



**COUNTRY  
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## **Hong Kong CLASS ACTIONS**

### **Contributor**

Stevenson, Wong & Co



### **Heidi Chui**

Partner, Head of Litigation and Dispute Resolution | [heidichui.office@sw-hk.com](mailto:heidichui.office@sw-hk.com)

This country-specific Q&A provides an overview of class actions laws and regulations applicable in Hong Kong.

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# HONG KONG CLASS ACTIONS



## 1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

There is currently no class action mechanism in Hong Kong. As an alternative, the only machinery for multi-party litigation takes the form of “**Representative Proceedings**” as set out in Order 15, rule 12 of The Rules of the High Court (Cap. 4A) (“RHC”) and The Rules of the District Court (Cap. 336H) (“RDC”).

### Representative Plaintiffs

RHC and RDC Order 15, rule 12(1) provide that where “numerous persons” have the “same interest” in any proceedings, the proceedings can be brought by any one or more of them suing on behalf of oneself and all the members of a class (**for discussion on the elements of “numerous persons” and “same interest”, see Question 2 below**). The persons bringing the action are commonly referred to as the representative plaintiffs. The representative plaintiffs need not obtain consent of the class for commencing a representative proceeding, and they can be self-elected (**Sung Sheung-hong v. Leung Wong Soo-ching [1965] HKLR 602**). No leave or representation order from the court is necessary before commencing any representative proceedings, but the representative plaintiffs may nevertheless apply for such an order.

### Representative Defendants

On application by the representative plaintiffs, the court is empowered to appoint any one or more of the defendants to act as the representative of the other defendants being sued. They are commonly referred to as the representative defendants.

### Effect of judgment or order rendered in representative proceedings

A judgment or order given in representative proceedings will be binding on all persons being represented. Nevertheless, a defendant may dispute his liability to have the judgment or order enforced against him on the

ground that by reason of facts and matters particular to his case he should be exempted from such liability.

## 2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

There is no restriction as to who may bring representative proceedings. The only requirement is that the “numerous persons” must have the “same interest” in the proceedings. Case laws have provided guidance on how these two elements are to be understood.

### “Numerous persons”

- **Hong Kong Kam Lan Koon Ltd v. Realray Investments Ltd [2004] HKEC 748**: an unincorporated association of an unknown number of persons which required to have its administration conducted by no less than 74 persons was held to clearly fall within the class of “numerous persons”
- **Calm Ocean Shipping SA v. Wing Goal Trading Ltd [2020] HKCFI 801**: the fact that there were only a few entities within the proposed class would not satisfy the “numerous” requirements, as Order 15 rule 12 is meant to “facilitate disposition of cases where parties were so numerous that the proceedings would be unmanageable if all were named”

### “Same interest”

- **Markt & Co Ltd v. Knight Steamship Co Ltd [1910] 2 KB 1021 (CA)**: “same interest” requires: (a) the same contract between all plaintiff class members and the defendant; (b) the same defence pleaded by the defendant against all the plaintiff class members; and (c) the same relief claimed by the plaintiff class members.
- **Prudential Assurance Co Ltd v. Newman Industries [1981] Ch 229**: changing from

the “same interest” test to the less stringent “common ingredient” test, where only “a common ingredient in the cause of action of each member of the class” or “some element common to the claims of all members of the class” is required

- **CBS/Sony Hong Kong Ltd v. Television Broadcasts Ltd [1987] HKLR 306:** the plaintiffs had to comply with the threefold test of establishing “a common interest, a common grievance and a remedy which is beneficial to all the plaintiffs”

### 3. Which courts deal with class actions or collective redress proceedings?

Representative proceedings can be brought in both the Court of First Instance of the High Court and the District Court. The choice of which court to pursue would lie in the value at stake: the District Court handles disputes of a value over HK\$75,000 but not more than HK\$3 million, while the Court of First Instance of the High Court has unlimited jurisdiction.

### 4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

Generally, types of conduct and causes of action that can be relied upon in other civil proceedings are available to representative proceedings.

### 5. Are there any limitations of types of claims that may be brought on a collective basis?

As expressly provided in RHC and RDC Order 15 rule 12(1), representative proceedings only apply to cases “not being such proceedings as are mentioned in rule 13”. Order 15 rule 13 concerns (a) the estate of a deceased person; (b) property subject to a trust; or (c) the construction of a written instrument, for which a separate set of rules on representation would apply.

Apart from the above, there is generally no limitation on the types of claims that may be brought on a collective basis.

