

THE CLASS ACTIONS
LAW REVIEW

SEVENTH EDITION

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PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, and this is reflected in this seventh edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in (as well as greater recognition and experience of the limitations of) technology is giving rise to ever more stringent standards, with the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more creative and active in promoting and pursuing class actions, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this *Law Review*, this updated publication aims to provide practitioners and clients with a single handbook to which they can turn for an overview of the key procedures, developments and factors in play in this area of law in a number of the world's most important jurisdictions.

Camilla Sanger and Peter Wickham

Slaughter and May

London

March 2023

HONG KONG

Wynne Mok¹

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

In the Hong Kong Special Administrative Region of the People's Republic of China, the sole machinery for multiparty proceedings comes in the form of representative proceedings, which are commenced by or against a representative plaintiff or defendant on behalf of persons who share the same interest. The judgment in a representative action is binding on all persons represented by the representative plaintiff or defendant though it shall not be enforced against any person who is not a party to the proceedings except with the court's permission. This representative proceedings mechanism is available in the High Court of Hong Kong² and the District Court.³ The Small Claims Tribunal also allows representative claims for two or more persons having claims against the same defendant.⁴

Hong Kong inherited this current multiparty litigation model from England but has not followed the latter's reforms on group litigation orders with the enactment of the Civil Procedure (Amendment) Rules 2000,⁵ nor the collective proceedings regime under the Consumer Rights Act 2015.⁶ As explained in this chapter, the representative proceedings model has its limitations and reform has been called for. Indeed, representative proceedings remain rare in Hong Kong and the jurisprudence in this area is limited.

Hong Kong has been exploring the option of introducing a dedicated scheme for multiparty litigation. In March 2004, the Chief Justice's Working Party on Civil Justice Reform released its final report on 150 recommendations in respect of reforms to be introduced to the civil justice system. One of the recommendations was to adopt a scheme for multiparty litigation.⁷ A subcommittee of the Law Reform Commission of Hong Kong (LRC) was then tasked to make suitable recommendations on multiparty litigation and subsequently launched a public consultation in 2009 to gather opinions.⁸ In May 2012, the LRC published its *Report: Class Actions* (the LRC Report) proposing, in particular, that Hong Kong introduce

1 Wynne Mok is a partner at Slaughter and May. The author is grateful to Rita Kan and Cyrus Lo (trainees at Slaughter and May) for their contribution to the publication of this chapter.

2 Order 15, Rule 12, Rules of the High Court.

3 Order 15, Rule 12, Rules of the District Court.

4 Section 21, Small Claims Tribunal Ordinance. The Small Claims Tribunal does not permit legal representation in hearings before it.

5 Section III of Part 19 of the Civil Procedure Rules.

6 Consumer Rights Act 2015, Schedule 8, Part 1.

7 Working Party on Civil Justice Reform, 'The Final Report on Civil Justice Reform' (3 March 2004), available at: https://www.civiljustice.hk/eng/archives_fr.html.

8 The Law Reform Commission of Hong Kong Class Actions Sub-Committee, 'Consultation Paper: Class Actions' (November 2009), available at: https://www.hkreform.gov.hk/en/docs/classactions_e.pdf.

a multiparty litigation model with an opt-out approach.⁹ The opt-out model envisages that once the court has certified a class of persons as suitable for a class action, all the members of that class (except foreign parties) would be automatically bound by the outcome, unless any of them indicated a wish to be excluded from the action. The LRC Report recognised that class actions commenced in Hong Kong may straddle numerous jurisdictions and involve foreign plaintiffs. Where they involve claimants from mainland China, for example, legal ambiguity exists as to whether the mainland courts would recognise and enforce class action judgments with an opt-out approach. Thus, under the LRC's recommended model, a foreign plaintiff must expressly opt in to the class action to benefit from the judgment.

The LRC also proposed implementing the class action regime in phases. At the outset, class actions could be launched in consumer cases where there was a general consensus that they were suitable to be dealt with by such actions (i.e., because of the number of potential claimants involved whose claims might be relatively insignificant individually). It was recommended that funding for class action litigations in consumer claims be made available by expanding the financial scope of the existing Consumer Legal Action Fund managed by the Hong Kong Consumer Council. The LRC also recognised a need to establish a general class action fund to cater for the needs of class action litigants should the class action regime extend beyond consumer cases.

