Ace Services Limited
21st Floor, CMA Building
64 Connaught Road
Central, Hong Kong

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A guide to civil litigation process in Hong Kong

Introduction

In this guide, Calvin Lau, Founder of Ace Legal will provide an overview of the civil litigation and arbitration in Hong Kong.

Basic Court Structure
Court of Final Appeal (*highest appellate court in Hong Kong)*
High Court: Court of Appeal (*Hears appeals from High Court's Court of First Instance and District Court)*
High Court: Court of First Instance (*Claims of a value of HK$3 million or more)*
District Court (*Claims of a value between HK$75,000 and $3 million)*

(note: there are various other Courts and Tribunals, which are excluded from the above diagram for the sake of simplicity.)

1. When commencing a civil claim, the Plaintiff should commence it in the appropriate Court. All of the above Courts have jurisdiction over civil matters. The Court of Appeal is actually a division of the High Court, and it hears appeals on all matters (both civil and criminal) from the High Court's Court of First Instance and also from the District Court. The Court of Final Appeal is the highest appellant Court.

2. The District court has civil jurisdiction to hear monetary claims not more than $3 million. Most significant commercial disputes are hear in the High Court's Court of First Instance, which has unlimited civil jurisdiction. In addition, some kind of claims must be commenced in the High Court rather than the District Court (even if they are not monetary claims for HK$3,000,000 or above) including:

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(a) Judicial review of the decision of a Government authority;
(b) Winding-up of companies; and
(c) Bankruptcy of individuals.

3. The Court of Final Appeal hears appeal if the matter is of great general or public importance, or otherwise ought to be submitted to the Court of Final Appeal for decision.

4. Basic Procedure for bringing a Court claim to trial.

(a) Issue of a Writ of Summons (by plaintiff)
(b) Service of the Writ (by plaintiff)
(c) Acknowledge of Service of Writ (by defendant)
(d) Service of a Defence (by defendant)
(e) Service of a Reply (optional by plaintiff)
(f) Discovery of Documents (both parties)
(g) Filing of timetabling questionnaires (both parties)
(h) Interlocutory applications (optional for both parties)
(i) Exchange of witness statements (both parties)
(j) Trial and Judgment

5. A plaintiff begins its action by filing a Court a "Writ of Summons" and "Statement of Claim", which set out the identities of the Plaintiff and the Defendant and the nature of the claim. Once the Court has issued the Writ of Summons, the Plaintiff has 12 months to serve it on the Defendant.

6. The Defendant then has 14 days (including the day of service) to "acknowledge service" and to indicate whether it intends to contest the Plaintiff's claim. If the Defendant wants to contest the claim, it must, within 42 days of service of the Writ (including the day of service), file in Court and serve on the Plaintiff a Defence (and a Counterclaim against the Plaintiff, if any).

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7. Assuming that the Defendant does contest the claim, the Plaintiff may (but is not obliged to) file a Reply to the Defence within 14 days after the Defence is served on it.

Quick Judgment?

8. There are two main methods a Plaintiff can use to try to obtain Judgment against the Defendant at an early stage:

   "Judgment in Default"
   If the Defendant fails to file an acknowledgement of service within 14 days of service of the Writ, or fails to serve a defence on the Plaintiff within 42 days, the Plaintiff is entitled to apply to Court for "Judgment in Default" against the Defendant. This can be a quick and cost-effective way to obtain Judgment against a Defendant without having to take the claim all the way to trial.

   "Summary Judgment"
   Once the Defendant has filed an acknowledgment of service, if the Plaintiff has grounds for arguing that the Defendant has no real defence to the Plaintiff's claim, the Plaintiff can apply for "Summary Judgment" against the Defendant. This is a quick way of obtaining Judgment against a Defendant where the Defendant's case is weak.

Discovery

9. An important step in the proceedings is "discovery" of documentary evidence, which, unless the parties agree otherwise, is to take place within 28 days of Reply being served on the Defendant (or, if the Plaintiff chooses not to serve a Reply, within 42 days after service of the Defence on the Plaintiff).

