

Dispute Resolution Around the World



Hong Kong

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1. Legal System

On 30 June 1997, the administration of Hong Kong by the United Kingdom ended, and the Hong Kong Special Administrative Region (the HKSAR) was established as an administrative region of the People's Republic of China (the PRC).

Earlier, on 19 December 1984, the Governments of the PRC and the UK had signed the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (the "Joint Declaration"). The Joint Declaration set out the basis on which the PRC was to resume the administration of Hong Kong on 1 July 1997. It also set out the PRC's basic policies regarding Hong Kong, which are intended to preserve Hong Kong's previous systems under Chinese rules.

The Joint Declaration provided that the policies of the PRC for Hong Kong set forth in the Joint Declaration would be stipulated in a Basic Law of the HKSAR of the PRC (the "Basic Law") to be adopted by the PRC's National People's Congress. The Joint Declaration also provided that those policies will remain unchanged for 50 years. The National People's Congress formally adopted the Basic Law on 4 April 1990.

The Basic Law came into force on 1 July 1997 and replaced the Letters Patent and the Royal Instructions as the constitutional document of Hong Kong. Its main functions are to give validity to all laws enforced in the HKSAR, to give authority to the judiciary and the Government, and to define the relationship between the Central People's Government in the PRC and the new Hong Kong Government. Consistent with the Joint Declaration, the Basic Law provides that Hong Kong will enjoy a "high degree of autonomy" and "executive, legislative and independent judicial powers".

The Basic Law provides that the courts of the HKSAR will adjudicate cases in accordance with the laws previously in force in Hong Kong,

except for any that contravene the Basic Law and subject to any amendments by the Hong Kong legislature. Article 81 of the Basic Law provides that the judicial system previously practised in Hong Kong shall be maintained, except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong Special Administrative Region. Article 87 further provides that “in criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained”.

These constitutional developments have resulted in changes to the structure of the legal system that existed prior to the PRC’s resumption of sovereignty over Hong Kong.

2. Courts and Tribunals

The Hong Kong courts continue to apply common law principles, in accordance with the regime established under the Basic Law. The system of courts and tribunals has in essence continued since the transfer of sovereignty, though with some significant changes - the principal development being the establishment of the Court of Final Appeal.

The courts have jurisdiction (that is, the power to hear and determine a dispute) in personam and in rem. This means that the courts will have jurisdiction over a dispute based on the presence in Hong Kong of a person against whom, or a thing (e.g., a ship) against which, the action is directed. Thus, when the defendant can be served with proceedings in Hong Kong, the court will have jurisdiction even if the case otherwise has little connection with Hong Kong.

Where a prospective defendant is not in Hong Kong, the leave of the Court of First Instance is needed to serve the proceedings out of the jurisdiction. The grant of leave is discretionary, and will be granted only in specified cases under the Rules of the High Court. In essence,



the dispute must have a sufficient connection with Hong Kong for the court to grant leave to serve out of the jurisdiction.

The Court of Final Appeal

The Court of Final Appeal is now the highest appellate court serving Hong Kong. Appeals to the Judicial Committee of the Privy Council ceased on 30 June 1997.

The Court of Final Appeal will hear civil appeals from any final judgment of the Court of Appeal if the matter in dispute concerns an amount of HKD1,000,000 or more. It will also hear other civil and criminal appeals (including interlocutory appeals) with leave if the matter is of great general or public importance, or otherwise ought to be submitted to the Court of Final Appeal for decision. Leave applications in the Court of Final Appeal are heard by an appeal committee of the court, generally comprising three judges.

Typically, when hearing an appeal, the Court of Final Appeal is composed of a bench of five, comprising the Chief Justice or other presiding judge, three permanent Hong Kong judges and one nonpermanent judge from Hong Kong or another common-law jurisdiction.

The court will consider authority from other common-law jurisdictions, including England, as persuasive, although they are not binding. The court is developing its own jurisprudence having regard to legislative background and other circumstances affecting Hong Kong.

The Court of Final Appeal is a statutory court. While it appears to have and accept inherent jurisdiction, that jurisdiction is subject to its enabling Ordinance, the Hong Kong Court of Final Appeal Ordinance. Where a matter is regulated by statute, the Court has no inherent jurisdiction to modify the statute.

The High Court

This court consists of two divisions - the Court of First Instance (the trial court) and the Court of Appeal. The Court of First Instance is the principal court exercising civil jurisdiction in Hong Kong. It has jurisdiction over any claim in excess of HKD1,000,000. Its work is allocated to particular lists, such as the General List, the Companies List and the Commercial List.

The Court of First Instance also tries more serious criminal offences. Trials are by judge and jury. The Court of Appeal hears both civil and criminal appeals from the Court of First Instance and from the District Court. Appeals, either as of right or by leave (see above), may be made to the Court of Final Appeal. A criminal case that has been appealed from the Magistrates Court to a judge of the Court of First Instance may also be referred to the Court of Appeal.

Rights of audience are generally restricted in the Court of First Instance. Broadly speaking, solicitors may appear in interlocutory applications and, in limited circumstances, at final hearings. A barrister must be retained to appear at trial or in an appeal. However, this restriction has been relaxed following the enactment of the Legal Practitioners (Amendment) Ordinance 2010 (the LPAO) in early 2010. The LPAO came into effect in 2012 and sets out a framework allowing accredited solicitor advocates rights of audience before the High Court and the Court of Final Appeal in civil or criminal proceedings or both.

