order for substituted service such as through newspaper advertisement.

#### Service Outside the Jurisdiction

The courts have discretion to grant leave for service outside jurisdiction upon an application made by the plaintiff. An ex parte application is to be made by the plaintiff with a full and frank disclosure regarding anything that casts doubts on

the merits of the case. The plaintiff must satisfy the court that there is a serious issue to be tried on the merit and a good arguable case that the claims fall within one of the jurisdictional gateways under O.11, r.1(1) of the Rules of the High Court or the Rules of the District Court.

If the leave to serve out is granted, service is to be effected in accordance with the local law of the place of service.

### 3.6 Failure to Respond

Once a claim has been served, the defendant may file an acknowledgement of service indicating its intention to defend by lodging it at the Registry within 14 days of service. A defendant is exposed to the risk of a default judgment entered against them if they fail to lodge an acknowledgement of service.

A plaintiff is entitled to obtain a default judgment if the writ had been duly served and the time for lodging an acknowledgement of service indicating an intention to defend has expired, the acknowledgement of service has been returned indicating an intention not to defend, or the defendant fails to file a defence within 28 days after the time limit for acknowledging service of the writ or a statement of claim is served.

If the defendant fails to serve notice of intention to defend within the stipulated time period, the plaintiff may enter into final judgment, when the claim is liquidated or is for recovery of land only, or interlocutory judgment in cases of unliquidated claims, claims for detention of goods only, claims for detention of goods and damages.

### 3.7 Representative or Collective Actions

Hong Kong does not have a class action mechanism. Representative proceedings are enabled under the Rules of the High Court, Order 15, Rule 12. Unless the court orders otherwise, a representative action may be begun by or against one or more persons who have the “same interest”. The test for the same interest is threefold: common interest, common grievance and a remedy beneficial to all plaintiffs. On application by a plaintiff, the court may allow a defendant to act as a representative of other defendants. The judgment delivered in a representative proceeding is not enforceable against a person who is not a party to the action unless the court permits otherwise.

### 3.8 Requirements for Cost Estimate

According to the Hong Kong Solicitors’ Guide to Professional Conduct, a solicitor wherever possible should when requested by a client give an estimate of the likely costs of acting in a particular matter. If a solicitor cannot give an approximate estimate of the costs and disbursements, they should inform their client accordingly and should give such a general forecast as they can, with the indication of the method by which their fees will be calculated.



## 4. Rules on Pre-action Conduct

### 4.1 Interim Applications/Motions

Interim applications can be made before trial. These applications are not limited to case management purposes and are for remedies (even if not final) as well. Some of the common interim applications are:

- application for interim payments;
- security for costs;
- discovery applications;
- Injunctions (discussed at **6.1 Circumstances of Injunctive Relief**); and
- application for further and better particulars.

### 4.2 Early Judgment Applications

The Summary Judgment procedure is a form of dispositive motion. It is a judgment without trial made by court either on its own motion or on the application of the plaintiff or the defendant (in a counterclaim). A summary judgment would be made either on whole or part of the claim at any stage where it is clear and obvious to do so. The essential ground is that there is no arguable defence to the claim or the counterclaim, hence no triable issue. It can also be made when the cause of matter can be determined resolving a question of law or construction of a document arising therefrom.

For information on judgment in default, see **3.6 Failure to Respond**.

A strike-out is an order made by the court to strike out pleadings or any part of it. It may be on application of parties or in the exercise of the inherent jurisdiction of the court. The possible grounds for striking out are:

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

Further, the court may order early trial in cases where application for injunction or receiver is made where it is considered just to do so. The court also has the power to limit the timings at trial.

### 4.3 Dispositive Motions

In addition to the forms of early judgment discussed at **4.2 Early Judgment Applications**, some forms of dispositive motions in Hong Kong are as follows:

- Preliminary issue: an action may be dismissed if it appears to the court that the decision of any preliminary issue arising in a matter and tried separately from the matter substantially disposes of the matter or renders the trial unnecessary.

- Challenge on jurisdiction: a defendant can upon filing of an acknowledgment of service file an application to dismiss an action for want of jurisdiction.