Also relevant to the development of a class action regime in Hong Kong is the introduction of the competition law regime in Hong Kong. Similarly to consumer claims, competition claims involve a potentially large pool of claimants with individual claims of insignificant amounts, namely victims of anticompetitive conduct, and this, therefore, is another area where a class action regime would be beneficial. Despite the Competition Ordinance taking effect from December 2015, collective actions do not yet feature in a competition law context. This contrasts with recent developments in England where an opt-out collective proceedings regime was established in 2015 for competition law claims in the Competition Appeal Tribunal (CAT). There have been landmark high-profile cases litigated in recent years (including the collective proceedings against Mastercard) and the CAT finally granted the first collective proceedings order under Section 47B of the Competition Act 1998 on 18 August 2021.¹⁰

The development of a class action regime in Hong Kong has also become intertwined with that of a weighted voting rights regime (WVR). In 2014, Hong Kong Exchanges and Clearing Limited (HKEX), the operator of the stock exchange in Hong Kong, published a consultation paper seeking views on whether companies with WVR structures (governance structures that give certain persons voting powers or related rights disproportionate to their shareholding) should be permitted to list on the exchange.¹¹ The consultation issues raised included concerns over the viability of class action lawsuits as means of redress for minority shareholders. The consultation conclusions published in June 2015 showed that only a small number of respondents considered the introduction of a class action regime to be a necessary

9 The Law Reform Commission of Hong Kong, 'Report: Class Actions' (May 2012), available at: <https://www.hkreform.gov.hk/en/publications/rclassactions.htm>.

10 *Walter Hugh Merricks CBE v. Mastercard Incorporated & Ors* [2021] CAT 28.

11 Hong Kong Stock Exchange, 'Concept Paper: Weighted Voting Rights' (August 2014), available at: <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Consultation-paper/cp2014082.pdf>.

prerequisite to allowing WVR companies to list, and the majority disagreed.¹² Those who disagreed noted that, in the United States, class action cases are most often brought to seek remedies for misconduct related to disclosure of information¹³ but not for governance issues typically arising from WVR structures. Some respondents claimed that the existing connected transaction rules under the Listing Rules, the Codes on Takeovers and Mergers and Share Buy-backs, and laws on directors' fiduciary duties were adequate to protect shareholders. Others submitted that the Securities and Futures Commission (SFC), the statutory securities market regulator, had powers under the Securities and Futures Ordinance (SFO) to seek class remedies on behalf of shareholders and, therefore, was much better placed to protect shareholder rights. Others expressed concerns about the risk of frivolous cases brought under a class action regime and the ensuing disincentive to companies listing in Hong Kong due to the potential cost of defending and settling class actions. Ultimately, in April 2018, the HKEX amended the Listing Rules to permit listing of companies with WVR structures that fulfil certain criteria, without introducing a class action regime.

II THE YEAR IN REVIEW

As recommended in the LRC Report, in May 2012, the Hong Kong Department of Justice (DoJ) formed a cross-sector Working Group on Class Actions (the Working Group) to consider the details of the class action regime proposed in the Report. The Working Group comprised representatives from the private sector, the legal profession and the Consumer Council.

In 2019, the Working Group focused its study on implementing a class action regime through an incremental approach, starting with consumer cases, and considered issues such as the proposed definition of consumer cases, certification criteria to be adopted by the court and relevant procedural rules and ancillary measures.¹⁴

On 31 December 2020, the Working Group announced its intention to commission a consultancy study on the economic and other related impacts on Hong Kong if a class action regime is to be introduced, initially restricted to consumer disputes (the consultancy study).¹⁵ On 26 August 2021, the Working Group engaged PricewaterhouseCoopers Advisory Services Limited to conduct the consultancy study.¹⁶ However, the status of the progress of the consultancy study is currently unclear.