The District Court

The District Court has jurisdiction over civil claims of not more than HKD1,000,000. The District Court also has a substantial criminal jurisdiction. The procedure in the District Court is substantially the same as the procedure in the High Court. Rights of audience are somewhat wider in the District Court; solicitors may appear in trials without retaining a barrister. There is no provision for jury trials in civil or criminal matters before the District Court.



Magistrates Court

The Magistrates Court hears criminal matters, either for trial or before transferring indictable offences to the District Court or Court of First Instance. Trials are by judge and jury.

Tribunals

There are a number of tribunals in Hong Kong established by legislation and exercising specific or specialized jurisdiction. Some tribunals are described below.

The **Small Claims Tribunal** exercises jurisdiction over civil claims for less than HKD50,000, though with some exclusions. For example, it does not have jurisdiction in respect of employment matters, defamation, or maintenance agreements in matrimonial proceedings. Lawyers have no rights of audience before the Small Claims Tribunal.

The **Labor Tribunal** has exclusive jurisdiction to hear claims (exceeding a small monetary limit) arising under the Employment Ordinance, although it retains a discretion to transfer matters within its jurisdiction to a court or tribunal of appropriate civil jurisdiction.

The **Lands Tribunal** has jurisdiction to hear miscellaneous claims concerning land, such as landlord and tenant disputes and rating matters. Again, this tribunal has a discretion to transfer matters to the District Court or to the Court of First Instance, depending on the sum in issue in the claim.

The **Market Misconduct Tribunal**, established in 2003 under the Securities and Futures Ordinance, has jurisdiction to hear disciplinary matters concerning market misconduct, including insider dealing, false trading, price rigging, stock market manipulation and similar misconduct affecting the market for securities. The remit of the Market Misconduct Tribunal extends to all types of civil market misconduct, and not just insider dealing as was the case with the Insider Dealing Tribunal, which it replaces. The old tribunal still operates in respect of disciplinary matters arising from insider dealing

that took place before the commencement of the Securities and Futures Ordinance. Both civil and criminal consequences may now flow from market misconduct offenses under this legislation.

Language and the Courts

Until the mid-1990s, only English could be used in the District Court, the High Court and in certain tribunals. In July 1995, that rule was removed to enable the Chinese language to be used in addition to English. The Basic Law provides that English may be used as an official language in the courts in addition to Chinese. The policy of the Hong Kong courts is one of bilingualism, and the decision as to whether English or Chinese should be used in a particular hearing or trial lies with the presiding judge. The language currently used most often in the higher courts is English, although the use of Chinese is increasing, particularly in the lower courts and tribunals in matters where the parties are self-represented.

It is now also a requirement that certain forms be prepared with Chinese translations where the person on whom the form is to be served is likely to be Chinese speaking and may not be proficient in English. High Court documents filed in court or served on any person may be in English or Chinese.

Consistent with the increasing use of the Chinese language in courts, legislation in Hong Kong is now published in both English and Chinese.

3. Legal Profession

The Hong Kong legal profession is divided into barristers and solicitors. In academic qualification there is little difference between them, although there are differences in their prequalification training. Barristers are specialist advocates and drafters of pleadings. They are sole practitioners. Barristers are divided into Junior Counsel and Senior Counsel appointed from the ranks of Junior Counsel by the Chief Justice as head of the judiciary. Junior Counsel draft pleadings



and act as advocates. For the more complex or significant cases Senior Counsel may be engaged; they generally act only as advocates and have Junior Counsel to assist them.

Solicitors have the primary contact with the client and undertake the research and preparation of witnesses and documentary evidence and the preparation of the action for trial, as well as any negotiations for a settlement.

Barristers, solicitors, expert witnesses and clients work as a team in the conduct of a commercial action of any significance. Barristers and solicitors owe legal and professional duties not only to their clients, but also to the court to act fairly and honestly.

Solicitors generally charge for their work at hourly rates. Barristers generally charge according to the complexity or significance of the matter, with reference to notional daily or hourly rates.

Contingency fees are not permitted in Hong Kong. In its July 2007 report on conditional fees, the Law Reform Commission of Hong Kong recommended that contingency fees should not be adopted in Hong Kong.

4. Procedure for Claims

After nine years of wide consultation, the Hong Kong Civil Justice Reforms (CJR) came into effect on 2 April 2009 and introduced significant changes to the procedures of the High Court and the District Court. The basic structure of the litigation process remained unchanged, with the major effect to be seen in the court's approach to the conduct of the case. There is increased judicial control and a greater emphasis on settlement. The primary objectives of the reforms were to increase cost-effectiveness; ensure expediency, a sense of proportion and fairness; and facilitate settlement and fair distribution of court resources.

Commencement of Proceedings

The plaintiff (the party bringing an action) begins its action by issuing a writ of summons or an originating summons, containing details of the parties and a brief statement of its claim. When the action is begun by a writ, a statement of claim is served either with the writ or later. It is an important document, since it sets out the factual basis of the plaintiff's claim. After the writ or originating summons has been issued, it must be served on the defendant within 12 months. The court may extend the period for service. Where service cannot be effected, the court may order service by other means ("substituted service").

Notice of Intention to Defend

When the defendant (the party against which proceedings have been brought) has been duly served, it must file a Notice of Intention to Defend within 14 days of service. If this notice is not filed, judgment may be entered by the plaintiff in default.

A defendant who wishes to dispute the jurisdiction of the court still gives Notice of Intention to Defend and, within the prescribed time for serving its defense, may apply to the court for an order to set aside the proceedings or for other appropriate relief.

