HONG KONG, SAR

Global litigation guide

DLA PIPER

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

Key contacts

Ewald Netten
Partner
DLA Piper Nederland N.V.
ewald.netten@dlapiper.com
T: +31 20 5419 865

Hong Kong, SAR

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Overview of court system

In 1997, the People's Republic of China (PRC) assumed sovereignty over Hong Kong and Hong Kong is now a Special Administrative Region of the PRC. Hong Kong has its own mini-constitution, called the Basic Law, which governs the laws applicable specifically to the region of Hong Kong. The Basic Law took effect on July 1, 1997 after the handover of Hong Kong from Britain to the PRC. All the laws previously in force in Hong Kong (including common law, statutes, etc) are maintained under the Basic Law except for any that contravene the Basic Law, and subject to any amendment by the Hong Kong Legislative Council. National laws of the PRC are not applied in Hong Kong except for those listed in Annex III of the Basic Law, which concern matters such as consular privileges and immunities.

Hong Kong operates under a common law legal system and its courts are separate from those in the PRC. In the event of conflict between statutory law and common law, the former will prevail. Commercial disputes exceeding HKD3 million (around USD385,000) are usually brought in the Court of First Instance of the High Court. Smaller claims are brought in the District Court or the Small Claims Tribunal. There are also specialized courts and tribunals, such as the Labour Tribunal and Lands Tribunal, which handle specific types of disputes. The highest appellate court in Hong Kong is the Court of Final Appeal, which hears appeals on both civil and criminal matters. In Hong Kong, the lower courts will be bound by the decisions and judgments of the higher courts.

Court proceedings may be conducted in either Chinese or English. Irrespective of the language used in the proceedings, witnesses may give evidence in the language of their choice and the court will accordingly arrange for interpretation facilities.

Limitation

In most commercial disputes, the limitation period for a claimant to commence a civil action is six years from the date when the cause of action occurred (for example, the date when the defendant committed the breach in a claim for breach of contract). However, in an action for breach of a contract created by deed, the limitation period is extended to 12 years from the date when the cause of action accrued. It is important to note that the Limitation Ordinance also prescribes shorter limitation periods for actions in respect of claims for personal injuries.

Procedural steps and timing

It is not mandatory for a party in any legal action in Hong Kong to have legal representation. Where the party is a corporate entity, a natural person (such as a director or officer of the entity) may be appointed with the permission of the court to act on its behalf in the legal action.

In general, the claimant would have to file a writ of summons with the relevant court to start a civil action in Hong Kong.

Once the writ of summons has been duly served on the defendant's legal representative, or by a bailiff on the defendant, the defendant must acknowledge service within 14 days (or, generally, 28 days if the defendant is served outside of Hong Kong with the court's permission) and state whether it intends to defend the action. The parties will then exchange pleadings (such as statements of claim, if not already served together with the writ of summons, defences, and replies) which define the parameters of the dispute and the specific issues which are to be proved by each party. If a statement of claim was not served together with the writ of summons by the claimant,

the claimant will need to file and serve it within 14 days of the defendant filing its acknowledgment of service and notice of intention to defend the action.

If the statement of claim was served together with the writ of summons by the claimant, the defendant has 28 days after the deadline for filing its acknowledgment of service to file and serve its defence. Otherwise, the defendant has 28 days after the relevant statement of claim has been served by the claimant to file and serve its defence. Thereafter, the claimant has 28 days to prepare its reply. In general, timelines prescribed by the rules of the court can be extended either by application to the court or through consent of the parties (without any application to the court).

Once the exchange of pleadings is complete, parties will undertake the disclosure process and go on to prepare their evidence (which includes witness statements and, if applicable, expert reports) for a final hearing of the dispute. Parties are generally obliged to attend court at regular intervals, during which orders are given to manage the conduct and timeframes of the case up until its final hearing.

The timeframe from the commencement of proceedings to handing down of judgment varies greatly depending on the complexity and case management style of an individual matter. Usually, relatively straightforward cases are ready to be set down for trial within two years from the commencement of proceedings. Complex cases, however, may take longer before they can be set down for trial.

Disclosure and discovery

In civil proceedings in Hong Kong, a party generally has a duty to disclose to the other party all documents relevant to the case that are within their custody, power or control, even if some of the documents are not favourable to their case. The disclosure process is usually undertaken after the pleadings have been filed as this is the time at which the points of dispute between the parties have crystallized. However, the court may also order disclosure prior to the commencement of proceedings where an applicant is able to satisfy the court that they need to obtain such disclosure in order to determine whether or not a cause of action exists against a potential defendant. Evidence is generally not obtained *ex parte*, but is obtained through discovery where parties may exchange and inspect the documents included in the list of documents. The primary test for evidence to be admissible in court is the test of relevance (ie evidence on any issue in the case or which directly/indirectly enables the party receiving discovery to advance their case or damage the case of their adversary will generally be admissible).

