



Newsletter No. 143 (EN)

How to Enforce Your Rights in Hong Kong

February 2015

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I. Introduction

In 2008 Hong Kong's judicial system was voted the best in Asia in a survey of expatriate business executives.¹ This is the culmination of two hundred years of modern legal development.

During the colonial era the British introduced a common law system and court structure which was a key factor in the development of the island from a trading post to a major financial and commerce centre. Under the "one country, two systems" doctrine, which was established upon the hand-over to China on 01 July 1997, the majority of the pre-1997 legal infrastructure, regulations and mechanisms remain intact, allowing Hong Kong to retain its reputation as a stable, comprehensive, transparent and reliable legal system.

However, as will be seen, the Hong Kong legal system is one of the slowest and most expensive legal systems when compared to other jurisdictions. Furthermore, the Hong Kong legal system cannot truly be called "fair" because even the party who wins the case completely may not be able to recover its entire legal costs. As such, financially strong parties can force the other party to continue the battle in the courts until the other party runs out of money.

This newsletter is designed to provide an overview of the current Hong Kong legal system and to provide a brief introduction as

to how this system can assist you to enforce your rights.

II. Court Proceedings in Hong Kong

1. *What Kinds of Rights are Enforceable?*

(1) Suing for a monetary payment

Any person or entity which is owed a sum of money may bring a claim in the appropriate Hong Kong court (please see Section II.3) against the debtor. Alternatively creditors may consider bringing winding up proceedings (please see Section II.2) against the debtor or trying alternative dispute resolution methods (please see Section IV) in order to get their money back.

(2) Suing for information

It is often the case that one person wants to obtain information from another person which that second person is not willing to disclose. Currently Hong Kong has no standalone right to sue someone for information.

However, the rules of Pre-action Discovery allow one potential party to obtain information from another potential party or even a third party on the basis that such information will help to settle or establish the existence of a potential underlying claim.

¹ Conducted by the Political and Economic Risk Consultancy.

a) Against a Potential Party

An application for Pre-action Discovery against a potential party can be brought before the Court when the applicant (usually the potential Plaintiff) can show that:

- It has, at least on the surface, a legitimate claim against the respondent;
- The documents requested would fall within the scope of standard disclosure in any subsequent proceedings. In other words they are documents which the party would be required to disclose anyway during any subsequent legal proceedings; and
- It is "desirable" to make such an order. Whether the order is "desirable" will depend on the facts of the case at hand. However whether the disclosure will make a settlement more likely is usually a key factor in making this determination.

b) Against a Non-Party

An applicant can also bring an application against a non-party for Pre-Action Disclosure if:

- The respondent is not a potential Defendant but they are involved or "mixed up" in a wrongdoing and thus have information and/or documentation that is critical to the applicant's claim. Usually the third party is innocent and sometimes is not even aware of the wrongdoing;
- They are likely to have relevant documents or information; and
- It is in the interests of justice to make such an order.

Most of the recent cases regarding such orders concern forcing Internet Service Providers to hand over user information for online defamation claims. Within these cases, the need to establish whether a claim exists and the identity of the correct defendant have been accepted as legitimate reasons for making such an order (e.g. *Cinepoly Records Company limited & others vs. Hong Kong Broadband Network Limited & Others* [2006] 1 HKLRD 255)

As this is an equitable rather than statutory remedy, whether an order is granted is at the discretion of the judge. Further, these applications can be expensive because the Court usually requires the applicant to cover the respondent's application and disclosure costs. This is because the applicant usually does not have any pre-existing right to the information requested. Therefore the non-party's refusal to disclose the information earlier should not lead to a cost order against them. By extension the innocent non-party should also not be made to bear the cost of collecting and disclosing information in regards to a dispute which does not directly concern them.

- (3) To compel somebody in Hong Kong to commit or refrain from committing a specific act

The Hong Kong courts can grant either a mandatory or prohibitive injunction which will compel a person/company to commit or refrain from a specific act respectively.

Injunctions can be made in support of an underlying claim e.g. an injunction not to dispose of certain property until ownership rights have been ascertained. Alternatively the injunction can be the end object of the proceedings, e.g. to retain possession over land by compelling an occupant to vacate.

