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Hong Kong
COMPETITION LITIGATION

Contributor

18LC

Kenneth Lee

Barrister | kenneth.lee@18lc.com

William Tse

Barrister | william.tse@18lc.com

Edward K H Ng

Barrister | edward.ng@18lc.com

Kristy K Y Wong

Barrister | kristy.wong@18lc.com

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

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1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

The Hong Kong Competition Ordinance (Cap 619) ("**CO**") provides for very limited scope for private competition damages claim. The CO only permits follow-on actions, as opposed to stand-alone actions, to be brought by a private party in respect of loss and damages suffered as a result of any *"act that has been determined to be a contravention of a conduct rule*" (section 110(1) of the CO).

An act is taken to have been 'determined' to be a contravention of a conduct rule if:-

the relevant court or the Hong Kong Competition Tribunal ("**CT**") has decided that the act is a contravention of a conduct rule; or

a person has made an admission, in a commitment that has been accepted by the Hong Kong Competition Commission ("**CC**"), that the person has contravened a conduct rule.

(section 110(3) of the CO)

The conduct rules are:-

- the first conduct rule, which prohibits agreements, concerted practices or decisions of association of undertakings that has the object or effect of preventing, restricting or distorting competition in Hong Kong.
- the second conduct rule, which prohibits undertakings with substantial degree of market power in a market from abusing that power by engaging in conduct that has the object or effect of harming competition in Hong Kong.

Stand-alone private actions were removed during the legislative stage, details of which are explained in **Question 25** below.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

The plaintiff can bring a follow-on action by filing an originating notice of claim in the form of form 8 of the schedule of the Competition Tribunal Rules (Cap 619D) ("**CTR**") and a statement of claim (rule 93 of the CTR).

In particular, the originating notice of claim must specify the decision of the relevant court, the CT or the admission in a commitment on which the plaintiff relies to establish a contravention of a conduct rule. The statement of claim must specify the particular part of the relevant decision or commitment which determines or admits that a relevant act is a contravention of a conduct rule.

As an originating document, the originating notice of claim is open to inspection by the public upon payment of a fee. Therefore, where the plaintiff wishes to maintain the confidentiality of any information contained in the statement of claim, the plaintiff may file the statement of claim and the originating notice of claim separately. Otherwise, the plaintiff may apply for confidential treatment of information under rule 37 of the CTR.

3. What remedies are available to claimants in competition damages claims?

Under section 112 of the CO, the CT in a follow-on action may make any one or more of the relief specified in schedule 3 of the CO. The remedies include, amongst others, declaration of contravention by the defendant, prohibitory and mandatory injunction, modification or termination of contravening agreement and damages.

4. What is the measure of damages? To what extent is joint and several liability

recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Hong Kong has not had an opportunity to consider these issues, however, it is anticipated that the measure of damages in a competition damages claim would be similar to other ordinarily principles in cases of torts, ie, that damages are generally compensatory and a plaintiff would be entitled to be put in the same position as he would have been in had the contravention of the conduct rule not occurred (counterfactual). The burden lies on the plaintiff to prove on the balance of probabilities that the damages sought to be recovered are foreseeable, caused by the contravention and not excluded from recovery by public or social policy.

Whilst the Hong Kong Court of Appeal in ***Competition Commission v W Hing Construction Co Ltd & Ors*** [2022] HKCA 786 recognised the application of the principle of joint and several liability in the context of calculation of pecuniary penalties in enforcement proceedings, it remains to be seen the extent to which such principle would apply in the context of competition damages claim.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

Except with the leave of the court, a plaintiff can only initiate a competition damages claim after the expiry of the period within which appeals can be brought against the decisions of the specified courts and the CT; and if the appeals have been bought, until the determination of the same. A plaintiff is barred from bringing such a claim more than 3 years after the earliest date on which the action could have been commenced following the expiry of the aforesaid period (section 111(3) of the CO).

