

Litigation ADR Questionnaire Hong Kong

CIVIL LITIGATION

	Question	Answer
1.	In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?	<p>Article 9 of the Basic Law provides that, in addition to the Chinese language, English may also be used as the official language by the judiciary. Court proceedings in Hong Kong can be conducted in Chinese and / or English¹.</p> <p>A party to any proceedings who is served with a document in an official language with which he is not familiar and who is familiar with the other official language, may request the other party to provide a translation in the other official language². If the requested party refuses to provide a translation within a reasonable time, the requesting party may apply to the court for an order for the translation to be provided³.</p> <p>In proceedings in Court, an interpreter will be provided by the Court.</p>
2.	What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?	<p>Unless specifically stated in the practice directions for certain types of cases, there is no general pre-action protocol in Hong Kong.</p> <p>An example of specific pre-action protocol can be found in the Practice Direction for Personal Injuries Case. It is expressly stated in that practice direction that “Prior to the commencement of proceedings, parties should explore settlement by making bona fide attempts to engage in settlement negotiations by without prejudice correspondence, by structured without prejudice face-to-face meeting, or by any other manner agreed by the parties. If such negotiations do not result in any settlement after a reasonable time, the parties should proceed to explore ADR by mediation or other ADR⁴”.</p> <p>A notice or letter before action is generally not required as a pre-condition to the accrual of the cause of action, although it will usually be sent in most of the cases.</p> <p>There are, however, some circumstances under which a pre-action letter will be required. For instance, in personal injuries cases, the claimant is required to serve a letter of</p>

¹ Official Languages Ordinance (Cap 5), section 5(1)

² High Court Civil Procedure (Use of Language) Rules, rule 5(1)

³ Ibid, rule 5(4)

⁴ Practice Direction No. 18.1 on Personal Injury Cases, paragraph 14

	Question	Answer
		claim to the proposed defendant and his insurer giving certain requisite information before the commencement of proceedings ⁵ . In the event of a claimant failing to send a letter of claim, he may be required to justify the incurring of costs of commencing the proceedings ⁶ . Even the claimant wins the case later, he may not be able to recover all the costs that have been incurred.
3.	What are the costs of civil and commercial proceedings? Who bears the costs?	<p>“Costs” in litigation generally refers to the sums of money paid by the litigants to their lawyers in relation to the legal service provided and are defined as including fees, charges, disbursements, expense and remuneration⁷.</p> <p>The conventional order of the court is that “costs follow the event”. That means that the losing party has to pay the cost of the successful party. In theory, the losing party is responsible for all the costs of the successful party which were necessary to pursue or defend the action. If the parties are unable to agree on the amount of costs, they can commence proceedings for taxation before a taxing master and the taxing master will make an order as to the appropriate amount of costs.</p>
4.	What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?	<p>There are two main parts to discovery: “listing” and “production”.</p> <p>For the “listing” part, each party to the proceedings is generally required to make and serve on the other party a list of documents⁸. The documents that should be included in the list of documents are documents that are or have been in the party’s possession, custody or power relating to any matter in question and the documents are required to be disclosed to the other parties during discovery.</p> <p>Some documents are protected from production and inspection. They are:</p> <p>(1) privileged documents under the legal advice privilege or the litigation privilege;</p> <p>(2) documents which would be injurious to the public interest⁹; and</p> <p>(3) documents that may tend to incriminate the party or his or her spouse.</p>

⁵ Practice Direction No. 18.1 on Personal Injury Cases, paragraph 15

⁶ Practice Direction No. 18.1 on Personal Injury Cases, paragraph 18

⁷ Rules of High Court (RHC), Order 42, rule 1(1) and Rules of District Court(RDC), Order 62, rule 1