### 6. How frequently are class actions brought?

Representative proceedings are rarely brought in Hong

Kong. As pointed out by the Law Reform Commission of Hong Kong (“LRC”) in its Report on Class Actions (May 2012) (“**LRC Report on Class Actions**”), under the current representative proceedings regime, defendants are free to challenge enforcement of a judgment and to re-open the proceedings on the basis that facts and matters peculiar to his case exist. This feature undermines finality of any judgment obtained from representative proceedings and discourages potential plaintiffs to pursue this route.

Despite the judicial efforts to relax the “same interest” test, there are still very few cases on representative proceedings as the more stringent landmark cases have not been expressly overruled by an appellate court in Hong Kong, which makes the law on representative proceedings uncertain. Instead, potential plaintiffs tend to resort to extra-judicial compensation schemes. For example, where an employer becomes insolvent, the employees may claim wages from the Protection of Wages on Insolvency Fund, which is also more expedient and cost-effective as opposed to commencing representative proceedings.

### 7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

For reasons explained in Question 6 above, there are only handful of reported cases on representative proceedings. That being said, there are three emerging business risks where we consider could be the focus of representative proceedings or potentially class action if implemented in Hong Kong.

1. **Virtual Asset Trading:** In response to the trend of investing in virtual assets, the Securities and Futures Commission recently published a consultation paper proposing allowing retail investors to access services of virtual asset trading platforms. With likely influx of retail investors to the virtual assets market, when dispute arises, the large group of investors may seek collective redress by pursuing representative proceedings or class action.
2. **Consumer cases:** If class action is to be introduced in Hong Kong, it is suggested to start with consumer cases. Therefore, consumers’ claims against unscrupulous traders would be the main focus on the way forward (**see our answer to Question 24 below**). There is currently in place a Consumer Legal Action Fund that provides financial support and legal assistance to

consumers in pursuing civil claims. If a class action regime is launched, the Consumer Legal Action Fund could be one of the funding options available to the potential plaintiffs, turning consumer cases into a main battlefield for class actions.

3. **Competition cases:** The Competition Ordinance (Cap. 619) has been introduced in Hong Kong since 2015. Nevertheless, there have not been any case where victims of anti-competitive conduct had pursued representative proceedings. The LRC Report on Class Actions also consider competition cases suitable for class action proceedings. Once a class action regime and the corresponding competition law rules are in place, anti-competitive conduct might be a business risk that corporations should beware.

## 8. Is your jurisdiction an “opt in” or “opt out” jurisdiction?

The current representative proceedings regime is not expressly characterised as opt-in or opt-out. Yet, a judgment or order handed down in a representative proceeding is only binding on the persons being represented, and such judgment or order shall not be enforced against any person not a party to the proceedings except with the leave of the court. This effectively makes the representative proceeding one of opt-in.

## 9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

Representative proceedings can be commenced by issuing a writ of summons together with a statement of claim to be personally served on the defendants. The class of persons to be represented must be defined in the writ with sufficient clearness. The representative capacity of the plaintiffs or defendants must be indorsed on the writ of summons and must also be stated in the title of the writ and of the statement of claim.

## 10. What remedies are available to claimants in class action or collective redress proceedings?

Usual remedies in civil proceedings are available in representative proceedings, such as declaratory relief and injunction. In cases where the representative plaintiffs agreed to distribute to class members the

damages *pro rata*, lump sum damages can be sought against the defendants without the need to make individual assessments. Relying on any court declaration of the class members’ entitlement to damages, each member may also claim damages individually by bringing their own action.

## 11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

Punitive or exemplary damages are not generally available for civil proceedings in Hong Kong including representative proceedings. Damages are usually awarded to compensate the actual loss or injury suffered by the plaintiff, except in exceptional cases of egregious tortious activities.

## 12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

Civil trials in Hong Kong are not conducted before juries except in limited circumstances with leave of the court, such as in cases of libel, slander, malicious prosecution, false imprisonment or seduction.

## 13. What is the measure of damages for class actions or collective redress proceedings?

Further to our answer to Question 11 above, the measure of damages in representative proceedings would be the same as in any other civil proceedings. In Hong Kong, the measure of damages for contractual and tort claims would be to put the party into a position it would have been had the contract been performed or had the tortious act not been committed.

## 14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

There are no obvious jurisdictional obstacles particular to representative proceedings. Where the representative proceedings may involve foreign parties, as in any other civil proceedings, the court would inquire whether the parties have previously submitted the dispute to any jurisdiction. If not, the court would determine the natural forum of the dispute.