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10. Discovery is the process by which the parties are able to obtain (usually from each other) relevant documents relating to the matters in question between them. The parties serve lists of documents upon each other, listing all of the documents that are relevant to the case. As a general rule, each, each party must disclose:

    (a) Any evidence upon which the party intends to reply; and, importantly
    (b) Any relevant documents it possesses that are relevant to the matters in dispute- even if those documents might damage its own case or help the other party's case

Case Management and Interlocutory Applications

11. The parties should file in Court "timetabling questionnaires" within 42 days of the Plaintiff's Reply being served on the Defendant (or, if the Plaintiff chooses not to serve a Reply, within 56 days after service of the Defence on the Plaintiff). The purpose of the timetabling questionnaires is for the parties to set out the steps they each believe need to be taken before trial. If the parties cannot agree on those steps, the Plaintiff must file and serve a "case management conference", at which the Judge or Master will deal with the case management summons.

12. In most cases, the parties will make several "interlocutory applications". These may include, for example, a Plaintiff's application for summary judgment, or a Defendant's application for security of costs, or an application by either the Plaintiff of the Defendant for an Order compelling the other side to give discovery of certain documents. Where possible, these interlocutory applications should be set out in the "case management summons"; however, in practice, they are often made earlier or later, by the applicant party filing in Court and serving a separate summons.

13. At the case management conference, the Judge or Master will give direction for the steps to be taken by the parties between the date of the conference and the date

of the trial. These steps may include setting out a timetable for dealing with interlocutory applications, and any other matters the Judge or Master thinks should be dealt with before trial, for example the discovery of documents not yet discovered, the appointment of experts to give evidence, the exchange of witness statements and the fixing of a date for the trial.

14. For any interlocutory applications brought by the parties (for example, security for costs), the Court will normally (either at the case management conference or at a separate, short "directions hearing") order that a date be fixed for the hearing of the application, and direct each of the parties to file and serve evidence in relation to the application before the hearing of it.

Costs

15. Litigation can be expensive for both the Plaintiff and the Defendant. After the trial has concluded, an unsuccessful party to an action will normally be ordered by the Court to pay the majority of the legal costs incurred by the successful party (in addition to its liability to pay its own lawyers' fees). This risk of being held liable for the other side's costs is an important factor in Hong Kong litigation, and affects the merits of brining or defending a claim.

16. The risks of costs liability, which increases over time as more money is spent on the litigation, can sometimes encourage the parties to try to settle the claim. The questions when, how, and whether to make an offer of settlement are important tactical considerations in Hong Kong litigation.

Without prejudice offers to settle and their costs consequences

17. At any stage during the litigation process, the parties can make an offer to settle the Plaintiff's claim on a "without prejudice" basis.

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18. The term "without prejudice" means that the offer does not compromise the party's position as stated in its Writ or Defence. For example, if a Plaintiff makes a "without prejudice" offer to accept a lower sum than it is claiming in the Writ, and the offer is not accepted, the Plaintiff will still have the right to demand the full amount at trial. In the same way, if the Defendant makes a "without prejudice" offer to pay a certain sum and that offer is not accepted, the Defendant can still defend the entire claim at trial.

19. Without prejudice offers cannot normally be shown to the Judge before or during the trial, so they cannot affect the Judge's decision on the outcome of the case. They are therefore useful tools for negotiation and settlement.

20. There are special kinds of without prejudice offers called sanctioned offers and sanctioned payments, which have to comply with certain Court rules. These can have important costs consequences for the offeree if not accepted. Similarly, any offers made "without prejudice save as to costs" may also have costs consequences if not accepted.

21. After the trial, when the Judge is considering who should pay the costs incurred by each party, any "sanctioned offers", "sanctioned payments", or offers made "without prejudice save as to costs" can be revealed to the Judge for the first time (offers simply made "without prejudice" should not normally be shown to the Judge at any stage, except if the parties agree to do so, or if there is a dispute as to the true meaning of the terms of a settlement reached by the parties).