Moreover, a party to a contract can apply for the equitable remedy of specific performance if the other party defaults on their agreement. If the application is approved then the defaulting party will be required to perform their original promise under the contract in question. Unlike in civil law jurisdictions, e.g. Germany, where specific performance is the plaintiff's primary remedy, with other rights (e.g. reduction of price, annulment of the contract, etc) only being granted if specific performance is not possible, specific performance in Hong Kong is only granted where the Court believes that monetary damages would not be enough to remedy the breach in question. Such orders usually involve land or other unique property.

2. General procedure for commencing a claim

(1) Letter Before Action and Letter of Claim

In contrast to other jurisdictions (e.g. the *Mahnbescheid* in Germany), there is currently no requirement under Hong Kong law to serve a Letter of Claim or Letter Before Action upon an intended Defendant (except in personal injury cases). Such letters are however recommended as they provide the intended Defendant with an opportunity to co-operate or make a settlement offer before the courts (and related costs) become involved thus saving both parties time and money.

(2) Litigation

If the Letter Before Action/Letter of Claim and any other negotiation attempts have failed and the other party is not willing to cooperate, then the person whose rights have been infringed should consider commencing litigation proceedings (please see Section II.4).

(3) Legal Representation

a) Availability

All parties in criminal or civil proceedings have the right to act on their own behalf (with some exceptions for corporate bodies) or to appoint a solicitor to represent them. Please note that if a party chooses to represent themselves they can appear in any court or tribunal in Hong Kong. They are not obligated to appoint a barrister and they are not subject to the same appearance restrictions as a solicitor (as detailed below). If a party wants but cannot afford legal representation then they can apply for legal aid.

b) Solicitors vs Barristers

The legal profession in Hong Kong is split into 2 branches (which mirror the UK system): solicitors and barristers. The two professions require different qualifications, and are regulated by different authorities and have very different roles to play in the overall legal system. The key differences between the two professions are as follows:

- Solicitors can only appear in the lower courts (below the High Court) whereas barristers can appear in any court;
- Barristers specialize in courtroom advocacy, drafting legal pleadings and giving expert legal opinions. Whereas solicitors deal with the client and carry out transactional-type legal work.
- Barristers are hired by the solicitor, not by the client, and in most cases have little or no direct contact with the client.
- Solicitors bill the client directly. Whereas barristers bill the instructing solicitor who then passes the cost onto the client.

- Solicitors practice as sole practitioners, or in partnerships. Barristers are almost always self-employed although many choose to form 'chambers' in order to share administrative and operating expenses with other barristers.

This system of solicitors and barristers dates back to the historic days of middle- age England, but arguably does not make sense nowadays. In most other jurisdictions (USA, Germany, Japan, etc.) there is only one legal profession which advises the client, and represents them at court. The solicitor/barrister system causes substantial duplication of work, as the solicitor must review the client's case in order to prepare the requisite advice and documents, and then the same procedure must be repeated by the barrister, in order to prepare for court. This causes the client to pay for the same service twice, as he must first pay the solicitor (hourly rate: 350 Euro and up), and then the barrister (hourly rate: 550 Euro and up) for the same work. Equally it is common for the solicitor to accompany the barrister to court, thus the client also needs to pay double for any court hearing or final trial.

(4) Winding Up

Any creditor who is owed a liquidated sum of over HK\$ 10,000 (approx. EUR 1,000) and who believes that the debtor company is unable to pay the same can serve a statutory demand for payment upon them. If the debt remains unpaid for over 21 days then the creditor can serve a winding up petition to dissolve the debtor company. While often effective, these petitions should only be served after careful consideration. If the debtor company is dissolved then the creditor will have to share any recovered funds/assets with all the debtor company's other creditors.

3. *The Hong Kong Court System*

(1) Tribunals

Hong Kong's tribunal system deals with numerous matters which require either specialist knowledge (e.g. Labour Tribunal) or which are considered too small to warrant the use of court resources. For example the Small Claims Tribunal hears all monetary claims for less than HK\$ 50,000 (EUR 5,000). The rules and procedures for tribunals are less strict than in most other courts and sometimes no legal representation is allowed.