6. Which local courts and/or tribunals deal with competition damages claims?

Sections 108 and 109 of the CO respectively provide that pure competition claims must not be brought in the Hong Kong Court of First Instance ("**CFI**") and may only be brought in the CT, while section 108 allows composite claims (which are claims consisting of competition claims and other claims) to be brought in either the CFI or the CT.

In order to discourage 'forum shopping' in which parties choose either the CFI or the CT to litigate depending on any perceived procedural advantages, sections 113 to 116 provide for a transfer mechanism under which the decision as to whether a claim should be heard in the CFI or the CT would be made by the CFI/CT and not by the parties to the proceedings.

Under the aforesaid mechanism, the CT would have a primary jurisdiction over competition matters. Pure follow-on claims would be considered by the CT. In the event that a composite claim is first brought in the CFI, the CFI would transfer all competition-related parts of the claim to the CT, and would retain those closely connected claims only if it is in the interests of justice to do so.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

The first conduct rule and the second conduct rule capture conduct outside Hong Kong, so long as the same may prevent, restrict or distort competition in Hong Kong. This is different from the position in the UK whereby the counterpart of the first conduct rule applies only if the agreement is, or is intended to be, implemented in the UK. Such an approach was considered not suitable for Hong Kong as the same would narrow the scope of the CO and undermine the competition authorities' ability to tackle agreements or conduct which are not implemented in Hong Kong but nonetheless affect competition in Hong Kong.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

The CO governs all competition damages claims in Hong Kong.

For private competition damages proceedings, the civil standard of proof on the balance of probabilities applies.

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

The CO provides for a judicial enforcement model through the establishment of the CC and the CT. The CC is tasked with the functions to investigate into competition-related complaints, and to bring public enforcement action before the CT in respect of anti-competitive conduct either on receipt of complaints, on its own initiative, or on referral from the Hong Kong

government or a court (similar functions are carried out by the Broadcasting Authority and the Telecommunications Authority in the broadcasting and telecommunications sectors). The CT has been set up within the Hong Kong judiciary as a superior court of record to hear and adjudicate on competition cases brought by the CC, private actions as well as reviews of determination of the CC. Unlike its counterpart in the EU, the CC does not have power to take decisions finding infringement of the competition rules.

Hong Kong courts and the CT are not bound by decisions of foreign competition authorities.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

There is no bar in the CO against private damages action proceeding while related enforcement action is pending. However, in view of the absence of stand-alone right of action in Hong Kong, private damages action typically can only be brought *after* the conclusion of the related public enforcement action, and not while the same is pending.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

There is no mechanism for class actions in Hong Kong.

Consolidation of competition damages claims can be made under Order 4 rule 9(1) of the Rules of High Court (Cap 4A) ("**RHC**") on the grounds that some common question of law or fact arises in both or all of them, or that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or that for some other reason it is desirable to consolidate the cases.

Further, under Order 15 rule 12 of the RHC, where numerous persons have the same interest in any proceedings, the proceedings may be begun and continued by or against any one or more of them as representatives of all or some of the others. A judgment or order given in representative proceedings under this rule shall be binding on all the persons represented in the claim, but shall not be enforced against any person not a party to the proceedings except with the leave of the court.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

The Hong Kong courts and the CT have not had an opportunity to consider these issues as there is no competition damages ruling as of the date of the drafting of these answers. Whether specific defences such as pass on applies, and if so the extent, therefore remains to be seen.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Under Order 38 rule 6 of the RHC and paragraph 25(i) of the Competition Tribunal Practice Directions 1 ("**CTPD 1**"), the CT may give leave, as in any civil case, to adduce expert economic evidence. The test for granting leave is whether the expert evidence is relevant to the issues in dispute as disclosed on the pleadings.

Parties should usually be allowed to appoint their own experts, although the CT may order the parties to appoint a single joint expert. When separate experts are appointed, the CT may direct that there be a meeting 'without prejudice' of such experts for the purpose of identifying those parts of their evidence which are in issue. Where such a meeting takes place, the experts may prepare a joint statement indicating those parts of their evidence on which they are, and those on which they are not, in agreement.