Summary Judgment

An application for summary judgment may be made in the clearest cases on the basis that the defendant does not have an arguable defense. Evidence is given by affidavit or affirmation only - no oral evidence is heard on applications of this type. If the application succeeds, final judgment is given in favor of the plaintiff. If it fails, the defendant may be allowed to defend with or without conditions imposed (e.g., that it pays all or part of the claim into court). A straightforward application is usually heard within about six to eight weeks of filing it with the court.

Applications may now also be made to have a question of law or the construction of a document determined on a summary basis, if the



court considers such a question to be suitable without a full trial and if this would finally determine the action or a claim or issue in the action.

Pleadings

In the absence of summary judgment, the defendant is required to serve its defense (a statement answering the plaintiff's claim) together with any counterclaim it may have against the plaintiff. The plaintiff may serve a reply to the defense and must serve a defense to any counterclaim. Following the CJR, a defendant can no longer rely on bare denials in response to the plaintiff's allegations. The defendant must now state reasons for denying any allegation and, if it intends to put forward a different version of events, set out expressly its own version.

The statement of claim, defence and counterclaim are often referred to as "pleadings". The system of pleadings amounts to a formal exchange of allegations and answers aimed at defining the issues between the parties. Every pleading must contain the material facts on which the party relies, but not the evidence by which those facts are to be proved.

The new CJR rules seek to encourage properly drafted pleadings and discourage speculative pleadings and those unsupported by evidence. The abolition of bare denials is consistent with this objective. Further, while the court retains the power to require necessary amendments to pleadings, it will be more difficult to amend pleadings unless it is necessary for the fair disposal of the case or to save costs.

In addition, pleadings, along with witness statements and expert reports, are now required to be verified by a statement of truth. A statement of truth is a declaration of belief to the effect that the party believes that the facts stated in the pleadings are true. This must be signed by the party putting forward the verified document or by the legal representative of that party. The failure to file a statement of

truth may result in a pleading being struck out or evidence inadmissible.

Discovery of Documents

It is the legal duty of each party and its solicitor to make full disclosure of those documents which are or have been in its possession or control which are relevant to the issues in the action. This process is called discovery and normally takes place after completion of exchange of pleadings, although pre-action discovery is possible in certain circumstances. Discovery is an important part of litigation procedure and its extent and expense in commercial actions can be considerable.

The courts' powers of ordering pre-action discovery have been enlarged as a result of the CJR to allow pre-action discovery against prospective defendants in all types of cases rather than, as previously, only in personal injury and death claims. The applicant will need to show that it and the respondent are likely to be parties to anticipated proceedings and that the documents sought are likely to be in the possession, custody or power of the person from whom they are sought, are directly relevant to an issue arising out of the claim in question, and are necessary either for disposing fairly of the cause or matter or for saving costs.

Similarly, the ability to seek discovery against third parties has now been extended to all types of cases where the third party is likely to have or have had in its possession, custody or power any documents which are relevant to an issue arising out of the claim. The test for relevance is slightly wider than for pre-action discovery.

Some classes of documents, although they must be disclosed, are nevertheless privileged and exempt from production and inspection. Communications with legal advisers for the purpose of obtaining legal advice are privileged. Documents tending to incriminate or expose a party to a penalty under Hong Kong law are also privileged.



Documents containing matters confidential to a party and not otherwise privileged must be disclosed and produced for inspection, but the court may order a controlled method of disclosure to protect confidentiality.

Oral discovery of any person before trial, in the form of a deposition, may also be ordered where it appears necessary to the court for the purposes of justice (e.g., where a witness is too old to attend court).

Finally, as part of the court's case management function, the CJR now allows the court the ability to make orders limiting the discovery which the parties would otherwise be required to make under the discovery rules and can direct the manner in which the discovery is to be made.

Admissions

A party may by notice seek written admissions from the other, without leave of the court.

In straightforward debt matters (i.e., where the only remedy that a plaintiff is seeking is the payment of money), a new procedure has been introduced that allows the defendant to file written admissions within the time limit in a prescribed form. This is aimed at facilitating settlement and to save time and costs.

When a defendant makes an admission of liability in a debt action, he may request time to pay, and the time and rate of payment may be determined by a court officer or a judge.

Interrogatories

Interrogatories are written questions, answered on oath or affirmation, which seek to clarify questions relating to matters in issue between the parties, or to obtain admissions. Principles relating to discovery (such as claiming legal professional privilege) also apply to interrogatories. There are two forms of interrogatories: ordered interrogatories and

interrogatories without order. The latter may only be served on a party twice, and thereafter, an order is required.

The sanctions for failure to answer interrogatories, or to provide adequate answers, include dismissal of the action or the striking out of the defense and entry of judgment.

Exchange of Witness Statements

The rules and practice directions of the High Court require (in most cases) the advance disclosure of each party's evidence in chief, i.e., the substance of what its witnesses propose to say at trial. Such statements will normally be ordered to stand as the witnesses' evidence at trial. The witness may be cross-examined on that evidence by the opposing party.

In this way, the material facts alleged in the pleadings, as well as the evidence on which each party proposes to rely on to prove those allegations or establish its defense, are disclosed prior to trial.

Withdrawal and Discontinuance

An action can in most circumstances be withdrawn or discontinued unilaterally by the plaintiff, but the plaintiff may be ordered to pay the defendant's legal costs (see below). Withdrawal or discontinuance is not a bar to a subsequent action on the same cause of action.