(2) Magistrates' Courts

Magistrates deal exclusively with criminal matters which include both summary and indictable offences. Crimes for which the sentence is over 2 years' imprisonment and a fine of over HK\$ 100,000 (EUR 10,000) are transferred to the District or High Court after the initial summary hearing.

(3) District Court

The District Court has civil jurisdiction over monetary claims of HK\$ 50,000 - HK\$ 1 million (EUR 5,000 - 100,000). Further, the District Court has exclusive jurisdiction over certain matters such as claims under the Employees' Compensation Ordinance (Cap 282). Further, the District Court can hear appeals from tribunals and statutory bodies where specifically stated in the applicable ordinance.

If a claim is valued at only slightly over HK\$ 1 million (approx. EUR 100,000), then the excess can be abandoned to bring the claim within the District Court's jurisdiction where costs are generally lower than the High Court.

(4) High Court

The Hong Kong High Court is the collective name for the Court of First Instance and the Court of Appeal.

(5) Court of First Instance

The Court of First Instance has unlimited civil and criminal jurisdiction. The Court of First Instance is also permitted to hear appeals from the Magistrates' Courts, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal.

(6) Court of Appeal

The Court of Appeal hears all appeals from the Court of First Instance, District Court, and the Lands Tribunal. It can also issue rulings on questions of law which are referred to it by the lower courts. It has no primary jurisdiction.

(7) Court of Final Appeal

The Court of Final Appeal is, as the name suggests, the final appellate court for Hong Kong. The judges of the Court of Final Appeal are appointed by the Chief Executive, on the basis of recommendations from an independent commission. These appointments must be endorsed by the Legislative Council. Appeals are heard by the Chief Justice plus three permanent judges and one non-permanent Hong Kong judge or one judge from another common law jurisdiction.

(8) Judicial Committee of the Privy Council

The UK Judicial Committee of the Privy Council acts as the highest court of appeal for British overseas territories, Crown dependencies and several Commonwealth countries. Before 1997 the Privy Council was the highest court for all Hong Kong cases and

their decisions would bind the lower Hong Kong courts. Since the handover, the Privy Council no longer hears Hong Kong cases. However pre-1997 Hong Kong related decisions remain part of the common law of Hong Kong (i.e. are binding on lower courts) unless and until they are overturned by the Court of Final Appeal.

4. Key Stages in a Court Case

(1) Pre-action steps

As noted above, it is customary (but not obligatory) for a "Letter of Claim" to be served upon a potential Defendant before an official claim is issued in order to provide them with an opportunity to meet the Plaintiff's demands without going to court.

The parties can also consider using alternative dispute resolution (please see Section IV) to settle their dispute. Litigation should be a last resort.

(2) Commencing a Claim

A Plaintiff officially initiates their claim by filing a Writ of Summons and fee payment at the applicable court. The Court will review, number, stamp and then return the Writ to the Plaintiff. The Plaintiff must serve the Writ upon the Defendant within 12 months.

The Writ of Summons which is filed and served by the Plaintiff must be indorsed with either a General Indorsement of Claim or a Statement of Claim. The former is a concise statement of the nature of the claim made or the relief or remedy sought by the Plaintiff, whereas the latter is a full statement of claim and must comply with court rules (Order 18).

Where a General Indorsement of Claim is used, the full Statement of Claim must be served within 14 days after the Defendant serves their Acknowledgment of Service.

Newly issued High Court legal actions are generally reported in major local newspaper and websites. Such reports usually briefly detail the nature of claim and the amount in dispute.

Further, Defendants are often compelled by contractual and/or regulatory requirements to report such legal action to related third parties such as the government, banks, law-enforcement agencies and most importantly, business associates with whom they maintain an on-going contractual relationship.

Such third parties frequently require the Defendant to provide a detailed description of the claim and the available defences. The third parties will then internally assess the Defendant's financial capability, likelihood of success and, if appropriate, take contractual/regulatory action against the Defendant in order to protect their own interests, e.g. call in loans, suspend contractual services etc. It is this external pressure which leads most Defendants to seek a settlement with the Plaintiff unless the claim is truly frivolous.