Numerous recent incidents in Hong Kong have highlighted the need to have a more systematic multiparty litigation mechanism and to expedite class action reform. One of these incidents is the discovery in 2015 that drinking water in certain public housing estates was

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- 12 Hong Kong Stock Exchange, 'Consultation Conclusions to Concept Paper on Weighted Voting Rights' (June 2015), available at: <https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2011-to-2015/August-2014-Weighted-Voting-Rights/Conclusions/cp2014082cc.pdf>.
 - 13 These types of information-disclosure matter include, for example, providing false information in registration documents, failure to disclose adverse material information.
 - 14 Government of the Hong Kong Special Administrative Region, 'LCQ14: Introduction of a mechanism for class actions' (April 2019), available at: <https://www.info.gov.hk/gia/general/201904/17/P2019041700786.htm>.
 - 15 Department of Justice, 'Announcement by Working Group on Class Actions' (December 2020), available at: https://www.doj.gov.hk/en/community_engagement/announcements/20201231_an1.html.
 - 16 Department of Justice, 'Announcement of Award of Consultancy Contract' (August 2021), available at: https://www.doj.gov.hk/en/community_engagement/announcements/20210826_an1.html.

contaminated by heavy metals, which at the time led to suggestions that a class action model would have been the most effective procedure for resolving claims from numerous affected occupants against the Housing Authority and responsible contractors.¹⁷

Many businesses have been seriously affected by the covid-19 pandemic. In 2020, an estimated 88 Hong Kong travel agencies closed as the city's tourism industry was forced to a standstill by the spread of covid-19. At its peak, some of the travel agencies owed thousands of customers over HK\$10 million. Although the Travel Industry Compensation Fund provides an *ex gratia* payment equivalent to 90 per cent of outbound fares, it does not provide protection for many other travel-related losses. Nor does it provide funding for consumer representative proceedings.¹⁸ In December 2021, a local fitness chain closed all its branches, leaving behind reportedly over 2,000 customers who had made lump sum membership fees or paid for personal training sessions. These customers might be left with no choice but to agree to be transferred to another fitness chain as it is not commercially viable for an individual with a relatively small claim to launch a costly and time-consuming lawsuit.¹⁹ In September 2022, a bakery chain ceased operation, leaving customers with unredeemed vouchers.²⁰ In these situations, a class action regime would have better facilitated access to justice for victims concerned.

In June 2022, the SFC issued a consultation paper seeking market views on its proposal to amend enforcement-related provisions in the SFO.²¹ Currently, under the SFO, the SFC is empowered to commence legal actions to seek remedies for persons affected by a contravention of one of the relevant provisions, requirements or conditions under or imposed pursuant to the SFO.²² Such legal actions are brought for the benefit of a group of unnamed investors. However, this power does not extend to misconduct of SFC-regulated persons in breach of the various codes and guidelines imposed by the SFC, even though such misconduct may cause investors losses. The SFC proposed, therefore, to have power to seek remedies on behalf of affected investors in cases where a regulated person has been disciplined for non-compliance with the codes and guidelines, such as the power to restore investors suffering loss from such non-compliance to the position they were in before entering into the transaction concerned.

17 Dennis Kwok, 'Lead-in-water crisis highlights the need for class-action suits', *Hong Kong Economic Journal* (25 July 2015), available at: <https://www.ejinsight.com/eji/article/id/1102740/20150725-lead-water-crisis-highlights-need-class-action-suits>.

18 Sophie Hui, 'Supreme bust among 36 agency closures', *The Standard* (21 May 2020) available at: <https://www.thestandard.com.hk/section-news/section/11/219225/Supreme-bust-among-36-agency-closures>. See also, Kanis Leung, 'Covid-19 crisis keeps visitors away', *South China Morning Post* (14 February, 2021), available at: <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/3121715/covid-19-crisis-keeps-visitors-away-hong-kongs>.

19 Carine Chow, 'Gym goers warm up for clash after Goji shutters, transfers members', *The Standard* (29 December 2021) available at: <https://www.thestandard.com.hk/section-news/section/11/237464/Gym-goers-warm-up-for-clash-after-Goji-shutters,-transfers-members>.

20 Stacy Shi, 'Crostini patrons stuck with coupons rage', *The Standard* (15 September 2022) available at: <https://www.thestandard.com.hk/section-news/section/11/245555/Crostini-patrons-stuck-with-coupons-rage>.