Sanctioned Offers and Payments (Payments into Court)

Sanctioned offers and payments are new rules following the CJR that build on and replace the previous regime of "payments into court" for the formal settlement of disputes. Under the new rules, a defendant facing a monetary claim may make a "sanctioned payment" of a sum of money into court as an offer to settle. Parties wishing to settle a non-monetary claim (e.g., an injunction) may make a "sanctioned offer" in writing.



If the sanctioned offer/payment is accepted within the time limit of 28 days, then the plaintiff will be entitled to his costs up to the date of acceptance. Acceptance of the payment has the same legal effect as accepting any other offer to settle, i.e., all further proceedings in respect of which the acceptance relates are automatically stayed.

The aim of the new procedure is to encourage the parties to take possible settlement seriously and to avoid unproductive prolongation of the litigation. Failure to accept the sanctioned offer/payment may result in a party facing costs penalties if it fails to do better at trial than the other party's sanctioned offer/payment. However, this consequence only attaches to settlement in the form of sanctioned offers and payments, while the rules do not prevent parties from making an offer to settle through alternative methods.

Security for Costs

A foreign plaintiff without assets in Hong Kong or a Hong Kong company plaintiff that is insolvent may be required to give security for the proportion of the defendant's costs that it may have to pay if it is unsuccessful in the action. Security is normally given by a payment into court, but it may be given by bond in some cases. More than one application for security may be made by a defendant during the course of an action. There is no requirement for a foreign defendant to give security unless it goes beyond defending the proceeding and makes a counterclaim arising out of different matters against the plaintiff (i.e., a cross-action), or the foreign defendant is the appellant in an appeal.

Trial

The common-law style of oral trial is conducted. If the parties are before the Court of First Instance, a barrister must be retained. The plaintiff's counsel will "open" the plaintiff's case by explaining to the judge the allegations made by the plaintiff, the evidence to be called and the legal principles relied upon. This is often done with the assistance of a written submission that is also provided to the judge. Witnesses are then called and cross-examined, and documents

tendered. Upon the plaintiff's case closing, the defendant may open and conduct its case (if it chooses to adduce evidence).

Upon all of the parties' cases being closed, final submissions are made. Judgment is then given by the Judge, usually after a period of time (in which judgment is "reserved"). Written reasons are given.

5. Remedies

Interlocutory Injunctions

A plaintiff may apply to the court for an interlocutory (interim) injunction to restrain the defendant from committing a wrong or to preserve the status quo until the rights of the parties have been finally determined by a trial in the action. The grant of an interlocutory injunction is both temporary and discretionary.

In urgent cases, the plaintiff may make an application *ex parte* (i.e., without notice to the other party), and even before - but conditional upon - the issue of the writ.

The jurisdiction is wide and can be exercised wherever it is right or just to do so, having regard to settled principles. The most important of these are that the applicant must show that there is a serious question to be tried (not that it is likely to succeed at trial), that it cannot adequately be compensated by an award of damages alone and that the "balance of convenience" between the parties lies in favor of granting the injunction.

Particular forms of interlocutory injunctions are also available. Thus, where an action or pending action properly brought within the jurisdiction claims a debt or damages against a defendant with assets in Hong Kong, an interlocutory injunction can be obtained *ex parte* to restrain the defendant from removing assets from the jurisdiction or dissipating them pending trial. This is known as a *Mareva* injunction, from the title of one of the first cases where such an order was made.



This type of injunction has become widely used, and often has the effect of bringing the parties to settlement terms at an early stage. However, strong evidence is required before a judge will be prepared to make such an order, as its effect on a defendant can be severe if, for example, bank accounts are frozen. The judge will need to be satisfied that the plaintiff has a good arguable case, that the defendant has assets in Hong Kong, that there is a real risk of their dissipation in the absence of an order being made, and that the balance of convenience is in favour of the order being made.

A plaintiff is also obliged to make “full and frank disclosure” of all material facts (including unhelpful facts) and to give an “undertaking as to damages” to the court, which operates in favor of the defendant and third parties, such as banks. The undertaking is to pay any losses or expenses reasonably incurred as a result of the injunction. The effect of the undertaking may be particularly onerous if, in due course (or after a trial), the injunction is discharged.

The jurisdiction granting these injunctions is constantly being developed and refined. For example, Mareva injunctions may now be granted to assist in execution of judgments on claims extending to assets outside the jurisdiction. Further, the court’s jurisdiction to grant interim injunctions in support of foreign proceedings has now been enlarged by the CJR. Interim relief in aid of foreign proceedings can now be sought as an independent, standalone form of relief, without being ancillary or incidental to substantive proceedings in Hong Kong. Under the new rules, a Hong Kong court can grant interim relief in aid of foreign proceedings provided those proceedings are capable of giving rise to a judgment that may be enforced in Hong Kong.

Where it can be shown that there is a real risk that a defendant will destroy evidence in its possession before trial, a plaintiff may seek an interlocutory order (known as an Anton Piller order) directing the defendant to permit certain persons to enter its premises to search for certain documents or articles outlined in the order (e.g., counterfeit goods) and to remove, inspect or make copies of those documents or

articles. If the defendant fails to comply with the order, it may be held in contempt by the court. The court also has the power to order a defendant (e.g., a retailer) to disclose names and addresses of suppliers of infringing goods. This type of injunction is commonly used in actions concerning infringement of intellectual property rights and abuse of confidential information.