(3) Acknowledgement of Service and Defense

Within 14 days of the date of service of the Writ, the Defendant must file the acknowledgment of service form at the Court Registry, either by post or in person. The Defendant, upon giving notice of intention to defend, must serve a defense on the Plaintiff and on every other party to the action before the expiration of 28 days after the deadline for filing the acknowledging service or after the service of the statement of claim, whichever is the latter.

(4) Admission

If the claim is for a monetary payment then the Defendant may file an admission and/or repayment proposal instead of a Defense. The Plaintiff has 14 days to respond. This response can accept the admission and proposal or it can just accept the admission and request that the Court determines the payment terms.

(5) Default Judgment

If the Defendant does not file the acknowledgment and/or Defense by the relevant deadline then the Plaintiff can apply for a judgment in default. If the claim is for a liquidated amount then an order will be made for the amount claimed and costs. If the claim is for an unliquidated amount then an interlocutory judgment on liability will be entered against the Defendant and the Plaintiff can then ask the Court to assess the amount of damages which they are entitled to.

A Default Judgment will be set aside if it is found that the Plaintiff did not abide by the relevant procedural rules (e.g. the Writ was not correctly served upon the Defendant). In all other cases the Default Judgment will only be set aside if the Defense has a "real prospect of success".

(6) Reply and Defense to Counterclaim

Upon receipt of the Defense the Plaintiff has 28 days to file a Reply or a Defense to any Counterclaim raised by the Defendant.

It should be noted that a Plaintiff may not advance by way in their Defense to Counterclaim any allegations which are inconsistent with their Statement of Claim. If no Defense to the Counterclaim is received then the Defendant may apply for a

Default Judgment thereon. The contents of these documents must be verified by a statement of truth.

A Reply is not compulsory or always necessary. It is only required in appropriate circumstances where the Plaintiff wishes to respond to allegations made in the Defense and to rely upon such responses throughout the claim.

The Writ, Statement of Claim, Defense, Reply and Defense to Counterclaim (if any) are collectively referred to as "pleadings" and are usually drafted by a barrister and then signed and submitted by the party's solicitor. Steps 2 - 6 above are collectively referred to as the "pleadings stage" which closes 14 days after the Plaintiff's Reply is served upon the Defendant.

(7) Summary Judgment

If the Plaintiff believes that the Defendant has no reasonable grounds for refuting their claim then they can apply for a **summary judgment**. A summary judgment will be granted if the judge having reviewed the pleadings determines that there are no triable issues, i.e. where the Defense is not supported by any reasonable grounds, concrete evidence or arguable points. The summary judgment hearing is much faster and cheaper than a trial.

(8) Timetabling Questionnaire

A Timetabling Questionnaire must be completed and filed by each party within 28 days of the close of pleadings stage. This timetable will set out all the dates and deadlines for all the remaining stages of the proceedings. It will also set out the name and details of any lay or expert witnesses which the party wishes to rely upon at trial. The parties are strongly encouraged to confer and agree upon the

desired timetable before submitted the Questionnaire to the Court.

(9) Mediation

Mediation is a process through which an independent mediator assists the parties to reach an out of court settlement.

Since 2010 the parties are obligated under Practice Direction No.31 to file and serve a Mediation Certificate along with the Timetabling Questionnaire which indicates whether they intend to use mediation to resolve their dispute. If the parties do not intend to use mediation the reasons for this decision must be given. Adverse cost orders may apply at the end of the case if the judge feels that the stated reasons were unjustified.

(10) Case Management Summons

The Plaintiff must submit a case management summons to the court within either 14 days of receiving the Defendant's Timetabling Questionnaire or within 14 days of the deadline for filing the Timetabling Questionnaire (whichever is earlier). This summons will ask the Court to give directions relating to the management of the case.

These directions will include all the steps that need to be taken to prepare the case for trial. The directions will also set the dates for the case management conference, pre-trial review and/or the trial. Once issued the parties must comply with the Court's directions. Extensions of time will only be granted if there are "sufficient grounds". Moreover, if the Plaintiff misses one of the set court dates then their claim may be struck out.

(11) Discovery

The above mentioned directions will include the deadline by which each side must disclose to the other a list of the documents, or other materials, which they intend to rely on to prove their claim/defense. The other side will then review the list and submit an inspection request for the specific documents or materials which they wish to see.