21 The Securities and Futures Commission, 'Consultation Paper on Proposed Amendments to Enforcement-related Provisions of the Securities and Futures Ordinance' (June 2022), available at: <https://apps.sfc.hk/edistributionWeb/api/consultation/openFile?lang=EN&refNo=21CP3>.

22 Section 213(1) SFO.

III PROCEDURE

i Types of action available

Representative plaintiff

In contrast with US-style class actions, representative proceedings in Hong Kong are more aptly characterised as a case management mechanism, the essential purpose of which is to ensure cases are run in a manageable and cost-effective fashion. In cases where parties are so numerous that the proceedings could be rendered unmanageable if all were named, the judiciary would achieve its case management objectives if the issues common to all plaintiffs could be decided in a single set of proceedings rather than in manifold proceedings all seeking substantially the same reliefs.

A representative action under Rules of the High Court (RHC) Order 15, Rule 12 may only be brought where all members of the represented group have the same interest. The question whether a group of claimants share the same interest involves the threefold test of: (1) common interest; (2) common grievance; and (3) a remedy that is beneficial to all.²³ Accordingly, a potential conflict of interest between the members within the represented group might be a factor against establishing that the same interest requirement has been satisfied.²⁴

The courts have historically adopted a restrictive interpretation of the term ‘same interest’ and required all members of a class to show identical issues of fact and law. As a result, class members had to establish that: (1) the same contract applies between all plaintiff class members and the defendant; (2) the same defence is pleaded by the defendant against all plaintiff class members; and (3) the same relief is claimed by the plaintiff class members.²⁵ Accordingly, under this restrictive interpretation, where consumers have contracted separately with the supplier under the latter’s standard form contract, they could not pursue a claim by way of representative actions under RHC Order 15, Rule 12. Also, the same relief requirement meant that damages, which have to be proved separately in the case of each plaintiff, could not be obtained in a representative action. Instead, equitable reliefs such as injunctions were the main remedy in representative proceedings.²⁶ The strict interpretation of the term ‘same interest’ may be the reason representative proceedings in Hong Kong have been historically uncommon.

Over the years, the courts have relaxed the same interest test and adopted a ‘common ingredient’ requirement instead. It is now sufficient if there is a common ingredient in the causes of action of the represented class members.²⁷ Once a common ingredient is established, class members can rely on the judgment on the common ingredient as *res judicata*, and can proceed to prove the remaining elements of the cause of action in separate proceedings.²⁸ This relaxation of the same interest requirement aims to make representative actions ‘not a rigid matter of principle but a flexible tool of convenience to facilitate the administration of justice’.²⁹

23 *CBS/Sony Hong Kong Ltd v. Television Broadcasts Ltd* [1987] HKLR 306.

24 *Calm Ocean Shipping SA v. Win Goal Trading Ltd* [2020] HKCU 1125, at 34.

25 *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021 (CA) at 1040–1045.

26 *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 244, 255.

27 *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 252, 255.

28 *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 229, at 255.

29 *John v. Rees and Others* [1970] Ch 345.

Apart from the emergence of the common ingredient formulation, other judicial developments have contributed to the relaxation of the same interest test. These developments included:

- a* removing the requirement that there be a single contract between the class of plaintiffs and the defendant;³⁰
- b* allowing separate defences to be pleaded by the defendant against different members of the plaintiff;³¹ and
- c* greater judicial willingness to award damages in representative actions.

If a representative plaintiff withdraws from the representative proceedings, the court may add or substitute him or her with any person in the represented class. The substitute plaintiff is treated as having been the representative plaintiff from the date of the original writ. This avoids the claim from being time-barred if the addition or substitution occurs after the limitation period for the relevant claim.³²

In certain restricted circumstances, the court has the power to appoint one or more plaintiffs or defendants to represent a class of persons whose identities may not all be known at the time when action is commenced, or persons not yet born. These restricted circumstances include proceedings concerning: (1) the estate of a deceased person; (2) property subject to a trust; and (3) the construction of a written instrument, including legislation.³³

Notwithstanding that the more liberal interpretation of the term ‘same interest’ adopted by the courts has made it easier to commence representative proceedings, the current representative proceedings regime is deficient in various respects, and this was highlighted in the LRC Report; for example:

- a* compared with US-style class actions, the requirements for representation orders remain technical and narrowly defined;
- b* even where a representation order has been made and the case has proceeded to judgment, finality is not necessarily achieved as individuals are still free to challenge enforcement on the basis that there are facts and matters peculiar to their case; and
- c* the existing rules make no specific provision for handling the special problems of multiparty litigation that require forceful case management by the judge; for example, class members with strong cases might wish to eliminate those with weak cases from the proceedings.³⁴

Without rules designed to deal specifically with group litigation, courts have to proceed on an ad hoc basis, and the resulting uncertainty discourages the employment of the representative proceedings process.