22. If the offeree did not "beat" the terms of a sanctioned offer/sanctioned payment at trial, the Court will normally order the party who failed to accept the offer/payment to pay the other party's costs. For example, imagine the following scenario:

    (a) The Defendant makes a "sanctioned payment" into Court of HK$5,000,000 in

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settlement of the Plaintiff's claim;

(b) The Plaintiff refuses to accept the "sanctioned payment" and the case then proceeds to trial; and

(c) At trial, the Plaintiff "wins" and the Defendant is ordered to pay the Plaintiff HK$4,000,000.

23. Because the Plaintiff failed to "beat" the Defendant's "sanctioned payment" (i.e. failed to obtain Judgement against the Defendant for a sum greater than HK$5,000,000), the Plaintiff will normally be ordered to pay the Defendant's costs incurred after the deadline for acceptance of the offer, even though the Plaintiff "won" the case. The Plaintiff may also be denied some or all of the interest it would otherwise have received on the debt.

24. "Sanctioned offers" to accept a certain sum made by Plaintiffs to Defendants have similar adverse costs consequences for a Defendant if they are not accepted and the Defendant fails to "beat" the Plaintiff's offer. The Defendant may also be ordered to pay increased interest on the debt.

25. Offers made "without prejudice save as to costs" can have similar costs consequences if not accepted, but because they do not comply with the Court rules for sanctioned offers/payments, the Court is less likely to take them into account when deciding who should pay whose costs.

26. If the offeree does not accept the "without prejudice" offer and then succeeds in "beating" the offeror's offer at trial, the offer will have no effect. It is therefore important to consider carefully the appropriate sum of money for the offer, for the offer to have maximum impact.

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Security for costs

27. It is important for Mainland companies, and especially for those without assets in Hong Kong, to take note of the "security for costs" provisions in Hong Kong civil procedure. The Defendant can apply to Court for an Order that the Plaintiff provide security for the Defendant's costs that the Plaintiff may be ordered to pay if the Plaintiff is unsuccessful in the action. "Security" usually means that the Plaintiff is ordered to pay money into Court, which is then held in Court until the case is concluded, so that it may be paid to the Defendant if the Plaintiff loses the case.

28. The purpose of the "Security of Costs" provisions is to allow a Defendant to spend money on defending a claim without fear that it may not be able to recover those costs from the Plaintiff if the Plaintiff's claim fails- otherwise, in some cases, Defendants could be pressured into not defending a claim (even if they had a strong defence) because of the risk of financial loss.

29. Where the Plaintiff is "foreign" (which, for these purposes, includes Mainland China), the Court is more likely to order the Plaintiff to give security, because it may be more difficult for the Defendant to recover a debt from a "foreign" company or individual. In contrast, a foreign Defendant is normally not required to give security unless it makes a counterclaim against the Plaintiff or brings an appeal against a Judgment.

Mediation

30. Mediation is a confidential, quick, and cost-effective method of settling disputes, outside of the traditional Court process. It has become increasingly popular, particularly where both parties appreciate the importance of maintaining their business relationship, and where it is important to preserve the parties' confidentiality. The majority of mediations achieve a settlement of the dispute.

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31. Although mediation is not compulsory, the parties are required to consider mediation once Court proceedings have been commenced, and if they refuse, they must provide a reasonable explanation for that refusal. If a party refuses to mediate without providing a reasonable explanation, the Court may order it to pay a greater proportion of the other sides' costs of the litigation once the case has concluded.

32. The parties appoint a neutral "mediator" (normally a lawyer or an expert in the industry relating to the dispute), whose role is to help the parties to negotiate and attempt to reach a settlement of their dispute. The mediator may, if appropriate, provide the parties with his opinions on the strengths and weaknesses of their positions, but he does not have the power to decide the outcome of the case.