### 4.4 Requirements for Interested Parties to join a Lawsuit

Joinder of interested parties is permitted with the leave of the court. Such leave to join two or more parties to a proceeding is given if there would be common question of law or fact in all the actions, if brought separately, and all the rights to relief claimed are in the same transaction or same series of transactions

### 4.5 Applications for Security for Defendant's Costs

On application by a defendant, where it is considered just, the court may order a plaintiff to provide security for costs. The defendant may apply on the following grounds:

- if the plaintiff is ordinarily resident outside of the jurisdiction or if the plaintiff is a foreign company with no presence or assets in Hong Kong; or
- if the plaintiff is a nominal plaintiff suing for the benefit of another and there is a reason to believe that the plaintiff will be unable to pay costs.

If such an order is made, a plaintiff can proceed only upon the payment of the security. In the event of non-payment there is a risk of dismissal of the proceedings.

### 4.6 Costs of Interim Applications/Motions

Costs and, the extent of them in any proceedings, fall under the discretionary power of the court. The matter of who pays the costs may also be agreed between the parties.

The general principle is that cost follows the event. If certain interim applications were improper or unreasonable, the court may also award wasted costs against the applicant.

The court is empowered to make a summary assessment of cost which is payable within 14 days or can order taxation of the costs at the end of the action.

### 4.7 Application/Motion Timeframe

There is no guaranteed timeframe for a court to deal with an application in Hong Kong. Such timeframe depends on the court's and the legal representatives' diaries. A party may make a written request to the Registrar with reasons for dealing with an application on an urgent basis. In cases of urgent ex parte injunction applications, the Hong Kong Court is able to grant an order on the day of application.

## 5. Discovery

### 5.1 Discovery and Civil Cases

Discovery is an important step in civil cases and is administered by the litigants.

#### Discovery of Documents

Within 14 days after the deemed close of pleadings, the parties are required to disclose in a list the documents in their respective possession, custody or power relating to the matters in question in the proceedings (be in privileged or not).

The inspection of the documents disclosed in the list (excluding the privileged documents) is usually conducted within seven days and the parties can take copies of the documents and if documents are referred to in pleadings, affidavits or witness statements or experts' reports, the other party is entitled to serve a notice for production of specified documents for inspection and for taking copies thereof.

Further, discovery is continuing obligation. If relevant documents come into a party's possession, custody or power at any time, the new documents must be disclosed in a supplementary list of documents.

#### E-discovery

This has been introduced in complex commercial cases for electronically stored documents (Practice Direction SL1.2).

The exchange of witness evidence is not a part of discovery but a stage of exchange of evidence after the discovery.

### 5.2 Discovery and Third Parties

Section 42(1) of the High Court Ordinance empowers the court to order discovery against a person who is not a party to the action. The summons must be served personally upon the third-party and upon every party to the action.

#### Norwich Pharmacal Discovery

This is an order for discovery against a third party who has "got mixed up in the tortious acts of others in order to facilitate their wrong-doing" under common law. The order for discovery of documents and disclosure of identity of wrong-doers may be made irrespective of the third party being willingly involved or not. The terms of any order must be specific to the case.

Additionally, under the Evidence Ordinance, the discovery of records held by banks may be sought by an application for inspection of bankers' books.

### 5.3 Discovery in This Jurisdiction

Discovery is required for documents that are relevant to the issues, regardless of whether it may be prejudicial to one's case. This enables both sides to evaluate their respective positions and may encourage early settlement.

A specific format is prescribed for the list of documents which contains two schedules. Schedule 1 contains a list of all the documents that are in the possession, custody or power of the client. The first part of Schedule 1 enlists the documents which the party does not object to produce, whereas the second part enlists those documents which the party objects to produce with the grounds of objection. The documents that have been but are no longer in the possession, custody or power of the party are enlisted in Schedule 2.

### 5.4 Alternatives to Discovery Mechanisms

This is not applicable in our jurisdiction.

### 5.5 Legal Privilege

Legal professional privilege is a ground to protect documents from production based on legal advice privilege (advice given whether or not litigation was contemplated or pending) and litigation privilege (if made when litigation was pending or contemplated).

A document comes into existence as part of a process of communications with a lawyer for the dominant purpose of obtaining legal advice (including internal confidential documents produced for such a purpose) would be protected by privilege. There is no distinction between external and in-house counsel in Hong Kong.