(12) Listing for Trial

Once the directions have been completed, the Plaintiff will file an application to the Court to have the case listed for trial. This application must be supported by the Plaintiff's trial bundle (i.e. a copy of all the documents and other items they intend to rely on at trial) and a fee will be payable.

The case will then be assigned to either the Running List (for trials that are not intended to last longer than three days) or the Fixture List (all other cases or exceptional cases). For cases in the Fixture List an appointment must be made with the Listing Officer. Both parties must attend this appointment at which the Listing Officer will fix the trial date. For the Running List the parties will be informed of the estimated trial date. If the case is due to be heard within the next month it will be moved to the Pending List. If the case is due to be heard within the next week it will be moved to the Warned List. Therefore, it is essential that the parties routinely check these lists in order to obtain the exact trial date. The Pending List is displayed at Court and the Warned List is displayed at Court and online.

(13) Trial Hearing

At the trial, the barristers will present their party's evidence and arguments to the Court. The Court will consider oral and written evidence from both lay and expert witnesses.

The length and exact content of any trial depend on the circumstances of the case at hand. Once all the evidence and arguments have been presented, the Court will issue its judgment. This judgment may be delivered at the end of the trial or it may be issued at later date if the Court needs more time for further deliberation.

(14) Settlement, Payments into Court and Consent Orders

Throughout the entire duration of the litigation process the parties are urged to use their best efforts to come to an amicable settlement. Such settlements save the time, money, mental stress and resources of everyone involved.

Aside from negotiation and other dispute resolution methods, either side may make a formal offer to settle at any time. If the other side accepts the offer then the case will settle. The settlement does not need to be approved by a judge. If the other side rejects the offer then the terms thereof will be kept secret until the end of the trial. If the final judgment is less favorable than the offer then the winning party will not be entitled to any legal costs which were incurred after the last day that the offer could have been accepted.

If a settlement is reached then the parties must notify the Court and apply for a Consent Order to be issued. The Consent Order will reflect the terms of the settlement and provides each side with valuable security as such orders can be enforced in the same way as a trial judgment.

5. Time

On average it takes at least two years (!) for a simple case in Hong Kong to come to trial; this does not include pre-trial

steps. The exact time will depend on the complexity of the case, whether summary judgment is possible, whether interim applications are required etc. Unfortunately a large portion of this timescale is waiting for the trial date, as can be seen in these Judiciary figures:

	Days		
	2011	2012	2013
Civil Fixture List - Application to fix date to hearing	231	244	261
Civil Running List- Setting down of a case to hearing	83	50	85

A timeline for a case for at least two years cannot be called fair, is not acceptable in modern jurisdictions, and is a clear drawback for Hong Kong compared to other countries, such as Singapore, Taiwan or Mainland China, where cases come before the court in six to nine months.

A timeline of two years means that wrongdoing in Hong Kong is often not punished, because after two years, companies close down, people absconded from Hong Kong, or pass away, witnesses' memories become unreliable and evidence disappears.

6. Costs

(1) Lawyers' Fees

Conditional fees (a.k.a. "no win, no fee" arrangements) are currently not permitted in Hong Kong. Further, Hong Kong solicitors are prohibited from entering into contingency fee arrangements for litigious matters. The result of these two rules is that anyone who requires legal representation in a court case (whether Plaintiff, Defendant or third party) must pay their own legal fees up front (unless Legal Aid applies).

Solicitors and barristers charge on an hourly rate basis which varies according to seniority and experience. It is extremely unusual for a solicitor or barrister to agree to a flat fee for a litigation case. Due to the varied nature of litigation work it is impossible to give any "average" fee information.

For example a large commercial dispute case which goes to trial could lead to fees of HK\$ 2.5 - 5 million (EUR 250,000 - 500,000). Alternatively, an interim injunction application could incur costs of HK\$ 400,000 - 700,000 (EUR 40,000 - 70,000).