30 *Irish Shipping Ltd v. Commercial Union Assurance Co plc (The Irish Rowan)* [1991] 2 QB 206 (CA).

31 *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch).

32 *Moon v. Atherton* [1972] 2 Q.B. 435, CA.

33 Order 15, Rule 13, Rules of the High Court. Appointment under Order 15, Rule 13 is more frequently made when a limited class of persons are to be affected by a judgment or court order, for example, beneficiaries of a trust, some of whom may not be known or even born.

34 See the Law Reform Commission of Hong Kong, ‘Report: Class Actions’ (May 2012) paragraph 1.7; Chief Justice’s Working Party on Civil Justice Reform, Civil Justice Reform Interim Report and Consultative Paper (2001), paras 385 to 387 at 148–9.

Representative defendant

Similar to representative plaintiffs, RHC Order 15, Rule 12 allows a plaintiff to sue two or more defendants, those defendants representing a class of individuals who may be unknown to the plaintiffs but who are bound together by being members of a club, society, association or other identifiable group of individuals. The same interest requirement is also applicable in the appointment of a representative defendant.

No leave is required by the plaintiff to bring an action against the representative defendants or to select the person he or she will sue as a representative defendant. However, an order is required where the plaintiff seeks to appoint any one or more of the existing defendants as representative defendants after proceedings have been commenced.³⁵

ii Commencing proceedings

Representative plaintiff

A representative plaintiff does not require leave to commence representative proceedings. The representative plaintiff may elect himself or herself to be the representative without needing to seek the consent of those he or she represents.³⁶ However, the court has power to order that the proceedings cease to continue in the form of representative proceedings where it is of the view that it is inappropriate to continue them in that form. Circumstances where the court may disallow continuation of representative proceedings include cases where the parties seeking, or selected, to represent others are not suitable representatives or do not fairly represent others having the same interest.³⁷

Representative defendant

A claimant does not require leave to bring an action against representative defendants nor is a claimant required to select the person he or she will sue as a representative defendant. However, should the plaintiff wish to appoint one or more of the existing defendants as representative defendants at any stage after commencement of proceedings, he or she would need to obtain an order to do so.³⁸ The application to do this is made by summons before the master and should be made as soon as practicable.

The court does not leave the matter of the appointment of the appropriate representative defendants to the plaintiff or defendants but, instead, makes a representation order after satisfying itself that the representatives are proper persons to defend on behalf of others.³⁹ It is possible, therefore, that individuals could be appointed as representative defendants to defend on behalf of others against their will.⁴⁰ However, in exercising its discretion, the court may take into account individuals' unwillingness to act in a representative capacity, and may consider other factors, such as whether the duties imposed upon the representative defendants would be unduly burdensome, including the obligation to inform persons potentially falling into the class of defendants, and the costs and time involved in acting as the representative

35 Order 15, Rule 12(2), Rules of the High Court.

36 *Sung Sheung-hong v. Leung Wong Soo-ching* [1965] HKLR 602.

37 Hong Kong Civil Procedure 2022, vol 1, [15/12/41]; *Ng Hing Yau v. City Noble Developments Ltd* [2017] HKEC 2470.

38 Order 15, Rule 12(2), Rules of the High Court.

39 *Walker v. Sur* [1914] 2 KB 930; Order 15, Rule 12(2), Rules of the High Court.

