

Resolving a dispute – initial considerations

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Litigation is a common recourse through which commercial parties can seek to resolve a dispute. As one would appreciate, however, commencing a lawsuit in the court is not a decision to be made lightly. As set out and explained below, there are a number of factors and preparation to be taken into account before commencing litigation.

Does the proposed defendant have any local assets in Hong Kong?

In many cases, the ultimate objective behind commencing litigation is for the plaintiff to obtain compensation from the party alleged to be at fault. In commercial litigation, the compensation (or relief) sought is, more often than not, in the form of monetary damages. If the defendant does not own any assets in Hong Kong, the judgment granted in favour of the plaintiff would be effectively useless. In such cases, even if the plaintiff, based on the judgment, obtains a winding up or bankruptcy order against the defendant, it is very likely that the plaintiff would still not be able to obtain any monetary compensation from the defendant. It is therefore, imperative for one to consider whether the defendant has assets within the jurisdiction against which the judgment may be enforced in order to ensure that the legal costs (and, perhaps equally importantly, the time invested in the litigation) would not be spent in vain.

Asset search

One common and recommended way of ascertaining whether the defendant has any assets in Hong Kong is to engage a private investigation firm to conduct a property search to find out whether the defendant has any properties in Hong Kong. If the search result is positive, it demonstrates that the defendant may be able to pay any damages to the plaintiff pursuant to the judgment. Even if the defendant failed to pay damages pursuant to the judgment, the judgment may be enforced against the defendant's property by way of a charging order, which can potentially result in sale of the landed property and the sale proceeds can be used to satisfy the judgment debt.

One common question asked by a party contemplating litigation is, whether there is any way to obtain information about the defendant's bank accounts in Hong Kong, unfortunately, this is not possible without a court order.

Asset freezing injunction

Even if the defendant does have assets in Hong Kong, one should consider seeking an asset freezing injunction (ie a *Mareva* injunction) if there are signs suggesting that the proposed defendant might dissipate its assets soon. This is particularly important, because litigation in Hong Kong can generally last two up to three years (from the commencement of action to delivery of judgment). All the time and legal costs invested by the plaintiff would be in vain if the defendant has already dissipated all its local assets by the time the court hands down its judgment. An application for a *Mareva* injunction may be heard by the court on an *ex parte* basis (ie in the absence of the defendant). In general, to obtain a *Mareva* injunction from the court, the applicant will have to demonstrate, amongst other things, a good arguable case on the substantive claim against the defendant and also a real risk of dissipation of assets.

Jurisdictional clause or arbitration clause

If the dispute arises out of a contract between the parties, one should also look at whether the contract contains any jurisdiction clause and/or arbitration clause. For instance, a contract may provide that the parties have agreed to submit themselves to the exclusive jurisdiction of a foreign court in the event of any dispute arising out of the contract or that any such dispute shall be resolved by way of arbitration. Such clauses are more common in cross-border disputes.

The Hong Kong courts are generally prepared to give effect to what the parties have agreed in the contract in question. Therefore, if the defendant disputes the jurisdiction of the Hong Kong court on the ground that there is an express contractual clause providing for the exclusive jurisdiction of a foreign court or an arbitration centre (eg the Hong Kong International Arbitration Centre), then the Hong Kong court would be generally ready to stay the legal proceedings commenced in the Hong Kong court in favour of the designated foreign court or an arbitration centre. In that scenario, the plaintiff may potentially be ordered to bear the costs of the defendant incurred in relation to the legal proceedings commenced in the Hong Kong court.

Hong Kong courts' discretion to override jurisdiction clause or arbitration clause

Although the general rule is that the Hong Kong courts would be prepared to stay the legal proceedings in favour of a foreign court or arbitration centre pursuant to the jurisdiction clause or arbitration clause, this rule is not completely absolute and rigid. In some cases, the Hong Kong court may exercise its discretion to override a jurisdiction clause or arbitration clause if, for instance, it is clear that the defendant does not have any credible defence and/or that the foreign court would not have jurisdiction over the dispute in any event. Nevertheless, such cases are exceptional and the threshold to be met by the plaintiff in order to convince the court into overriding the jurisdiction clause or arbitration clause is high.

References:

Communications Private Limited v Le Ecosystem Technology India Private Limited [2017]
HKCU 2204

Security for costs

Under Hong Kong law, a defendant may apply to the court for security for costs to be paid by the plaintiff on the ground that:

- the plaintiff is ordinarily resident outside of the jurisdiction (eg a company incorporated in a foreign country with no presence or assets in Hong Kong), or
- that the plaintiff is a nominal plaintiff suing for the benefit of another and there is reason to believe that the plaintiff does not have the means to pay

The rationale is to ensure that the plaintiff would be financially capable of paying the defendant's legal costs if the plaintiff's claim turns out to be unsuccessful. When dealing with such an application, the court will take into account the cumulative effect of a number of factors in exercising its discretion of whether to order security for costs:

- the plaintiff's prospect of succeeding in its claim
- whether the defendant has an arguable defence to the plaintiff's claim
- the plaintiff's financial situation
- whether an order for security (if granted) would stifle the plaintiff's claim, and
- whether there was any delay on the defendant's part in making the application

If an order for security for costs is made, the plaintiff will not be allowed to proceed with the legal proceedings unless and until the security has been paid into court. The plaintiff might also stand the risk of having the legal action dismissed by the court if the ordered security is not paid by the deadline imposed by the court. A foreign plaintiff should therefore be prepared for the possibility of facing a security for costs application prior to commencing litigation in Hong Kong.

Demand letter before commencing litigation

Even if the other relevant factors suggest that the dispute can be and should be resolved by litigation in Hong Kong, it is strongly advised that one should not start the legal action without first writing a demand letter to the opposing party. The pre-action demand letter is a very important document and, in order to be effective, should be written by legal professionals. A well-written demand letter would:

- lead to the opposing party understanding the grounds of your claim
- clearly set out your demands (eg asking the opposing party to honour its contractual obligations and/or seeking monetary compensation) and also a time limit for complying with the demands, and
- demonstrate that you are prepared to commence legal proceedings against the opposing party if the demands are not complied with

As one would appreciate, court proceedings involve costs and risks, and there can be no guarantee that one will ultimately succeed in his or her claim in the court even when the claim appears to have strong merits. By comparison, the costs of having a pre-action demand letter prepared is relatively low. Therefore, it is generally recommended that one should seriously consider issuing a properly written demand letter to the opposing party before starting a litigation. A letter of demand may potentially open the possibility of an early settlement without going to the court, thereby saving both parties' costs and time.

Conclusion

It should be noted that the above list of pre-litigation considerations is by no means exhaustive. The factors which one should take into account prior to commencing litigation can vary on a case-by-case basis. As such, the most prudent course of action for one to take is to seek professional legal advice from dispute resolution expert lawyers if he or she is looking to resolve a dispute in the most effective and efficient way.

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