(2) Court Fees

	High Court	District Court
Issuing Writ of Summons	HK\$1,045 (EUR 100)	HK\$ 630 (EUR 60)
Setting case down for trial	HK\$1,045 (EUR 100)	HK\$ 630 (EUR 60)

The following court fees may also be incurred depending on the case in question;

- Translation;
- Certification;
- Service fee; etc

(3) Recoupment of Costs

In Hong Kong the losing party is usually ordered to pay the winning party's costs. However, the "costs" which are payable are not the same as the costs which the winning party has actually incurred. Instead, the amount payable is assessed by the Court via a process known as "taxation of legal costs". Under taxation the losing party will only be required to pay the winning party's "reasonable costs" as

determined by the Court. Due to this process the winning party usually only recovers 50 - 75 % of their actual legal expenses. Interim costs orders can also be made during the litigation process, e.g. wasted costs orders for failing to meet a deadline or interim application costs such as for Pre-Action Discovery.

III Enforcing a Judgment

If the losing party (the judgment debtor) refuses to abide by the terms of the judgment or settlement then the following enforcement options are available:

- Examination of the debtor under oath to obtain information on available assets;
- Seizure of the debtor's goods or land;
- An order requiring a third party who owes a debt to the judgment debtor to pay the winning party (the judgment creditor) instead;
- A charge on land or other property in favour of the judgment creditor;
- Appointment of a receiver to manage the judgment debtor's property and/or business in order to raise funds to pay the judgment debt;
- Committal for contempt of court;
- An order empowering the judgment creditor or a third party to do what the judgment debtor should have done under the original judgment; and
- Any other order which is appropriate under the circumstances

All enforcement proceedings must go through either the Court or the Bailiff's Office (depending on which method is chosen). For example, a judgment creditor cannot turn up at the judgment debtor's house and seize his goods. Instead, the judgment creditor must contact the Bailiff's Office and follow the applicable procedures.

IV. Alternative Dispute Resolution

1. Arbitration

Hong Kong has a long arbitration history and the Hong Kong International Arbitration Centre has been a hub for the settlement of cross-border disputes for decades. The legal framework for arbitration in Hong Kong can be found in the Arbitration Ordinance (Cap 609).

Under the Ordinance any dispute can be settled via arbitration so long as a valid arbitration agreement is in place. If such an agreement does exist and one party brings a court claim against the other then the said other party can apply to have the proceedings stayed until arbitration has been undertaken or the agreement is shown to be invalid.

Parties to arbitration may represent themselves or appoint an advocate (not necessarily a legal professional).

Arbitrators can grant interim measures such as injunctions. Further an arbitration order can be enforced in the same way as a Court judgment. In terms of time and money arbitration is usually significantly faster than court proceedings but not necessarily cheaper. Costs include the arbitrators' fees, representation fees, venue fees etc.

2. Conciliation

Conciliation is where an independent third party meets with the parties separately in order to better identify the issues to be resolved, reduce tension, improve communication and explore solutions. The results are not binding and cannot be enforced like a court order. Conciliation can be conducted privately or through an institution

such as the Hong Kong International Arbitration Centre.

V. Conclusion

As can be seen from the above, there are a variety of options for those wishing to enforce their rights in Hong Kong. Litigation has been the focus of this newsletter as it is the most well-known form of dispute settlement and because of the reputability of the Hong Kong Court system. However, alternative methods of dispute resolution such as mediation and arbitration should always be seriously considered, as the Hong Kong court system does have some significant drawbacks which make it undesirable to start legal proceedings, for sums under EUR 100,000. The main drawbacks of the Hong Kong legal system are:

- It is very slow.
- It is expensive.
- Legal fees cannot be recovered completely.
- The solicitor/barrister system causes substantial duplication of work and is outdated.

If Hong Kong does not address these drawbacks, then it may soon be outperformed by other Asian cities (such as its longtime rival Singapore), as investors in Hong Kong become more and more afraid that they will not be able to enforce their legal rights. Furthermore, in light of Mainland China's legal system reforms (such as new laws being implemented and new and young judges being hired), it may soon be the case that investors will consider investing directly into China, instead of Hong Kong, where they face higher rents, higher labour costs and have to rely on an arguably outdated legal system.

*We believe that the information provided was helpful for you.
If you have any further questions, please do not hesitate to contact:*

Lorenz & Partners (Hong Kong) Ltd.

Unit 2906, 29/F, Wing On Centre
111 Connaught Road Central

Tel: +852 252 814 33

www.lorenz-partners.com

E-Mail: hongkong@lorenz-partners.com