As such an order amounts, in effect, to civil search and seizure, the courts have developed detailed substantive and procedural requirements with which a plaintiff must comply, together with sanctions for failure to do so. The court must be satisfied before granting an Anton Piller order that the plaintiff has a strong prima facie case of a civil cause of action. The damage sought to be avoided by the plaintiff must be serious, and there must be a real risk that the defendant will destroy relevant evidence that is in its possession. The likely harm of the order to the defendant must not be excessive or out of proportion to the legitimate object of the order. Even if all these conditions are met, the court will still have to weigh the balance of the plaintiff's need for the order against the injustice to the defendant, given that the order is made *ex parte*, without an opportunity for the defendant to be heard by the court.

An interlocutory injunction may also be granted, in special cases, to prevent a defendant from leaving the jurisdiction for a limited period. Such an injunction is called a prohibition order. The purpose of such draconian relief is to require the defendant to remain available and subject to the court's jurisdiction while the plaintiff pursues enforcement options.

Costs

The court has a discretion in ordering reimbursement of costs and the amount of such costs. The unsuccessful party in proceedings is almost invariably ordered to pay the costs of the successful party. "Costs" include the fees and expenses a party is obliged to pay his own solicitor, barrister and experts. Court fees are only minimal filing fees.



The amount allowed is usually assessed on a “party and party basis”, that is, all costs necessarily and properly incurred for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed. The successful party rarely obtains full reimbursement for all his costs - the proportion is generally about two-thirds of the actual costs paid.

In many cases, the costs payable by the unsuccessful party are agreed after negotiation. If they are not, they are determined by the procedure of “taxing” (i.e., assessing) a detailed bill of costs before one of the court’s taxing masters.

The new regime under the CJR now imposes tougher cost sanctions. We described the costs implications that follow from sanctioned payments and offers above. The court is now able to order summary assessments of interlocutory applications, so that a party subject to a costs order may be required to make immediate payment rather than wait until the costs are determined at the end of the main proceedings. In addition, the court’s previous power to order payment of wasted costs against solicitors has been extended to “legal representatives,” which means that barristers are now also subject to this exposure (wasted costs are those costs incurred as a result of improper or unnecessary acts or omissions or any undue delay or misconduct in the proceedings). Finally, the court may now also make costs orders against non-parties where it is satisfied that it is in the interests of justice to do so. This sanction will potentially affect third party funders, such as insurers funding insureds and creditors funding liquidators’ actions.

6. Appeals

With limited exceptions, an appeal is possible at every stage of litigation. Appeals from the Small Claims Tribunal and the Labor Tribunal are to the Court of First Instance. In most cases, appeals from a master of the Court of First Instance (on interlocutory applications) are to a judge of the Court of First Instance in chambers, although certain decisions of masters will lie to the Court of Appeal (e.g.,

against an assessment of damages). Appeals from a judge of the Court of First Instance, the District Court or the Lands Tribunal are to the Court of Appeal (typically consisting of an uneven number of judges of not less than three, although a two-judge court hears certain types of appeals or applications).

Appeals from the Court of Appeal are to the Court of Final Appeal. As outlined above, appeals may be as of right or by leave. A grant of leave is made where the case is one of general importance.

Generally, an appeal is not a re-hearing, and fresh evidence is rarely allowed. The appellate court will rarely interfere with a decision based on the exercise of the lower court's discretion or with a trial Judge's view of the facts based on his perception of the witnesses, unless that exercise of discretion or perception was clearly wrong or involved an error of principle. Witnesses are not heard on appeal. However, an appeal from a master to a judge in chambers of the Court of First Instance is a re-hearing *de novo* whereby the judge hears all of the evidence afresh and the parties are free to adduce fresh evidence without leave.

7. Enforcement of Judgments

A judgment takes effect from the time it is pronounced. Interest runs on the amount of the judgment from the date of judgment at the statutory rate applicable from time to time. Pre-judgment interest is calculated as part of the judgment sum.

The principal methods of enforcement of judgment debts or the carrying out of orders of the court are by:

- (a) issue of a writ of execution (directing the bailiff, an officer of the court, to seize and sell the defendant's goods to satisfy the judgment debt) or writ of possession (directing the bailiff to obtain the property ordered to be returned to the plaintiff);
- (b) presentation of a petition to wind up a defendant company or to declare bankrupt an individual defendant;



- (c) examination of the judgment debtor (or where a company, one of its officers) before a master by oral cross-examination on oath about debts owing to him or her and what other property or means he or she has of satisfying the judgment. The judgment debtor can be required to produce relevant books or other documents and can be fined or committed to prison for failure to comply with any requirements of the examination;
- (d) garnishee proceedings, where debts due to the defendant may be ordered to be paid directly to the plaintiff to satisfy the judgment;
- (e) charging order, where a charge in favor of the plaintiff is imposed on an interest in land or securities owned by the defendant;
- (f) appointment of a receiver over the defendant's interest - e.g., where the defendant is a joint tenant of property, or will become entitled to fees not yet earned; and
- (g) proceedings for contempt, where a judgment or order requires a person (or where a company, any of its officers) to do an act within a specified time, or not to do an act, is disobeyed. The person disobeying may be fined, or a writ of sequestration may be issued against his or her property, or he or she may be committed to prison. Committal is the ultimate punishment for contempt and may be ordered where there has been flagrant or repeated failure to carry out undertakings given to the court or disobedience of a court order.