### 5.6 Rules Disallowing Disclosure of a Document

Generally, a document that is not relevant to the issues (as discussed above) does not need to be disclosed. Other documents which are not required to be disclosed include:

- documents protected by legal professional privilege;
- documents that could incriminate or expose the disclosing party to penalty;
- documents privileged on the grounds of public policy; and
- documents, the disclosure of which may be injurious to public interest.

## 6. Injunctive Relief

### 6.1 Circumstances of Injunctive Relief

The High Court and the District Court have the power to grant both interlocutory and final injunction in all cases where it appears just and convenient to do so. It may be applied by an ex parte or inter parte application. Injunctions may be prohibitory, imposing a negative obligation abstaining from an act, or mandatory imposing a positive obligation on the person. An injunction order may be made with or without conditions.

The test for granting an injunction is whether there is a serious issue to be tried (the claim should not be struck out as frivolous), whether the balance of convenience lies in the

favour of granting an injunction and whether irreparable damage would be suffered if the injunction is not granted.

Some of the available injunctions are listed below:

- Mareva Injunction acts to restrain a defendant from disposing assets within the jurisdiction or worldwide during the pendency of trial;
- under Section 21M of the High Court Ordinance, the court is empowered to grant interim relief in relation to proceedings which may have been commenced or are to be commenced outside Hong Kong which may give rise to a judgment enforceable in Hong Kong;
- anti-suit injunction can be granted under Section 21L of the High Court Ordinance. It is used to prevent the commencement or continuation of foreign proceedings. It is granted when there is a jurisdiction agreement in favour of Hong Kong, arbitration agreement or when Hong Kong is the natural forum for such dispute and the foreign proceedings are or would be unconscionable;
- prohibition order is another type of injunction that may be granted to prevent a debtor from leaving Hong Kong without pending the payment of debt or provision of security; and
- an Anton Piller Order is used for preservation of evidence. It entitles a party to enter the premises of the defendant to prevent the destruction or removal of evidence. This form of mandatory injunction is awarded with caution.

### 6.2 Arrangements for Obtaining Urgent Injunctive Relief

The Practice Direction 11.1 provides for situations where immediate orders may be required.

In case of emergencies during the court working hours, the solicitor is required to contact the Clerk of the court who would direct the matter to the Judge or Deputy Judge who is available.

In extreme cases, there is a possibility of hearing after court hours before the Duty Judge.

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

Injunctive relief such as Mareva injunction and Anton Piller order can be obtained on an ex parte basis (either based on urgency and/or secrecy).

### 6.4 Liability for Damages for the Applicant Undertaking and Fortification

If an interlocutory injunction (be it ex parte or not) is granted in favour of the plaintiff, the plaintiff is often required to provide an undertaking as to damages suffered by the defendant if it is subsequently found that the order ought not

have been made. Additionally, the plaintiff may be required to fortify the undertaking by giving security.

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

Injunctive relief may be granted against worldwide assets of the respondent.

### 6.6 Third Parties and Injunctive Relief

In appropriate cases, injunctive relief can be granted against third parties. The Chabra jurisdiction developed in case law enables the court to extend the ambit of the Mareva injunction to non-parties in order to support the plaintiff's claim against the defendant.

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

If there is a non-compliance of injunction orders, the respondent or a third party who knowingly assists or permits such non-compliance can be held liable for contempt of court. The consequences may include imprisonment, fine, or seizure of assets.

## 7. Trials and Hearings

### 7.1 Trial Proceedings

Hong Kong follows an adversarial process in trial. The trial is conducted by way of oral arguments and examination of witnesses rather than being primarily conducted in writing. The following is an approximate structure of stages of a trial:

- opening submissions of the plaintiff(s);
- examination-in-chief of the plaintiff's witnesses;
- cross-examination of the plaintiff's witnesses;
- re-examination of the plaintiff's witnesses;
- opening submissions of defendant;
- examination-in-chief of the defendant's witnesses;
- cross-examination of the defendant's witnesses;
- re-examination of the defendant's witnesses;
- the defendant's closing submissions;
- the plaintiff's closing submissions; and
- the defendant's reply on any new points of law raised during the plaintiff's closing submissions.

On a case by case basis, the judge may dispense with the opening submissions and the trial may begin with the examination of witnesses.

### 7.2 Case Management Hearings Interim Applications

Interim or interlocutory applications are usually heard in chambers. Written skeleton arguments will be filed by the parties before the hearing. At the hearing, the applicant will make its oral argument in support first, then followed by the

respondent's oral argument in opposition. The Applicant can make reply submissions.