Each party to a civil action must disclose the relevant documents it possesses in the form of a list, known as the list of documents. Except for documents that are privileged, all other documents must be provided to the other party on request or made available for the other party's inspection. A party may refuse to disclose privileged documents to the other party. If there is a dispute as to whether a document is privileged, the court will make a final decision.

Prior to the commencement of proceedings, parties may make an application for pre-action discovery against prospective parties. However, pre-action discovery is limited to documents which are directly relevant (ie likely to be relied on in evidence by any parties or will support or adversely affect any party's case in the intended proceedings) and an order will only be made if the court considers it to be necessary for fair disposal of the cause or for saving costs.

There is a continuing obligation to give discovery after the commencement of proceedings and additional documents may be disclosed in a supplemental list of documents.

Default judgment

Default judgments can be applied for in civil proceedings in the District Court and the Court of First Instance where a defendant does not:

- give notice of intention to defend; or
- serve a defence, within a prescribed time limit.

A defendant may apply to set aside or vary a default judgment at any time if it was irregular in any respect or if the defendant can show that it has a meritorious defence to the claim and that there is a reasonable explanation for why the judgment was allowed to go by default in the first place. In considering whether to set aside a regular default judgment, the court will take into account all the circumstances and may only make a setting aside order with terms imposed on the defendant (for example, requiring the defendant to pay all or a part of the sum(s) being claimed by the claimant into court).

An application must be made to court for a default judgment by the party seeking such judgment after the expiration of the period fixed for service of the required pleadings from the other party. As a default judgment is administrative in nature, the court will not examine the merits of the claim.

In order to grant judgment in default of a notice of intention to defend, the court must be satisfied on one of the following prerequisites: (i) the defendant acknowledged service of writ, (ii) there is an affidavit/affirmation filed by the plaintiff proving due service of writ, or (iii) the plaintiff produces the writ indorsed by the defendant's solicitor confirming acceptance of service.

Appeals

The Court of Appeal hears appeals from both the District Court and the Court of First Instance.

An appeal can be made on the grounds of challenges on the question of law, findings of fact and the exercise of discretion, but does not trigger a re-trial. The courts will consider the merits, the entire evidence and the trial. If new points or evidence intend to be raised for the first time during appeal, leave of the court (ie the court's permission) will be required for the appeal.

For civil cases in the District Court, a party who is not satisfied with the decision of a judge can apply to that judge for leave to appeal. The time limit for seeking leave to appeal is 28 days from the date of a final judgment, or 14 days from an interlocutory order or decision. If the judge refuses to grant permission to appeal, the party may apply for permission to appeal from the Court of Appeal within 14 days from the date of the judge11/11/2023 06:32:05s refusal.

For a case in the Court of First Instance, generally no leave is required for an appeal against a final judgment, but permission is still required for an appeal against an interlocutory order or decision of a judge of the Court of First Instance and the time limit for seeking leave is 14 days from the date of the interlocutory order or decision. Similar to an appeal from the District Court, if leave is refused by the Court of First Instance judge, the party may apply for permission to appeal from the Court of Appeal within 14 days from the date of the judge's refusal. The time limit for filing a notice of appeal against a final judgment of the Court of First Instance where no leave is required is 28 days from the date of the judgment.

Due to a number of factors, such as the availability of the parties and judges, it usually takes a minimum of six months before an appeal will be heard by the Court of Appeal. In terms of timeframe for resolving the appeal, there is no stipulated period and the timeframe for the Court of Appeal to issue a judgment varies depending on factors including the court's workload and the complexity of the case. This means that the Court of Appeal may issue a decision in less than six months or it may take over a year.

For civil appeals, leave to appeal from either the Court of Appeal or Court of Final Appeal is required. Permission to appeal will only be granted if the question or questions involved in the appeal is/are of great general or public importance, or, if taking into account all the relevant circumstances such as merits, the appeal ought otherwise to be submitted to the Court of Final Appeal. The time limit for seeking permission to appeal to the Court of Final Appeal is 28 days from the date of the Court of Appeal judgment. If the Court of Appeal refuses to grant leave, a further application for leave can be made to the Court of Final Appeal within 28 days from the date of the Court of Appeal' s refusal. The Court of Final Appeal will usually hand down its written judgments within approximately one year after leave has been granted. That said, much depends on how busy the Court of Final Appeal is and also on the complexity of the case.

An appeal will not automatically operate to suspend the proceedings and the judgment will be deemed valid unless and until it is reversed. If the parties intend to suspend the effect of the appealed judgment, they may apply for a stay of execution of judgment pending the appeal.