Execution Against Assets Overseas

Often in international business transactions, the judgment debtor may not have any assets in Hong Kong, but the creditor may know or suspect that there are assets abroad. A Hong Kong judgment can be registered and enforced in any country with which an agreement has been reached as to reciprocal enforcement of judgments. At present,

these countries include Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Italy, Israel, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka. However, in a number of countries, notably the United States, Japan and, since 1997, the United Kingdom, a Hong Kong judgment is not directly enforceable, but is only enforceable at common law. In other words, in those countries it is necessary to commence fresh proceedings to pursue the Hong Kong judgment and to obtain and enforce a judgment of the courts of that country.

8. Recognition and Enforcement of Foreign Judgments in Hong Kong

If a foreign judgment for the payment of a sum of money (a “money judgment”) is obtained in a country designated under the Foreign Judgments (Reciprocal Enforcement) Ordinance, then an application can be made to the Hong Kong court to register that foreign judgment. However, the process is not automatic, and each judgment will be assessed on an individual basis to see if it fulfils the necessary criteria. Once leave is given to register, after a period specified by the court, the foreign judgment can be enforced in the same way as a Hong Kong judgment provided the judgment debtor has not succeeded in an application to set aside the registration. Where a foreign money judgment cannot be registered under the Ordinance, it is only enforceable at common law. The judgment creditor must bring fresh proceedings in Hong Kong on the foreign judgment. The Hong Kong courts will recognize and enforce in local proceedings a judgment obtained abroad, and without going into the underlying merits of the claim founding the foreign judgment, if certain conditions are satisfied. In short, the court requires that:

- (a) the foreign court had jurisdiction over the defendant according to Hong Kong rules (i.e., the defendant was present in the foreign jurisdiction at the relevant time when proceedings were brought, or consented to the foreign court having



jurisdiction either by appearing to contest the claim or by prior relevant agreement);

- (b) the foreign judgment was not obtained by fraud;
- (c) the foreign judgment was not contrary to Hong Kong rules of public policy or notions of natural justice;
- (d) the foreign judgment was for a debt or a definite sum of money; and
- (e) the foreign judgment was final and conclusive.

After commencement of the action by issue and service of a writ, the plaintiff (the foreign judgment creditor) can apply for summary judgment on the ground that the defendant has no defense. If the application fails, the action will proceed towards a trial in the usual way. The Hong Kong court tends to define narrowly the defenses to an action on a foreign judgment (particularly the defenses based on public policy or natural justice).

Enforcement between Hong Kong and the PRC

In 2006, the PRC and Hong Kong signed the Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters, and the Mainland Judgments (Reciprocal Enforcement) Ordinance (the MJREO) came into effect in Hong Kong on 1 August 2008.

The MJREO provides for the mutual enforcement of final judgments requiring the payment of money in commercial cases. Commercial cases are defined as a dispute arising from civil or commercial contracts where the parties concerned have made an agreement in writing, specifying the mainland or Hong Kong court that has sole jurisdiction to resolve any dispute arising out of the contract.

Therefore, the arrangement does not cover orders for specific performance, injunctions, matrimonial matters, bankruptcy and insolvency matters, employment or consumer matters.

In order to register a mainland judgment for enforcement in Hong Kong under the MJREO, the judgment must (i) be from a court designated by the MJREO, i.e., courts at the Intermediate People's Court Level or above and specified Basic Level People's Courts; (ii) be certified as final and conclusive and as being enforceable in the mainland; and (iii) order the payment of a sum of money; and the registration must be applied for within two years from the date the judgment takes effect.

To register a Hong Kong judgment for enforcement in the mainland, the judgment creditor has to register both the Hong Kong judgment and a certificate that the judgment can be enforced by execution in Hong Kong. Under the MJREO, the High Court has the power to issue certified copies of judgments of the Court of Final Appeal and of the High Court, and to issue the required certificate. The District Court has mirroring powers in respect of its judgments.

A similar recognition regime has been entered into between the mainland and Macao on 1 April 2006. However, at present, there are no arrangements between Hong Kong and Macao for the mutual recognition of judgments.

9. Arbitration Law

The new Arbitration Ordinance (the AO) came into operation on 1 June 2011. The AO replaces the previous Ordinance and is intended to simplify arbitration law in Hong Kong and make it more user friendly by largely adopting the UNCITRAL Model Law (the "Model Law") (including the 2006 amendments to the Model Law on interim measures) in relation to all arbitrations.



A unified arbitration regime

The AO seeks to unify what were previously two separate regimes for domestic and international arbitrations into a single unified regime substantially based on the Model Law.

Despite the removal of the split regime, parties may opt in to certain provisions which previously applied only to domestic arbitration, as listed in Schedule 2 of the AO. Matters under Schedule 2 relate to: (i) determination of a dispute by a sole arbitrator; (ii) consolidation of arbitration; (iii) determination of a preliminary point of law by the court; (iv) challenging an arbitral award on the ground of serious irregularity; and (v) appeal against an arbitral award on question of law. The AO also automatically applies these Schedule 2 provisions to arbitration agreements entered into before, or within six years after, the AO comes into force and which specify that the arbitration under the agreement is to be a domestic arbitration.

Interim measures and enforcement of interlocutory orders

Based on the Model Law, the AO now adds considerable detail in relation to the power of the arbitral tribunal to grant interim measures. For instance, arbitral tribunals will have express power to make orders for preservation of assets and to grant preliminary orders, including preliminary orders on an ex parte basis, preventing the parties from frustrating the purpose of interim measures.