⁸ RHC and RDC, Order 24, rule 2

⁹ RHC and RDC Order 24 rule 15

	Question	Answer
		<p>If a document is privileged, a party is not required to disclose it, even if it is relevant to the matters in dispute.</p> <p>Generally speaking, documents which are “without prejudice” communications, i.e. communications between parties which are in the course of negotiations to settle, are inadmissible as evidence at trial (which will be discussed below). However, they must be listed by a party in the list of documents, but the party can choose whether to produce the documents for inspection.</p> <p>After the “listing” part, parties need to complete the “production” part, i.e. each party to the proceedings is required to produce the listed documents for inspection of by the other party by physically showing the documents.</p> <p>At present, there is no Practice Direction specifically relating to e-discovery in Hong Kong. Electronic disclosure of documents is not common in Hong Kong.</p>
5.	<p>What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?</p>	<p>Subject to some exceptions, facts required to be proved at the trial of any action must be proved by the examination of witness orally¹⁰.</p> <p>In Hong Kong, the court will direct the parties to exchange witness statements before the trial starts¹¹. The parties are required to exchange written statements of the oral evidence that the party intends to adduce on any issues of fact to be decided at the trial. If the party decides to call a particular witness to testify at trial, the witness will often adopt the written statements to stand as evidence in chief and he will then be subject to cross examination at the trial hearing.</p> <p>A witness can be compelled to attend the court to give evidence. A party can issue a writ of subpoena <i>ad testificandum</i> to compel a witness who is unwilling or uncooperative to attend the specified court at the specified date and time to give oral evidence.</p>
6.	<p>How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their</p>	<p>The parties are free to adopt any method for settlement discussion. It can be oral or written. If the parties are legally represented, it is common for the lawyers to discuss settlement proposals on behalf of the parties.</p>

¹⁰ RHC and RDC, Order 38 rule 1

¹¹ RHC and RDC Order 38 rule 2A(2)

	Question	Answer
	representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?	<p>With the new practice direction on mediation¹² that came into effect¹³, mediation becomes mandatory for all civil proceedings in Hong Kong (which will be discussed below). Parties need to engage an independent mediator who assists parties to narrow down disputes and reach a settlement.</p> <p>As a general rule, settlement correspondence between the parties or their lawyers is not admissible as evidence. Evidence of the content of all negotiation genuinely aimed at settlement, whether oral or in writing, is excluded from being given in evidence.</p>
7.	How can foreign judgments be enforced?	<p>There are two mechanisms by which a foreign judgment can be enforced in Hong Kong:</p> <ol style="list-style-type: none"> (1) under the provisions of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319) (“FJ(RE) Ordinance”); or (2) at common law. <p>Under the provision of the FJ (RE) Ordinance, the successful party of the foreign judgment can apply for an ex parte order that the judgment be registered. Once registered, the foreign judgment would have the same effect as a Hong Kong judgment and can be enforced by the usual methods of executing judgments in Hong Kong. However, the FJ (RE) Ordinance only applies to superior court judgments from certain countries¹⁴,</p> <p>Under common law rules, the successful party of the foreign judgment can issue proceedings in Hong Kong and cite the foreign judgment debt as the cause of action. The plaintiff can then apply for a summary judgment (arguing that the defendant has no defence). Once a summary judgment has been obtained, the successful party of the foreign judgment will have a valid Hong Kong judgment which can be enforced by the usual methods of executing judgments in Hong Kong.</p>

¹² Practice Direction 31

¹³ The Practice Direction 31 Mediation came into effect on 1 January 2010.

¹⁴ These countries include Australia, Belgium, France, Germany, India, Israel, Italy, New Zealand and Singapore.

ARBITRATION

	Question	Answer
1.	Are mediation clauses in commercial contracts binding and enforceable?	Yes. Mediation clauses in commercial contracts are binding and enforceable in Hong Kong. Both the Hong Kong International Arbitration Centre (HKIAC) and the Law Society publish suggested standard mediation clauses.
2.	What is the procedure for mediation? Is it a popular method for resolving commercial disputes?	<p>There are no fixed procedures for mediation in Hong Kong and the parties are free to agree on the procedures for mediation. Generally speaking, there are three stages for mediation. Firstly, the parties have to select a mediator once they have agreed in principle to mediate. The parties and the mediator will then have a pre-mediation stage agreeing on a timetables and the preparatory work to be done. The final stage is the actual mediation itself.</p> <p>With the new practice direction on mediation¹⁵ that came into effect¹⁶, mediation becomes mandatory for all civil proceedings in Hong Kong. It requires the parties to the proceedings to attempt mediation before going to trial. If a party decides not to attempt mediation, he should give sufficient reasons to justify his decision. If a case is suitable for mediation and a party unreasonably refuses to mediate and the matter proceeds to trial, an adverse costs order may be made even if the party succeeds at trial.</p>
3.	Are arbitration clauses in commercial contracts binding and enforceable?	Yes. Arbitration clauses in commercial contracts are binding and enforceable in Hong Kong, provided that they are in writing ¹⁷ and unambiguous. The Hong Kong International Arbitration Centre (HKIAC) publishes suggested model arbitration clauses.
4.	What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?	Arbitration in Hong Kong can be conducted by ad hoc arbitration or institutional arbitration. Parties who want to resolve their commercial disputes are able to choose either by designating an institution such as HKIAC to administer it (institutional arbitration) or by not involving any institution (ad hoc arbitration).
5.	Which arbitration institutes are most popular?	The Hong Kong Institute of Arbitrators is a popular arbitration institute.