Interim relief proceedings

The courts have wide powers and discretion to grant interim relief to parties in the proceedings. As in ordinary proceedings, legal representation in interim relief proceedings is not mandatory. The most common interim relief applications by far are for interlocutory injunctions to restrain the commission of any particular act by the respondent until trial or a further order of the court discharging the injunction in question.

An interlocutory injunction may be made on an urgent *ex parte* basis immediately prior to the formal commencement of the legal action.

In brief, an application for interlocutory injunction may be made to restrain the commission of an allegedly wrongful act by the respondent when:

- there is a serious issue to be tried (ie the claim has some expectation of success and is not a merely fanciful one);
- monetary compensation given at trial for the allegedly wrongful act would not be an adequate remedy for the applicant;
- the applicant is able to compensate the respondent and other affected parties for losses and damage arising from the granting of the injunctive relief if ordered by the court to do so subsequently; and
- the balance of convenience favours the granting of the injunction. In deciding where the balance of convenience lies, the court will take into account all relevant circumstances of the case.

In appropriate circumstances, an application for interlocutory injunction may be made on an urgent *ex parte* basis (ie without giving notice to any of the other parties in the action) at the same time or immediately prior to the formal commencement of legal action. Such *ex parte* hearings are heard by the court as soon as possible, usually on the same day the application papers are filed with the court. If a party applies for an interlocutory injunction before an action is commenced, the injunction applied for will be granted by the court with a condition requiring the party to issue a writ of summons immediately or as soon as reasonably practical.

An application for interlocutory injunction is usually supported by the applicant's affidavit evidence. In an *ex parte* application, the applicant has a strict duty to make full and frank disclosure of all material facts (even those unhelpful to their case) to the court.

Other interim remedies available include but are not limited to the following:

- **Security for costs**: Where the claimant resides/is incorporated outside of Hong Kong, a party can make an application for the claimant to pay a specified sum into court to meet any order for legal costs made at the trial.
- **Interim payments**: The general purpose of an interim payment is to reduce monetary hardship or prejudice that the claimant may suffer leading up to the trial. Where the defendant has already admitted liability or it is clear that, if the matter proceeds to trial, the claimant would obtain judgment for substantial compensation against the defendant, the court can require the defendant to make an advance payment to the claimant.
- **Anton Piller orders**: In order to prevent a defendant from destroying important documents/information, the court can grant an order which permits the claimant's representative to enter the defendant'exs premises to search for and seize certain documents which are relevant to the case.
- **Appointment of receivers**: A party in a dispute over the validity of the board of directors' appointments of a company and/or the ownership of the controlling stake in a company may apply for the appointment of receivers to the company to take over control of the management until determination of the dispute by the court. The court may appoint receivers to the company if it is just and convenient to do so having regard to all the relevant circumstances.

It is rare for interim injunctive reliefs to be appealed. Normally, if the aggrieved party disagrees with the interim injunctive relief granted by the judge, it will make an application to have it discharged. For interim injunctive relief obtained by the applicant on an *ex parte* basis, an aggrieved party may make a discharge application at the return day hearing. The return day hearing is typically held within a week of the hearing at which such interim injunctive relief was granted by the court and its purpose is to provide an opportunity for the parties affected by the interim injunctive relief to make submissions to the court and for the court to decide whether the interim injunction should continue.

If no discharge application is made at the return day hearing or if there is no return day hearing because the application for interim injunctive relieve was not made on an *ex parte* basis, an aggrieved party may make an application to discharge the interim injunctive relief at any time. Such application will normally be heard by the court within three to six months and the court usually decides on the application within two to three months of the conclusion of the hearing.

Appeals against interim remedies other than injunctive relief are usually heard by the court within three to six months, and decided within three to six months. Timeframes for the handing down of appeal decisions may vary greatly and would be affected by factors such as how busy the court hearing the appeal is and the complexity of the case.

Prejudgment attachments and freezing orders

Hong Kong courts can grant an interim freezing order, known as a Mareva injunction, which restrains a party from disposing of or dissipating its assets pending final judgment. A Mareva injunction is a type of interim relief, but the requirements that claimants must satisfy in order to obtain one are slightly different from the requirements referred to in interim relief proceedings, as further explained below.

It is possible to apply for a Mareva inunction to freeze any valuable assets of the defendant such as money in bank accounts, real properties, or shares in companies. However, the Mareva injunction will only operate to restrain the defendant from diminishing the value of their assets to less than the amount (usually the amount claimed by the claimant) specified in the injunction order.

The initial application for a Mareva injunction can be made either to the Court of First Instance or the District Court and is usually heard on an *ex parte* basis. Like other types of interlocutory applications, if a party applies for a Mareva injunction before an action is commenced, the injunction applied for may be granted by the court with a condition requiring the party to issue a writ of summons immediately or as soon as reasonably practical.