40 *Baynard Ltd v. Secretary for Justice* [2011] 1 HKLRD C3 English Judgment.

defendant. It may also consider viable alternative relief for the plaintiff, such as an action to sue defendants named as ‘persons unknown’ by describing the role and nature of those persons, and amended later if their identity becomes known.⁴¹

iii Defining the class

In a representative action, the writ should clearly and precisely define the class of persons sought to be represented,⁴² and should be endorsed with the representative capacity of the plaintiff or defendants.⁴³ The representative capacity of the plaintiffs or the defendants should also be included in the title of the writ and the statement of claim.⁴⁴

The class must be clearly defined, as the ambit of the class affects such practical matters as who will be bound by the judgment and who might be liable for costs. A vague definition of class would also hamper the ability of the representatives to inform potential class members. It is not sufficient to state that the representative represents some of the members of a class without defining who are to be excluded.⁴⁵ If persons have been excluded from the definition of class, they should be made parties in their personal capacity. The court would consider it inappropriate to allow a representative action where there were a potential conflict of interest between the members within the represented group.⁴⁶ There does not appear to be a bar to overseas persons being included in a class provided that the common ingredient test is satisfied.⁴⁷

The class must also contain ‘numerous persons’,⁴⁸ because the objective of representative proceedings is to facilitate disposition of cases where parties are so numerous that the proceedings would be unmanageable if all were named. While there is no set number required, a group of a few people (for example, five persons) is unlikely to be sufficiently numerous, unless the claim amount is very small or the court is satisfied that it is the wish of all the persons interested that a representation order should be made.⁴⁹

Where the class is too small to constitute a class of numerous persons or not capable of being clearly defined, or where other considerations apply that make it inappropriate for representative proceedings to continue, the court may consider other viable relief, such as granting an action to sue additional defendants as persons unknown and describing the role and nature of that person, with amendment later if their identity becomes known.⁵⁰

iv Binding effect on the class

It is a fundamental principle that if a representative action is conducted properly, any member of the class represented is bound by any judgment or order given in the action, as he or she is treated as being present in the proceedings by representation, notwithstanding that they are

41 *Calm Ocean Shipping SA v. Win Goal Trading Ltd* [2020] HKCU 1125, at 39, 40, 46.

42 Hong Kong Civil Procedure 2022, vol 1, [15/12/5].

43 Order 6, Rule 3, Rules of High Court.

44 *Re Tottenham* [1896] 1 Ch. 628.

45 *Re Pentecostal Mission, Hong Kong and Kowloon* [1962] H.K.L.R. 171.

46 *Calm Ocean Shipping SA v. Win Goal Trading Ltd* [2020] HKCU 1125; see also the recent UK decision *Jalla & Ors v. Shell International Trading and Shipping Company Limited* [2020] EWHC 2211 (TCC).

47 *Calm Ocean Shipping SA v. Win Goal Trading Ltd* [2020] HKCU 1125.

48 Order 15, Rule 12, Rules of the High Court.

49 *Re Braybrook* [1916] W.N. 74; Hong Kong Civil Procedure 2022, vol 1, [15/12/4].

50 *University of Hong Kong v. Hong Kong Commercial Broadcasting Co Ltd* [2016] 4 HKLRD 113, at 52-25; *Calm Ocean Shipping SA v. Win Goal Trading Ltd* [2020] HKCU 1125, at 39, 40, 46.

not named parties to the proceedings, as explained below.⁵¹ In addition to judgments given after trial, judgments entered in default of notice of intention to defend are also binding on those represented. In the latter case, however, a person represented can apply to be added as a named defendant and seek to set aside the default judgment, to bring the matter to trial.⁵² Further, if he or she can demonstrate fraud or collusion or other issues of similar nature, he or she may apply to have the judgment set aside. Otherwise, judgments given after trial cannot be challenged except on appeal.⁵³

v Procedural rules

Enforcement

Leave is not required to enforce a judgment against the representative plaintiff or defendant, who is a named party to the proceedings.

However, leave is required to enforce a judgment against a member of the represented class who is not a named party to the proceedings. Application is made by summons before the master and personal service of the summons on the person against whom the judgment is sought to be enforced is required.⁵⁴

A represented member only has limited tools at his or her disposal to resist the enforcement of a judgment, namely the existence of facts and matters particular to his or her case that entitle him or her to be exempted from liability arising from the judgment;⁵⁵ for example, he or she was not in fact a member of the class represented at the time the cause of action arose. The individual member cannot challenge the validity or binding nature of the judgment, nor put forward any defence that could have been (but was not) raised in the proceedings.