33. The mediation takes place at a venue consisting of separate private rooms for each of the parties and a main room for face to face meetings and negotiations between the parties. Over the course of the mediation, the mediator will normally meet several times with each party privately and confidentially to discuss the dispute, and if appropriate, to relay messages between the parties. There will also be meetings between the parties, normally with the mediator present.

34. If Court proceedings have already been commenced before the mediation takes place, those proceedings will normally be "stayed" to allow time for the mediation to take place.

35. There is no fixed duration for a mediation, but most mediations last one or two days. If the mediation is unsuccessful and the parties cannot agree terms for settlement, the "stay" will then be lifted and the Court proceedings will continue.

36. Normally, the parties will pay their costs incurred in the mediation. If the mediation fails and the case proceeds to trial, the winning party cannot recover its costs incurred in the mediation from the losing party.

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37. If the mediation succeeds, the parties will enter into a settlement agreement, which will often contain provisions obliging the parties to keep the terms of settlement confidential. The Court proceedings will then be discontinued.

The Arbitration process in Hong Kong

38. Arbitration is a popular alternative to Court proceedings. Like Court proceedings (but unlike mediation), arbitration leads to a binding determination of the dispute, even if the parties do not agree a settlement.

39. Arbitration is conducted before impartial tribunals made up of between one and three arbitrators, who are the equivalent of Judges in Court proceedings.

40. In many respects, arbitration proceedings are similar to Court proceedings. An arbitrational tribunal makes an "award", which can be any remedy or relief that could have been ordered by the Court if the dispute had been the subject of Court proceedings. For example, arbitrators have the power to order a party to perform a contract.

41. However, arbitration differs from Court proceedings in the following respects:

    (a) Every aspect of the arbitration process is usually confidential between the parties involved;
    (b) Arbitral proceedings are more flexible than Court proceedings; and
    (c) In general, the arbitration process is quicker than Court proceedings.

42. Arbitration will only apply to a dispute if the parties agree that it will. Normally, the terms upon which the arbitration of a dispute will take place are set out in an "arbitration clause" in the contract forming the subject-matter of the dispute. Since arbitration is a flexible process, and the parties may choose many aspects of how

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the arbitration process will be carried out, the terms of the arbitration clause are very important, and legal advice should be sought to ensure that the clause is adequately drafted. Important considerations include the following:

(a) There is a choice of several different sets of procedural rules of the arbitration, produced by "arbitral institutions". The parties may choose which arbitration institution's rules will apply, and will usually also agree that the institution will also administer the arbitration. Some examples of arbitral institutions are the Hong Kong International Arbitration Centre, the International Chamber of Commerce, the China International Economic and Trade Arbitration Commission or the London Court of International Arbitration.
(b) The parties may choose the number of arbitrators and the method of appointment of arbitrators. Arbitration clauses usually provide that the parties are free to select the arbitrators either directly or indirectly through a third party or institution. If the parties cannot agree on the method for choosing an arbitrator, the Arbitration Ordinance provides for a set of default procedures.
(c) The parties may agree with county's or state's law will apply to the arbitration process. However, Hong Kong law will continue to apply in place of the law selected by the parties if applying the chosen law would violate Hong Kong policy.

Arbitration or litigation?

43. For commercial disputes, arbitration has many advantages over litigation:

(a) The arbitral process is more flexible than litigation
(b) Resolving a dispute by way of arbitration may make it easier to maintain an ongoing commercial relationship between the parties
(c) Mutual enforcement of Judgments between Hong Kong and the PRC is not without difficulties. Providing for contractual disputes to be resolved by way of arbitration is a way round this problem, since it is generally easier to

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enforce Hong Kong arbitration awards rather than Court Judgments in the Mainland

(d) Since the PRC has adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitration awards made in any other states that are also party to the New York Convention are enforceable in the PRC. Hong Kong, as a special administrative region in the PRC, is also a party to the New York Convention.

44. A potential disadvantage of arbitration is that parties often have more limited rights to appeal an arbitral award, compared to a Court Judgement.