Any orders given *ex parte* will generally operate only for a limited period of time until the matter can be brought to a hearing involving all parties (ie an *inter partes* hearing). The plaintiff will generally file and serve the *inter partes* summons as soon as practicable or in line with the timeline specified in the order granted by the court for the Mareva injunction. An applicant seeking a Mareva injunction on an *ex parte* basis must provide full and frank disclosure of all matters relevant to the case, and will normally be obliged to give an undertaking to pay compensation for any losses or damage suffered by the opposing party in the event that the applicant later fails to prove that they are entitled to such an injunction order.

To obtain a Mareva injunction, an applicant must show that:

- it has a good arguable case on a substantive claim (ie a higher threshold than an application for an interlocutory injunction to restrain the commission of any allegedly wrongful act) which has already been commenced or is about to be commenced against the other party;
- the other party has assets within the jurisdiction;
- there is a real risk that the counterparty will dissipate or dispose of its assets unless restrained by the court; and
- the balance of convenience lies in favour of granting the injunction.

The applicant will be required to give undertakings, ie an undertaking in damages to compensate the other party or a third party (ie bank) for any loss incurred as a result of the injunction if it is subsequently set aside or the applicant fails to demonstrate the necessity of the injunction. However, the applicant will not be required to give any security to the court as a condition. Once granted, the Mareva injunction will be enforceable immediately and all relevant parties with notice or knowledge of the said injunction must do whatever they reasonably can to preserve the assets covered.

If the claimant asserts a proprietary claim over an asset currently in the possession of the defendant, the claimant may also apply for what is known as a proprietary injunction to restrain the defendant from disposing of or taking any action to diminish the value of the asset in question until final judgment.

To obtain a proprietary injunction, the applicant must show that:

- there is a serious case to be tried as to whether the applicant is the rightful owner of the asset;
- something ought to be done for the security of the asset, and that monetary compensation given at trial would not be an adequate remedy for the applicant; and
- the balance of convenience lies in favour of granting an injunction.

Costs

Hong Kong courts have a wide discretion to award costs orders against a party in order to cover the opposing party's costs of litigation. The general rule is that the unsuccessful party will be liable to pay the legal costs of the successful party. Where each litigant has enjoyed some success in the proceedings, courts may modify the general rule to make costs orders that reflect the litigants' relative success.

Costs orders are subject to a costs assessment process administered by the courts. It is unusual that a party will be able to recover all of its actual legal costs through this process. On a standard assessment, a successful party may recover approximately 60-70% of their actual costs. However, in certain circumstances, the courts may order the costs to be assessed on a more generous basis (such as on a common fund basis or indemnity basis) where the court is of the view that the successful party should recover a greater proportion of the costs it has incurred (such as when the opposing party has engaged in unreasonable conduct in the proceeding). If the parties cannot agree on the costs to be paid, the party which is awarded costs can proceed to have the costs assessed by the court (also known as taxation of costs).

In terms of fees payable to the courts, in general a claimant will only need to pay a nominal amount (approximately USD80 to USD130) in court fees to commence a civil action in Hong Kong. However, if the court is subsequently required by any party to undertake a taxation of costs, a taxing fee calculated on a sliding scale, generally at around 2-5% of the amount of legal costs claimed, will also be payable to the court by the party requesting the taxation.

Class actions

A representative proceeding may be commenced by or against any one person as a representative of numerous persons who have the same interest in the proceeding. Although bearing similarities to a class action, the procedure for a representative proceeding is generally no different from that of an ordinary court proceeding. The parties may include a brief outline in their endorsement of claim to note that it is a representative proceeding. The usual practise is to include an annex in the writ of summons to provide the list of individuals being represented. In line with other court proceedings, there is no specific timeline to commence the proceedings. The timeframe may vary significantly subject to the complexity and case management style of the specific matter.

A judgment in representative proceedings is enforceable against parties to the proceedings. If a party seeks to enforce the judgment against a person who is not an actual party to the proceedings but who is a member being represented, leave from the court is required. As a represented person is not considered to be a party to the proceedings, they are unable to appeal the judgment individually and the judgment will be appealed by the representative.

Other than the representative proceedings as described above, Hong Kong does not have any mechanisms available for collective redress or class action. In 2009, the Law Reform Commission issued a report which recommended a new mechanism for class actions. The Department of Justice established a cross-sector working group in 2012, and the working group has been holding regular meetings to study the proposals in the report in detail and to consider ways to take the matter forward. However, it has yet to publish any findings or recommendations so far.

Key contacts

Kevin Chan
Partner, Head of Litigation and Regulatory, Asia
DLA Piper Hong Kong
kevin.chan@dlapiper.com
T: +852 2103 0823

Harris Chan
Partner, Head of Litigation and Regulatory, Hong Kong
DLA Piper Hong Kong
harris,chan@dlapiper.com
T: +852 21030763

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