An expert witness has a duty to help the CT on matters within his expertise. This duty overrides any obligation to the person from whom the expert has received instructions or by whom he is paid.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

An application to the CT is heard and determined by member(s) of the CT, which consist of all judges of the CFI (sections 135(1) and 145(1) of the CO).

As to how evidence is dealt with, the CT is not bound by the rules of evidence and may receive and take into account any relevant evidence or information, whether or not it would be otherwise admissible in a court of law (section 147 of the CO).

Rule 35 of the CTR states that the evidence of witnesses at the hearing of any proceedings may be taken orally on oath or affirmation, or by affidavit, declaration or otherwise as the CT thinks fit.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

This would depend on a variety of factors, including the complexity of the case and the number of interlocutory applications. According to paragraph 11 of the CTPD 1, the CT will indicate as early as practicable, a target date or range of dates for the substantive hearing of a matter. Realistic timetables leading towards such date(s) will be laid down which are expected by the CT to be strictly observed.

Appeal against the decision by the CT can be made to the Hong Kong Court of Appeal. Subsequently, a further appeal can be made to the Hong Kong Court of Final Appeal on questions of general public importance.

16. Do leniency recipients receive any benefit in the damages litigation context?

The CO does not provide any benefit for leniency recipients in the damages litigation context. Practically, however, as Hong Kong only has 'follow on' right of action, a leniency agreement will mean no enforcement against the leniency recipient, and therefore no "determinations of contraventions" from which victims can 'follow-on' in their damages claim.

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

The Hong Kong courts and the CT have not had an opportunity to consider these issues as there is no competition damages ruling as of the date of the drafting of these answers. It therefore remains to be seen as regards the application of, and the extent to which, the principle of "umbrella effects" and different economic methodologies would apply in competition damages in Hong Kong. The situation is likewise for interest calculation.

18. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

Provision is made for third party proceedings in rule 23 of the CTR.

In the context of enforcement proceedings, in ***Competition Commission v W Hing Construction Co Ltd & Ors*** [2022] HKCA 786, the Hong Kong Court of Appeal confirmed that a third party may be joined by a respondent for the purpose of seeking indemnity and contribution against it, in order that the findings of the CT in the enforcement proceedings would bind the third party.

The position in the context of a damages claim (more particularly a 'follow-on' damages claim) however remains to be seen.

19. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

Theoretically, the normal procedural mechanisms for the disposal of actions without trial such as summary judgment and order for strike out also apply in the context of a competition damages claim. Practically however, under the special context that Hong Kong only has a 'follow-on' damages regime (when only causation and quantum are in issue), the use of some of the relevant mechanisms may be limited. For example, in view of the usual complexity in the assessment of competition damages, it is fairly unlikely that any 'follow-on' damages claim can be disposed of by way of summary judgment.

20. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Hong Kong does not have any specific mechanism for the collective settlement of competition damages claims.

21. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

There is no automatic general discovery in proceedings in the CT. Parties may instead apply for general directions on discovery or apply for discovery and production of specific documents. However, even where a document is relevant, the CT may refuse to make an order having regard to all the circumstances of the case including in particular the confidential nature of the information, the balance between the interests of the parties and other persons, and the extent to which the discovery is necessary for the fair disposal of the proceedings (rule 24 of the CTR).

The CT has jurisdiction to order disclosure against non-parties where it can be shown that the non-party is likely to have the relevant documents sought which are necessary either for fairly disposing of the matter or for saving costs (Order 24 rule 8 of the RHC).

Privileged documents are generally not discoverable. On the other hand, mere confidentiality would not justify restricting the access of a party to a document.

In practice, the following methods are usually employed to protect confidentiality.

An originating document filed in the CT is open to inspection by the public. Where a party wishes to keep confidential any information in such a document, he can apply to the CT in writing, specifying the information for which confidential treatment is requested.

“Confidentiality rings” are typically formed at the earlier stage of the proceedings, so that confidential information is to be disclosed only to certain individuals within a party or among its representatives. Members of the confidentiality rings are required to give confidentiality undertakings to limit any further disclosure of the confidential information.