## Case Management Hearings

The court takes an active role in managing the timetable of every procedural step in case management hearings in every civil case. Below are the procedural steps:

- Within 28 days of close of pleadings, parties are required to complete a Timetabling Questionnaire informing the court their respective plans for next steps, eg, any interlocutory application to be made, number and identity of witnesses, any expert witness and proposed directions as to the timetable for discovery and exchange of witness statements, etc. If no agreement on proposed directions is reached, a Case Management Summons is issued. The court usually makes an order nisi on the papers at this stage and will fix a date for a Case Management Conference (CMC).
- Before the CMC, the parties are required to file a Listing Questionnaire. At the CMC, the court will hear from the parties as to the progress of complying with the case management directions. The court would then make directions as to the fixing of a date for a Pre-Trial Review and the dates and time limits for the trial. The court may also direct a further CMC if the case is not ready to be set down for trial.

## 7.3 Jury Trials in Civil Cases

Jury trial are available in matters of malicious prosecution or defamation. The parties may choose trial by jury over trial by a judge.

## 7.4 Rules That Govern Admission of Evidence

The test of relevance is the primary rule for evidence to be admissible in court. Evidence is relevant if it assists in proving or disproving a fact thus making a matter requiring proof more or less probable. Both direct and circumstantial evidence are admissible if relevant.

Generally, all relevant evidence is admissible unless excluded due to remoteness from the issues.

Hearsay evidence is only admissible where, having regard to the circumstances, the court concludes that the evidence is not prejudicial to interests of justice.

The court has the discretion to exclude evidence obtained unlawfully in order to protect the integrity of the judicial process.

## 7.5 Expert Testimony

The Evidence Ordinance (Cap 9) considers expert evidence to be admissible. The party seeking to adduce expert evidence must establish that the expert is qualified in that expertise to give expert evidence and that the evidence is

relevant as it would assist in arriving at a decision on one or more of the issues.

The court is also empowered to appoint a single joint expert if it would be in the interest of justice to do so, to control costs and reduce delays.

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

The general rule is that open justice requires open proceedings, however there are statutory exceptions. The court may on an application or on its own motion order that the whole or part of the proceedings will be held in camera. In case of proceedings held in camera, no reporting of the proceeding or the judgment can be made without the approval of the judge or master. If the judge considers it appropriate for reporting, the parties should be afforded an opportunity to be heard before any such order is made.

Practice Direction 25 provides that certain proceedings are generally not open to the public. This includes those regarding:

- disability;
- ex parte applications regarding injunctions;
- winding-up and bankruptcy;
- intellectual property;
- arbitration;
- legal representation;
- trustees; and
- obtaining evidence for foreign courts.

## 7.7 Level of Intervention by a Judge

The trial judge has the responsibility and necessary authority to administer the trial and can exercise judicial power over any issue that may arise during a hearing or trial.

The judge will only intervene and ask questions of witnesses or counsel when it is strictly necessary to clarify points or to develop any points that may have been overlooked, or to ensure that complicated issues or submission of law are clearly presented.

Generally, a judgment must be handed down by the judge in open court. The judgment is required to be reasoned. There is no specific rules as to the circumstances in which a judgment must be given at the hearing, or at a later date.

## 7.8 General Timeframes for Proceedings

The general time frames for proceedings would vary depending on facts and circumstances peculiar to a matter. It depends on the complexity of the matter, whether the defendant would defend the claims, make counterclaims, the number of interlocutory applications by the parties, etc. The courts in Hong Kong are also very busy and thus, the time frame would also be affected by the court's diaries.

## 8. Settlement

### 8.1 Court Approval

In general, court approval is not required to settle a lawsuit. There are a few exceptions. For instance:

- if an application to withdraw or diminish a sanctioned offer is subsisting, the sanctioned offer may not be accepted without the leave of the court.
- the defendant's sanctioned offer or payment is made less than 28 days before the commencement of trial, or the plaintiff does not accept within the stipulated time period, and the parties cannot agree on costs;
- the plaintiff's sanctioned offer is made less than 28 days before the commencement of trial, or the defendant does not accept within the stipulated time period and there is no agreement on costs;
- in case of multiple defendants, if a sanctioned offer or payment is made by one or more, but not all defendants, and the plaintiff does not discontinue the claim against those defendants, or if the plaintiff discontinues the claim, but the non-offeree defendants do not provide written consent to your acceptance of the offer or payment; and
- settlement or compromise by or on behalf of a person under disability.