### **15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?**

There is no limit as to the nationality or domicile of plaintiffs. However, where the representative plaintiffs are ordinarily resident outside of Hong Kong, the defendants may require the overseas representative plaintiffs to make payment into court as security for the defendant's costs.

### **16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?**

The conduct of representative proceedings in Hong Kong is not impacted by any international laws.

### **17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?**

There is no mechanism for collective settlement. Therefore, parties to representative proceedings may reach out-of-court settlement in their personal capacity, as in other civil proceedings. While the representative plaintiffs may settle the action, the represented members may commence proceedings under their own name.

### **18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?**

There is no judicial oversight for settlement of representative proceedings.

### **19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?**

Insofar as we are aware, there has been no reported cases where representative proceedings interact with regulatory enforcement findings in Hong Kong. In fact, the Securities and Futures Commission i.e. a financial regulator in Hong Kong, may on its own initiative commence legal actions to seek remedies against persons who have contravened the Securities and Futures Ordinance (Cap. 571). Although it is not strictly

similar to representative proceedings, the remedies sought may also be for the benefit of the affected investors as a whole.

### **20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?**

Insofar as we are aware, representative proceedings have not yet been brought for ESG matters.

### **21. Is litigation funding for class actions or collective redress proceedings permitted?**

ChamPERTY and maintenance remain unlawful in Hong Kong. Therefore, litigation funding for representative proceedings is not permitted.

An exception would be government funding in the form of legal aid. According to Section 8(1) of the Legal Aid Ordinance (Cap. 91) ("LAO"), any person including those "in a representative...capacity" may apply for legal aid. That being so, the representative plaintiffs or defendants would have to satisfy both a means test (i.e. not exceeding financial eligibility limit) and a merits test (i.e. having reasonable grounds for bringing or defending the proceedings).

The parties who are not acting as representative plaintiffs or defendants may also be covered by legal aid, as Section 9(2) of the LAO provides that the Director of Legal Aid may "take or cause to be taken such steps as may be necessary to conserve the interests...of any person on whose behalf the applicant is acting pending determination of his application".

### **22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?**

Section 64 of the Legal Practitioners Ordinance (Cap. 159) and Principle 4.17 of the Solicitors' Guide to Professional Conduct expressly prohibit contingency fee arrangements in relation to court proceedings in Hong Kong. The same rules apply to representative proceedings. Solicitors would generally charge the client on the basis of time spent or on at an agreed fee.

### **23. Can a court make an 'adverse costs' order against the unsuccessful party in**

## class actions or collective redress proceedings?

In Hong Kong, costs normally follow the event. The unsuccessful party would usually be ordered to pay the costs of the successful party, in addition to his own legal costs. Adverse costs order may be available in situation where a party unreasonably fails to engage in mediation.

It is worth mentioning that only the representative plaintiffs and defendants are liable for costs, but not the represented parties who are not parties to the proceedings.

## 24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

Following a public consultation in 2009, the LRC Report on Class Actions was published in May 2012, where it was recommended, among other things, that:

- An incremental approach to implementation of a class action regime be adopted, starting with consumer cases
- An opt-out approach be adopted to class action. However, where the class action

involves foreign plaintiffs, an opt-in approach should be adopted, where class members outside of Hong Kong would not be included in the class action unless they take positive steps to opt-in to the action

- A representative plaintiff must satisfy the court his or her ability to satisfy an adverse costs order, so as to prevent financially capable class members from deliberately selecting impecunious plaintiffs who would be entitled to legal aid to act as the class representative
- A legally aided person should not lose his legal aid funding by agreeing to act as representative plaintiff in a class action
- In the long term, a general class actions fund should be established to support class action plaintiffs who require assistance

The Hong Kong Government had established a cross-sector Working Group to consider the recommendations as set out in the LRC Report on Class Actions. 31 meetings were held by the Working Group between 2013 and 2020. On 26 August 2021, the Working Group appointed an advisory firm to conduct a consultancy study on the impacts on Hong Kong if a class action regime starting with consumer cases is to be introduced. It remains to be seen the findings of the consultancy study and the actual timeline of implementing the proposed class action regime.

## Contributors

### Heidi Chui

**Partner, Head of Litigation and Dispute Resolution**

[heidichui.office@sw-hk.com](mailto:heidichui.office@sw-hk.com)