Mediator-arbitrators

Under the AO, an arbitrator is allowed to act as a mediator after arbitral proceedings have begun, provided the parties consent in writing. Once a mediator-arbitrator is appointed, the arbitration will be stayed, and the mediator-arbitrator will act as a mediator, communicating in confidence with both parties to try to settle the matter.

Confidentiality

To enhance confidentiality in international arbitration, the AO provides that unless the court otherwise directs, court proceedings relating to arbitration are not to be heard in open court. Furthermore, unless otherwise agreed by the parties or under exceptional circumstances as provided for in the AO, no party may publish, disclose or communicate any information relating to arbitral proceedings and awards.

Cost of the arbitration and the arbitral tribunal's fees

Section 74 of the AO expands upon the arbitral tribunal's powers to deal with costs. Unless there is specific agreement by the parties that the court will assess the amount of recoverable costs, the tribunal will do so. It will not have regard to court scales or practices and may award costs incurred prior to the commencement of the arbitration, and it may award the costs of orders or directions (including interim measures) to be paid forthwith. This is a departure from the previous ordinance, under which taxation by the court was the norm.

Enforcement of awards

The enforcement provisions of the Model Law have not been adopted in the AO. Instead, the AO takes a similar approach to that under the previous ordinance. As such, an arbitral award is enforceable in the same manner as a judgment of the court, but only with leave of the court. Awards made in a New York Convention state or in mainland China will be enforced in the same way as under the previous regime.

10. Institutional and Ad Hoc Arbitration

In 1985, the Hong Kong International Arbitration Centre (HKIAC) was established. The AO provides that the HKIAC has statutory power to appoint arbitrators or umpires in some circumstances.

The HKIAC is administered by a full-time Secretary General. It provides accommodation and support services for international



arbitrations such as simultaneous translation and transcription. It maintains a panel of arbitrators from a number of different jurisdictions.

The HKIAC handles a variety of disputes involving parties from around the world. Its role has been strengthened, in particular as a place for the arbitration of business disputes between foreign companies and enterprises from the PRC, by the signing of a cooperation agreement between the HKIAC and its counterpart in Beijing, the China International Economic and Trade Arbitration Commission (CIETAC).

Since 2008, the HKIAC has offered the additional service of administering an arbitration in accordance with the HKIAC Administered Arbitration Rules (HKIAC Rules). The HKIAC Rules recently underwent a review, and the revised edition to the HKIAC Rules is expected to come into force in March 2013. The key areas where amendments were made include:

- (a) joinder of parties to an existing arbitration provided that all the parties are bound by one or more valid arbitration agreements;
- (b) consolidation of two or more existing arbitrations where the parties agree to do so, all the claims are made under the same arbitration agreement or the claims arise out of the same transaction or series of transactions and the HKIAC finds the arbitration agreements to be compatible;
- (c) the fees of the arbitral tribunal which are to be fixed in accordance with an hourly rate (subject to a cap of HKD6,500 or higher if all parties agree) or the HKIAC's Schedule of Fees;
- (d) clarification and expansion of the arbitral tribunal's powers to grant interim measures in light of the AO; and

- (e) the provision of emergency arbitrators prior to the constitution of the arbitral tribunal.

Hong Kong has seen an increase in the number of cases involving entities from the PRC. Hong Kong has a number of practical advantages including cost; convenience; the ready availability of Chinese language arbitrators; counsel and translators and an arbitration regime which accommodates both international practice and the traditional Chinese preference for conciliation.

International Chamber of Commerce (ICC) Arbitration

Arbitrations conducted under the rules of the ICC can be heard in Hong Kong. Frequently companies from different countries contracting in Asia will provide in their agreement for disputes to be submitted to ICC arbitration in Hong Kong under Hong Kong law or another law, even though neither of the parties may be from Hong Kong, and the performance of the contract has nothing to do with Hong Kong. ICC arbitration is internationally recognized and respected and, for that reason, is acceptable to multinational corporations. Hong Kong is recognized as a forum within Asia which is able to handle large arbitrations comfortably and has lawyers from many jurisdictions used to dealing with complex dispute work.

Other Arbitral Institutions

On 24 September 2012, CIETAC opened an arbitration center in Hong Kong. This is the first arbitration center set up by CIETAC outside mainland China.

The establishment of the CIETAC Hong Kong Arbitration Centre, together with the existing arbitral institutions in Hong Kong, including the HKIAC and the ICC International Court of Arbitration (Asia Office), provides options for parties in their choice of institution and enhances Hong Kong's position as a leading center for international arbitrations.



There are certain other institutions which administer arbitration in Hong Kong. For example, the Hong Kong General Chamber of Commerce has an arbitration committee, which will appoint arbitrators at the request of parties to an arbitral agreement regardless of whether the parties are members of the chamber.

Ad Hoc Arbitration

Apart from arbitrations being conducted under the auspices of HKIAC and other arbitral institutions, Hong Kong is also selected as the place of arbitration for many ad hoc arbitrations.

ICSID and Bilateral Investment Treaties

Hong Kong is, through the PRC, party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “Washington Convention”).

The Hong Kong SAR is also party to 15 bilateral investment treaties. These are with Australia, Austria, the Belgium-Luxembourg, Denmark, France, Germany, Italy, Japan, Republic of Korea, the Netherlands, New Zealand, Sweden, Switzerland, Thailand and the United Kingdom. These Agreements provide for the settlement of investment disputes by arbitration.

11. Enforcement of Arbitration Awards

A Hong Kong arbitral award may, on application to the court, be enforced as if it were a judgment of the court. If the respondent has assets in Hong Kong, a variety of means of enforcement are available. The jurisdiction of the court is not limited by the absence or otherwise of the respondent from Hong Kong.