### 8.2 Settlement of Lawsuits and Confidentiality

Generally, the terms of settlement would be confidential unless disclosure is required by law or court order. The terms of Consent Order based on parties' agreement would be open to the public and can be accessed upon request. In case the settlement agreement is executed through a Tomlin Order, it would be appended to a schedule in the Order. The access to the order may be possible by an application to the Registrar with adequate reasons.

### 8.3 Enforcement of Settlement Agreements

Settlement agreement may be enforced by way of a civil action, if a Consent Summons or Consent Order is executed, the agreement can be enforced by normal modes of execution of judgment and, if a Tomlin order is executed, all further proceedings be stayed except for the purpose of carrying the agreed terms into effect.

### 8.4 Setting Aside Settlement Agreements

A consent order or a "Tomlin" order can only be set aside where the consent given was procured under misrepresentation or fraud.

## 9. Damages and Judgment

### 9.1 Awards Available to Successful Litigant

The remedy or the relief sought must be specifically set out in the Statement of Claim, although costs do not need to be claimed specifically.

The common types of awards made by court are as follows:

- damages which may be liquidated, unliquidated, restitutionary damages/ account of profits;
- order for mesne profits;
- relief against forfeiture;
- equitable remedies such as injunctions and specific performance in appropriate cases or damages in lieu thereof; specific performance would include order for sale of goods/land, charging orders against property to secure payment of debts, grant or assignment of lease; and
- award of costs and interest.

### 9.2 Rules Regarding Damages

Punitive damages are also known as exemplary damages and are awarded for a deterrent effect in exceptional cases. Aggravated damages are awarded, in addition to general damages, in special circumstances where evidence is given to show aggravated mental suffering. This form of damages is not awarded to corporations.

For penalty or liquidated damages, the position in Hong Kong is that liquidated damages must be a genuine pre-estimate of loss or else it will be disallowed for being a penalty.

Regarding the restriction of amount of damages, there is no rule limiting the maximum damages, but the underlying principle is that the award of damages must be justified.

### 9.3 Pre and Post-Judgment Interest

#### Pre-judgment Interest

Pre-judgment interest is payable in Hong Kong until the date of the judgment. Section 48 of the High Court Ordinance empowers the court to award pre-judgment interest in money claims, ie, for debt or damages. Under Section 48(3) HCO, the defendant "shall" be liable to pay pre-judgment interests where the damages for personal injury or death claims exceed HKD30,000. Otherwise, the court has discretion to decide whether to award interest. The usual practice is as follows:

- for debts and liquidated demands, interest is paid from the date upon which money should have been paid;
- for economic loss, if the date of loss can be identified, then interest is paid from the date of such loss. Otherwise, the court may award interest from the date on which the cause of action arose or any proper later date; and



- if it is a non-economic loss, in cases of personal injury, interest may be awarded from the date of the writ.

In non-personal injury claims, the norm is to award pre-judgment interest at a commercial rate ie, prime rate plus 1% (as a starting point) unless evidence can be shown to differ from the norm.

### Post-judgment Interest

Post-judgment interest accrues from the date of judgment and carries a simple interest at such rate as the court may order, or in the absence of such an order, at the rate fixed by the Chief Justice from time to time. The court would generally adopt the judgment rate which is revised from time to time in absence of special circumstances.

### Statutory Limits to the Award of Interest

Interest in respect of a debt is not awarded for a period during which, for whatever reason, interest on the debt already runs. In personal injury cases, a scale is provided to limit the available interest. In other cases, the judgment rate would determine the interest available.

## 9.4 Enforcement Mechanisms of a Domestic Judgment

The following means are available for enforcement of domestic judgments:

- a judgment for the payment of money (not payment of money into court) can be enforced via a writ of fieri facias, a garnishee order, a charging order, or the appointment of a receiver;
- a judgment for the giving of possession of land may be enforced by a writ of possession;
- a judgment concerning the delivery of goods may be enforced by a writ of delivery or a writ of specific delivery (ie, a writ of delivery to recover the goods without alternative provision for recovery of the assessed value thereof), whereas a judgment to do or abstain from doing any act can be enforced by an order of committal and a writ of sequestration;
- order for liquidation in winding up applications; and
- examination orders may be made for getting more information regarding the assets of the judgment debtor.