The difficulty of resisting enforcement of the judgment, together with the binding nature of the representative proceedings, and the lack of consent required from class members before a representative plaintiff commences proceedings underscore the importance for individual members to opt out of representative proceedings by ensuring they are specifically excluded from the member class.

That said, in a recent case, the court found that a cross-undertaking in damages given by a representative plaintiff in an injunction application made on behalf of a represented class did not afford the defendants meaningful protection because the represented class may dispute liability arising out of such a cross-undertaking.⁵⁶

Judge or jury

All civil actions in Hong Kong are heard by a single judge in the first instance with the exception of defamation cases, which may be heard by a jury depending on the level of court in which the defamation action is brought.

51 Order 15, Rule 12(3), Rules of the High Court.

52 Order 15, Rule 6, Rules of High Court.

53 Per Jessel M.R. in *Commissioner of Sewers v. Gellatly* (1876) 3 Ch.D. 610.

54 Order 15, Rule 12(4), Rules of the High Court.

55 Order 15, Rule 12(5), Rules of the High Court.

56 *Peng Yingzhen v. Absolute Skill Holdings Limited* [2022] HKCFI 3328, at [136].

Speed of the litigation

It is difficult to generalise about the time required for the disposition of representative proceedings in Hong Kong, particularly in light of the underutilisation of the regime and the resulting lack of empirical data to support such generalisations. Various factors affect the time it takes for representative proceedings to reach trial and judgment, including the nature of the claims made and the complexity of the claims, and court diary considerations. While representative proceedings are commonly perceived to promote judicial efficiency by resolving a large number of disputes in which there are common issues of fact or law within a single set of proceedings, such efficiency may not necessarily be achieved on an individual case basis. Various issues peculiar to representative proceedings tend to lengthen the time required to obtain substantive judgment in representative proceedings, such as disputes on whether representative proceedings are suitable for a particular case, the choice of representatives and definition of class, and time needed for representatives and their legal counsel to communicate and liaise with class members.

Liability and quantum

It was not historically possible to claim damages in a representative action as this offended the rule that the same relief is claimed by the represented class members. As a result, declaratory and injunctive reliefs were the default reliefs in a representative action. The recent trend has been for the courts to relax this rigid approach, such as facilitating a claim for damages through making a declaration of the class members' entitlement to damages, which then enables class members to claim damages individually.⁵⁷ Courts have also declared that a defendant owed a plaintiff class a lump sum, without making any individual assessments,⁵⁸ and allowed damages in different measures where the claim was an adjunct to the primary equitable relief claimed, such as an injunction.⁵⁹

Damages and costs

In Hong Kong, the measure of damages for contractual and tort actions is generally compensatory in that damages are awarded to put the innocent party in the position it would have been in had the contract been properly performed or had the tort not been committed. Punitive or exemplary damages are only awarded in limited circumstances, such as where the defendants' conduct was calculated to make a profit for themselves over and above compensation payable to the claimants. As most civil cases in Hong Kong are heard by a judge, damages are usually awarded by the presiding judge.

As for costs, only representative plaintiffs or defendants who are named parties in the proceedings are liable for costs, and other represented members of the class who are not named parties are not liable. Similarly, represented parties who are not named parties cannot recover costs.⁶⁰ It remains to be seen whether this seemingly unfair position will change when a comprehensive class action system is finally introduced in Hong Kong in accordance with the multiparty litigation scheme recommended in the 2009 Civil Justice Reform. For

57 *Prudential Assurance Co Ltd v. Newman Industries* [1981] Ch 229.

58 *Walker v. Murphy* [1915] 1 Ch 71 (CA); *EMI Records Ltd v. Rilely* [1981] 1 WLR 923 (Ch).

59 *CBS Song Ltd v. Amstrad Consumer Electronics plc* [1988] Ch 61 (CA).