Redaction of documents is another common method to protect confidentiality. Confidential treatment is only to be accorded to information that genuinely requires to be protected. In general, confidentiality cannot be claimed for the entire or whole sections of a document as it is normally possible to protect confidential information with limited redactions.

Whilst trials in the CT should generally be heard in open court, the CT has discretion to direct that a confidential matter be heard in camera.

Confidential materials are also typically excised from judgments.

22. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Yes. Costs normally follow the event, although the courts and CT may make some other order as to the whole or any part of the costs, depending on the circumstances of the case.

Relevant circumstances include:-

- whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- the manner in which a party has pursued or defended his case or a particular allegation or issue;
- whether a plaintiff who has succeeded in his claim, in whole or in part, exaggerated his claim; and
- conduct before, as well as during, the proceedings.

23. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party’s costs? Are lawyers permitted to act on a contingency or conditional fee basis?

No. In Hong Kong, third parties are generally not permitted to fund any form of litigation (unlike arbitration). Otherwise, this may constitute maintenance, which means “wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse” (***Winnie Lo v HKSAR*** (2012) 15 HKCFAR 16, citing ***Giles v Thompson*** [1994] 1 AC 142).

Lawyers in Hong Kong are not permitted to act on a contingency or conditional fee basis as it may constitute champerty. Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute.

Although maintenance and champerty has been abolished in various common law jurisdictions, it remains to be a criminal offence in Hong Kong.

Contingency or conditional fee arrangement is also prohibited under the Hong Kong Bar Code and the Hong Kong Solicitors' Guide to Professional Conduct.

24. What, in your opinion, are the main obstacles to litigating competition damages claims?

The main obstacle is that, as explained above in **Question 1**, a victim who has suffered loss and damage as a result of another's contravention of the conduct rules can only bring a 'follow-on' action against the latter. Unlike the situation in many other jurisdictions, a victim does not have the liberty to commence a stand-alone damages claim. Practically therefore, a private damages claim generally can only be commenced after a successful public enforcement action has been taken by the competition authorities.

Enforcement agencies, however, are typically constrained by budget and manpower. This can lead to a bottleneck in private damages claims due to competition authorities having to deal with a backlog of public enforcement cases.

Further, in enforcement proceedings, competition authorities have to prove their cases on the criminal standard of proof, which is higher than the civil (or commensurate) standard that typically applies in stand-alone damages claims overseas. The higher standard of proof in enforcement proceedings may mean fewer successful public enforcement actions, and in turn fewer "determinations of contraventions" from which victims can 'follow-on' in their damages claim.

25. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

Looking forward, it is hopeful that a stand-alone right of action can be reintroduced in Hong Kong.

The original Competition Bill provided for private actions to be brought by persons who have suffered loss and damages as a result of a contravention of a conduct rule. However, such a stand-alone right of action was eventually removed as a result of a compromise by the government. It was because at the legislative stage back in 2012, there were anxiety and concerns from small and medium enterprises ("**SMEs**") that large companies could make use of the stand-alone right of private action to harass SMEs. They were worried that larger companies, which had more resources, could resort to or threaten litigation as a means to drive out or affect the business of smaller competitors.

To reduce the anxiety and concerns of SMEs, the government considered that "*a gradual approach*" should be adopted, such that at the initial stage, enforcement would be carried out by the CC, supplemented by the follow-on right of action for determined contraventions. As the business community acquired more experience with the new competition regime, "*a stand-alone right of action might be introduced*". The government also said it would review the need to introduce the stand-alone right of private action "*in a few years*' time".

As of the date of the drafting of these answers, more than 6.5 years have passed since the CO came into full effect on 14 December 2015. The need to review the appropriateness of stand-alone right of private action is therefore overdue. Given the general consensus that private enforcement can complement public enforcement by increasing deterrence and providing compensation, it is hoped that the government will review the competition law regime and introduce the stand-alone right of action soon.

Contributors

Kenneth Lee
Barrister
kenneth.lee@18lc.com

William Tse
Barrister
william.tse@18lc.com

Edward K H Ng
Barrister
edward.ng@18lc.com

Kristy K Y Wong
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