Hong Kong (as part of the PRC) is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “Convention”), which provides for mutual recognition and enforcement of arbitral awards in countries which are parties to the Convention. Pursuant to the Convention, arbitral awards

of more than 140 foreign countries that are signatories to the Convention are summarily enforceable in Hong Kong with the leave of the court.

Arbitral awards of foreign countries that are not party to the Convention are also summarily enforceable with leave of the court. The AO adds a new section covering enforcement of awards that are not made in a New York Convention state or in mainland China, so that the court is empowered to enforce such awards on a discretionary basis without the need to demonstrate reciprocity. The AO also specifies the grounds on which enforcement of such awards may be refused. These grounds are essentially the same as those available under the New York Convention, but there is one important difference: under section 86(2)(c) of the AO, the court is permitted to refuse to enforce an arbitral award “for any other reason that the court considers it just to do so”. The common law position on the enforcement of non-Convention awards is that the court will refuse leave to enforce only if there are real grounds for doubting the validity of the award, or where the award is not in a form that can be entered as a judgment. Perhaps section 86(2)(c) is intended to preserve these residual grounds for refusing enforcement even if they do not fall within any of the New York Convention grounds for non-enforcement.

The AO also makes specific provision for the summary enforcement in Hong Kong of arbitral awards made by “recognized mainland arbitral authorities” of the PRC (not including Hong Kong). Likewise, arbitral awards made in Hong Kong pursuant to the AO are enforceable in other parts of the PRC pursuant to the Arrangement of the Supreme People’s Court for the Mutual Enforcement of Arbitral Awards in the Mainland and the HKSAR.

Both types of arbitral awards are subject to certain limitations. For example, a mainland award may not be enforceable in Hong Kong if an application for enforcement is also pending on the mainland.¹ A

¹ Section 93



Hong Kong award may not be enforceable on the grounds that mirror the ones for refusal in the New York Convention. The most controversial one of these is that a Hong Kong award will not be enforced if the enforcement would be contrary to the public policy or interests of China. If the losing party is a state-owned company, such a defence may be raised. However, a defendant could just as easily raise the defence of state immunity in court, so it is a problem that may have to be faced in litigation or arbitration.

On 7 January 2013, Hong Kong and Macao entered into the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region (the “Arrangement”). Under the Arrangement, the courts of Hong Kong must recognize and enforce arbitral awards made in Macao pursuant to the laws of arbitration of Macao, and the courts of Macao must recognize and enforce arbitral awards made in Hong Kong pursuant to the AO. The Arrangement will take effect on a date to be designated by both governments.

12. Power to Appeal and/or Set Aside an Award

An arbitral award in international arbitrations is final and binding on the parties and can only be set aside in very limited circumstances. The grounds upon which an award may be set aside or varied (aside from in circumstances where the arbitrator has misconducted himself in the proceedings) include where:

- (a) proper notice of the arbitration proceedings or the appointment of the arbitrator was not given;
- (b) the award deals with matters outside of the scope of the submission;
- (c) the arbitration agreement is invalid under Hong Kong law;
- (d) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Hong Kong; or

- (e) the award is in conflict with the public policy of Hong Kong.

13. Mediation and other ADR techniques

Mediation has become a very active and quite successful dispute resolution technique in Hong Kong, particularly since the CJR came into effect.

The rules now require the courts to encourage parties to use alternative dispute resolution procedures (particularly mediation) where appropriate, to facilitate their use and to help parties settle their case as part of the courts' duty of active case management.

Mediation is the process of negotiation between parties facilitated by an independent third party. The mediator seeks to do that by assisting in an objective appraisal of the dispute and each parties' interests and by eliminating communication barriers. The process, which includes joint and separate meetings between the parties, is very flexible; control remains with the parties. Participation is voluntary, and if the parties do not reach an agreement, they may end the process. If the parties agree on a settlement, this will take the form of a binding and enforceable agreement.

Under the CJR, parties are now required to stipulate their willingness to attempt mediation with a view to settling proceedings. The courts can also impose adverse costs order where there has been an unreasonable refusal to mediate.

There are a number of organizations in Hong Kong which will propose suitable candidates for appointment as mediators if the disputing parties wish to try to settle their differences using this technique but cannot agree upon a mediator. One such organisation is the Hong Kong Mediation Council (HKMC) set up by HKIAC in January 1994 to promote the development and use of mediation as a method of resolving disputes.

The AO also permits an arbitrator to act as mediator with the parties' consent. Information obtained by the mediator/arbitrator from one



party is kept confidential from the other party unless the mediation fails, in which case all relevant information made available to the mediator/arbitrator must be revealed to both parties. The arbitrator may then continue to a full hearing and make an award on the merits.

In addition, a new Mediation Ordinance came into force on 1 January 2013. The legislation provides a regulatory framework for the conduct of mediation and protects the confidentiality of mediation communications in proceedings, which include both court and arbitral proceedings.

A number of nonprofit organizations have also been established in Hong Kong to assist with disputes involving smaller amounts and/or of a specific nature (such as family and building management disputes). One example is the Financial Dispute Resolution Centre (FDRC), which commenced operation in June 2012. The FDRC facilitates resolution of monetary disputes of not more than HKD500,000 between individual customers and financial institutions. Disputes accepted by the FDRC will first be mediated. If mediation fails, claimants may proceed to arbitration, to be conducted by the FDRC on a “documents-only” basis.

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