## 9.5 Enforcement of a Judgment from a Foreign Country

There are three mechanisms for recognition and enforcement of foreign judgments in Hong Kong:

- under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (the FJREO);
- under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (the MJREO) for judgments from any part of China other than Hong Kong, Macau or Taiwan; or

- under common law, where the above-mentioned statutes do not apply, however, no reciprocity is required.

To be recognised the foreign judgment should be for a fixed sum of money, should be final and conclusive on the merits of the case, should not be wholly satisfied, should be made by a court with jurisdiction and should not be the exercise of sovereign functions of a foreign state or be against public policy.

Once the judgment is recognised under any of the above mechanisms, it can be enforced as a Hong Kong judgment.

# 10. Appeal

## 10.1 Levels of Appeal or Review to a Litigation

The hierarchy of the court structure has been discussed at **1.1 General Characteristics of Legal System.**

The civil appeal structure in Hong Kong is governed by statute and can be divided as follows:

- appeals from the decisions of a District Court/ High Court Master to the Judge in Chambers in the respective courts;
- appeals from decisions of the District Court and the Court of First Instance (CFI) that are made before the Court of Appeal;
- as provided by special statutes, appeals from certain tribunals can be made directly to the Court of Appeal; and
- appeals from decisions of the Court of Appeal and the CFI lie before the Court of Final Appeal (CFA).

### Judicial Review

Application for judicial review can only be made with the leave of the court before the Court of First Instance. If the decision to which the application relates is quashed by the CFI, it would remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the Court of First Instance.

### Review of Interlocutory Decisions

The CFI has no power to review interlocutory decisions and appeal is the only recourse.

The District Court may on sufficient cause being shown review the interlocutory order made at or before trial in connection with which the application was made.

## 10.2 Rules Concerning Appeals of Judgments

Appeals can be made either as a matter of right or with the leave of the court, as determined by statute.

Appeal from the decision of the Master is generally as of right.

As a general rule, the following decisions require leave:

- a decision of a Judge in the District Court;
- a decision of a Judge of the Court of First Instance in an interlocutory matter;
- an appeal against the decision of a Court of First Instance Judge solely on the question of costs;
- a decision of a Judge of the Competition Tribunal in an interlocutory matter;
- an appeal against the decision of a Competition Tribunal Judge solely on the question of costs;
- a decision of the Lands Tribunal;
- appeal against a consent order and must be made by both parties; and
- appeal to the CFA may only be made on leave granted by the Court of Appeal or the CFA. Leave would be granted if the question involved is of great general or public importance, or otherwise, ought to be submitted to the court for decision.

An application for leave to appeal should be made to the judge or master of the respective court who gave that decision.

The test for leave to appeal (except to the CFA) is stipulated in section 14AA(4) of the High Court Ordinance, which provides that leave to appeal shall not be granted unless the appeal has a reasonable prospect of success, or there is some other reason in the interests of justice why the appeal should be heard.

### 10.3 Procedure for Taking an Appeal

Where appeal is a matter of right, the appellant should serve a notice of appeal on the respondent and the court below within 28 days of the decision. Where leave is required, an application for leave should be made to the Judge handing down the decision within 14 days of the decision, failing which to the Court of Appeal.

Leave to appeal to the Court of Appeal must be made by summons. The application must be supported by a statement of the reasons why leave should be granted, accompanied by a bundle with draft grounds of appeal.

In the case of appealing from the decision of the Court of Appeal, if leave to appeal is refused by the Court of Appeal, a further application can be made to the Court of Final Appeal within 28 days.

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

Appeal can be made on the following grounds:

- challenges on question of law;
- challenges on findings of fact; and
- challenges as to exercise of discretion.

The general rule is that there is a rehearing of the first instance decision unless when there are statutory exceptions. Rehearing does not imply a fresh trial but a consideration of the entire evidence and the trial.

The leave of the court is required to raise for the first time in appeal, new points which were not considered in the court below. Fresh evidence can be adduced on appeal if it could not have been procured at trial with reasonable diligence, if it could crucially impact the outcome if considered and on the understanding that it must not be inherently improbable.