¹⁵ Practice Direction 31

¹⁶ The Practice Direction 31 Mediation came into effect on 1 January 2010.

¹⁷ Section 19(2) of the Arbitration Ordinance (Cap. 609)

	Question	Answer
6.	What influence can the parties have on the identity of the arbitrator(s)?	The parties are free to agree on the identity of the arbitrator in accordance to the arbitration clause. For arbitrations in Hong Kong, where the parties are unable to agree on the appointment of an arbitrator, either party may request the HKIAC to make the appointment.
7.	In what language is an arbitration proceedings conducted?	Parties can conduct the arbitration in any language they choose.
8.	What types of pre-arbitration measures are available and what are their limitations?	There is no express provision in the Arbitration Ordinance that relates to pre-arbitration measures.
9.	What are the costs of arbitration proceedings and who bears these costs?	<p>The costs of the arbitration include the costs incurred by the parties in the course of the arbitration (such as professional fees by the solicitors or the counsels), the arbitrators' fees, fees paid to the arbitration institution, and other costs of the hearing.</p> <p>The parties are free to agree on who bears the costs. The usual practice in Hong Kong is that the costs are to be shared equally among the parties.</p>
10.	What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?	<p>Unlike court proceedings, there is no automatic right to discovery for arbitration in Hong Kong. The arbitrator will usually order discovery, although it is not mandatory. The scope of discovery will either be agreed between the parties or determined by the arbitrator. If so ordered, the parties will be required to disclose all relevant documents regardless of whether they assist or harm their own case.</p> <p>The rules of privilege in court proceedings (as discussed above) also apply to arbitrations.</p>
11.	What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?	<p>An arbitrator or an arbitral tribunal is not bound by the strict rules of evidence that apply in court proceedings (except for the rules relating to privilege). The arbitrator or the arbitral tribunal can decide what evidence to admit.</p> <p>Generally speaking, the arbitrator or the arbitral tribunal will direct that written witness statements are to be exchanged in advance. These usually stand as the witness's evidence in chief. If there is an arbitration hearing (not a paper arbitration), witnesses will be cross-examined.</p>

	Question	Answer
12.	How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?	<p>The parties are free to adopt any method for settlement discussion. It can be oral or written. If the parties are legally represented, it is common for the lawyers to discuss settlement proposals on behalf of the parties.</p> <p>As a general rule, settlement correspondence between the parties or their lawyers is not admissible as evidence. Evidence of the content of all negotiation genuinely aimed at settlement, whether oral or in writing, is excluded from being given in evidence.</p>
13.	Under what circumstances can an Arbitration Award be enforced, challenged or annulled?	<p>Hong Kong is a party to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention). Arbitration awards made in Hong Kong are enforceable in principle in the courts of all states that are party to the New York Convention. The actual procedure for enforcement depends on the local law of the countries.</p> <p>An arbitral award is final and binding on the parties, subject to a very limited right of appeal to the court. A party to arbitral proceedings may appeal to the court on a question of law arising out of an award made in the arbitral proceedings¹⁸.</p> <p>Further, an arbitral award can only be challenged or annulled under limited circumstances such as on the ground of serious irregularity¹⁹.</p>

¹⁸ Section 4 of the Schedule 2 of the Arbitration Ordinance

¹⁹ The ground of serious irregularity is discussed in detail in section 4 of the Schedule 2 of the Arbitration Ordinance.