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

While granting the leave to appeal, the court may restrict the grounds of appeal. The grant of leave to appeal against an interlocutory decision to the Court of Appeal may be restricted to a “a particular issue arising out of the interlocutory judgment or order”.

Further, leave to appeal may also be subjected to conditions for securing just, expeditious and economical disposal of the appeal. The conditions may include security for costs, a timetable to be followed by the parties to avoid delay, and/or include the grant of a stay of the order pending the appeal.

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

An appellate court has the power to seek further evidence on question of fact, to draw inferences of fact, to affirm, vary or discharge the decision of the court from which the appeal lies or may remit the matter with its opinion to that court, or may make such other order in the matter as it thinks fit, and to order a fresh trial.

## 11. Costs

### 11.1 Responsibility for Paying the Costs of Litigation

As a general rule, the losing party has to pay for the costs of the winning party. If the amount is not agreed, it is decided by a taxation of costs by a taxing master.

The taxation of costs is usually on one of the following bases. On a party and party basis, the usual basis of costs where all costs that were necessary and proper for enforcing or defending the rights of the party whose costs are being taxed, are awarded, on an indemnity basis, all costs are allowed, except when they are unreasonable, and on a trustee basis, a trustee is entitled to be paid out of the fund it holds. No

costs would be disallowed unless it is contrary to the duties of the trustee.

Regarding appeal or review, the award of costs can be challenged in appeal. If the procedure for taxation of costs has taken place, a dissatisfied party may apply for review of the costs by the taxing master or to the judge for an order.

## 11.2 Factors Considered When Awarding Costs

The court has discretion and full power to determine by whom and to what extent the costs are to be paid. Conventionally, costs follow the event. However, the court has the discretion to depart from the general rule. The court tends to consider the following matters while exercising discretion:

- objectives of the Rules of the High Court;
- any written offer expressed as “without prejudice save as to costs” except when the party making such offer made a sanctioned payment or sanctioned offer;
- conduct of the parties regarding whether it was reasonable to raise, pursue or contest a particular allegation or issue, manner in which the case was pursued or defended, whether the claim was exaggerated even if successful, conduct before and during the proceedings;
- even if party is not wholly successful, whether they have succeeded in part of their claim; and
- any admissible offer drawn to the attention of the court.

## 11.3 Interest Awarded on Costs

Simple interest is levied on costs, being a form of judgment debt. The rate of interest is either that ordered by the court or the rate fixed by the Chief Justice. The rate of interest may vary for different periods. Interest on costs runs from the date of the order as to costs.

If the receiving party fails to do better than the sanctioned payment, such party may be ordered to pay costs of taxation on an indemnity basis and the rate of interest on costs could be up to 10% above the judgment rate.

If a party does better than the sanctioned offer, then the paying party may be ordered to pay interest on the whole of the allowed costs at a rate not exceeding 10% above judgment rate.

## 12. Alternative Dispute Resolution

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

Alternative Dispute Resolution (ADR) is highly promoted in Hong Kong. ADR is viewed as a flexible, time and cost-effective way to enable parties to resolve disputes. The popularity of ADR is growing rapidly by way of statutes, practice directions and the approach adopted by the courts.

Arbitration and mediation are the most popular forms of ADR. The Arbitration Ordinance and the Mediation Ordinance provide for the regulatory frameworks in the respective areas. Hybrid approaches of arb-med are also adopted.

### 12.2 ADR Within the Legal System

ADR is viewed as a voluntary mechanism rather than compulsory, though it is strongly encouraged. If there is a valid arbitration agreement between parties, they are bound by the same.

The Practice Direction 31 on Mediation aims to facilitate voluntary settlement of disputes. In every civil claim commenced by a writ of summons, parties are required to file a mediation certificate indicating its willing to mediate.

The failure to reach a settlement does not adversely affect court proceedings. However, an unreasonable refusal to make an attempt to participate in mediation may lead to cost sanctions irrespective of the outcome in litigation.

### 12.3 ADR Institutions

#### Arbitration

Hong Kong is an international hub for ad-hoc and institutional arbitrations given the pro-arbitration outlook of courts. The arbitration institutions in Hong Kong receive tremendous support making Hong Kong an attractive seat for arbitration. As a recent development, there is an exclusive arrangement with Mainland China, whereby interim measures can be obtained in China in support of institutional arbitral proceedings seated in Hong Kong prior to the issuance of the award.

#### Mediation

The mediation institutions in Hong Kong play an important role in the publicity of mediation and training of mediators. The system of accredited panel of mediators enables parties to appoint specialised and qualified persons.

## 13. Arbitration

### 13.1 Laws Regarding the Conduct of Arbitration

The law on arbitration in Hong Kong is governed by the Arbitration Ordinance (Cap. 609). It incorporates a unified regime for domestic and international arbitrations. The Ordinance adopts the UNCITRAL Model Law in its entirety with modifications and supplements. Party autonomy is a key feature and courts can interfere in the dispute only where expressly provided in the Ordinance.

Some features of the Arbitration Ordinance are that the competence-competence doctrine of the Model law is further expanded by listing out matters where the tribunal can rule on its competence. Further, if the tribunal decides that it lacks the jurisdiction, such decision is not subject to appeal;



the Arbitration Ordinance contains provisions for appointment of “emergency arbitrator” before the constitution of the arbitral tribunal for emergency relief in or outside Hong Kong. This order is enforceable as a court order with the leave of the court.

Further to this, the Ordinance has “med-arb” provisions. Parties are enabled to appoint the arbitrator as the mediator as well. This is a progressive step for mediation.

Moreover, confidentiality is secured with the provision on closed court proceedings and amendments have been made to allow third-party funding in arbitration.

The Ordinance provides four regimes for recognition and enforcement of awards:

- Awards made in countries that are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- Mainland awards;
- Macao awards; and
- Other awards.

Awards include interim award and subject to the leave of the court, they are enforceable as an order of court.

### 13.2 Subject Matters not Referred to Arbitration

The general principle is that matters that are enforceable against the world at large or administrative matters, are excluded from arbitration. This includes criminal proceedings, divorce proceedings and custody disputes, competition and anti-trust disputes, winding-up orders and matters such as tax which are reserved for state determination.

By way of a recent amendment, disputes over intellectual property is made arbitrable and such awards are enforceable.

### 13.3 Circumstances to Challenge an Arbitral Award

The Arbitration Ordinance adopts the exhaustive list of the Model law and the burden of proof lies on the party seeking

to set aside. An application to the court of First Instance is to be made on any of the following grounds:

- incapacity of a party to the agreement;
- invalidity of the arbitration agreement under the law applicable to it or in the absence of applicable law provision, under the laws of Hong Kong;
- the applicant was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or otherwise being unable to present his case;
- the award dealing with a dispute not falling within the terms or scope of the arbitration agreement; and
- the composition of the arbitral tribunal or the arbitral procedure not being in accordance with the parties’ agreement or Hong Kong law;

Award may also be set aside by the court on finding that:

- the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or
- the award conflicts with Hong Kong’s public policy.

Additionally, under Schedule 2 of the Arbitration Ordinance challenges can also be made on the grounds of serious irregularity and on questions of law. Schedule 2 would be applicable if parties opt into these provisions.

Apart from the specific grounds of challenge, an award may also be set aside if the application to challenge an arbitrator is upheld by the court.

Apart from exceptional circumstances, the court imposes indemnity costs on unsuccessful applicants for setting aside. Thus, maintaining the finality and integrity of the arbitral process.

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Hong Kong is a pro-enforcement jurisdiction with a unified system for domestic and foreign arbitration. Subject to the leave of the court, the awards are enforceable in the same manner as a court judgment. There are two stages in the enforcement of an award.

In the recognition stage, the court decides whether leave should be granted to enter into judgment in terms of the award. This is a purely mechanistic stage.

In the execution stage, the application for enforcement may be made ex parte but a court may direct the issuance of an originating summons. At this stage, the court hears the difficulties in enforcing the award. The grounds for the challenges to enforcement overlap with the grounds for setting aside an award. However, the court may refuse to enforce if it thinks it is just not to do so.

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The grounds for refusal to enforce the non-Convention awards are largely similar to grounds of setting aside and the grounds of refusal to enforce Convention awards, Mainland awards and Macao awards.

There is no requirement for reciprocity between Hong Kong and another foreign jurisdiction for an award to be enforceable.

The New York Convention Awards, Mainland and Macao awards are enforced under similar, but three distinct regimes.