60 *Markt & Co Ltd v. Knight Steamship Co Ltd* [1910] 2 KB 1021.

example, under the equivalent group litigation provisions in England and Wales under CPR 48.6A, common costs may be ordered, meaning that group litigants would be severally liable for an equal proportion of the common costs.⁶¹

In respect of funding, Hong Kong maintains the common law offences of champerty and maintenance. While the offences no longer apply to arbitration,⁶² their continued applicability in relation to general litigation has been reaffirmed by the Court of Final Appeal, the highest court in Hong Kong.⁶³ Under the principle of maintenance, a person with no interest in a legal action of another should not meddle in the action by providing assistance and, under the principle of champerty, a person shall not obtain a share of proceeds of another's legal action as a reward. The established categories of exceptions to the principle of champerty and maintenance are where the third party has common interests with another in the litigation, where there are access to justice considerations, and in insolvency proceedings.⁶⁴

As mentioned above, the LRC Report recognised the importance of a suitable funding model for any class action system to have any practical meaning. The LRC Report proposed expanding the Consumer Legal Action Fund to make funding available for class action proceedings in respect of consumer claims. It further recommended that a general class action fund should be set up to make discretionary grants to eligible impecunious class action plaintiffs.

Settlement

A representative may discontinue or settle the proceedings prior to judgment, in which case the represented members may commence their own proceedings or apply to be made defendants in the first action. After the court has issued a judgment, a representative plaintiff has no power to discontinue or settle and cannot deprive class members of the benefit of the judgment, because, after a judgment is issued, no class members may bring further action in respect of matters adjudicated in the first action.⁶⁵

IV CROSS-BORDER ISSUES

As long as overseas plaintiffs or defendants share the same interest as the representative plaintiff or defendant, they may be included in the class, subject to the normal rules of service out of jurisdiction.⁶⁶

61 Hong Kong Civil Procedure 2022, vol 1, [15/12/44]; Rule 48.6A(3), Civil Procedure Rules 1998.

62 Section 98K, Part 10A, Arbitration Ordinance.

63 *Unruh v. Seeberger* [2007] 2 HKLRD 414.

64 *ibid.* See also *Re Cyberworks Audio Video Technology Limited* [2010] 2 HKLRD 1137. More recently, courts have observed that extending third-party funding to general litigation involves a delicate balance between different public policies, and that it is more appropriate to deal with this by way of legislative enactments rather than have the courts to decide on an individual case basis. See *Re A* [2020] HKCU 705.

65 *Handford v. Storie; Re Alpha Co* [1903] 1 Ch. 203.

66 See for example: *Calm Ocean Shipping SA v. Win Goal Trading Ltd* [2020] HKCU 1125. The case involved a plaintiff seeking an order for the first defendant to be appointed as representative defendant on behalf of other defendants, some of whom were foreign. In principle, the class could have included these foreign members but for the court refusing to grant the representative order on other grounds.

V OUTLOOK AND CONCLUSIONS

Hong Kong's existing representative proceedings regime remains an under-utilised mechanism for plaintiffs pursuing collective claims. Some proponents view that the existing representative proceedings could be significantly improved by way of strong court control and case management. However, piecemeal judicial developments are unlikely to remove the significant uncertainty in adopting the representative action procedure.

Some believe that alternative dispute resolution mechanisms such as arbitration and mediation could provide sufficient, efficient and fair redress for collective claims.⁶⁷ For instance, collective arbitration is possible under the rules of major arbitration institutions. There are others who believe the current statutory regime sufficiently provides for those claims to be brought by regulatory bodies on behalf of lay claimants. For instance, the SFC can protect victims who have been harmed by securities-related misconduct or misfeasance through legal actions under the SFO.⁶⁸ However, in reality, alternative dispute resolution methods cannot be a complete substitute for a comprehensive class action regime. For instance, collective arbitration would only be possible for claimants who have agreed to submit their claims to arbitration in the first place. Further, given the heavy caseload of regulators, which necessitates prioritisation of cases, and the amount of time it can take for sufficient evidence to be gathered to bring a claim to trial, the availability of a comprehensive class action regime to supplement the current statutory regime would be likely to improve access to justice.

Looking forward, the LRC Report has proposed implementing a class action regime incrementally. It has identified 16 types of cases that might be suitable for class action proceedings, such as labour disputes and insurance, consumer, securities and competition cases.⁶⁹ Further impetus for a comprehensive class action regime in the territory may be provided by the liberalisation of the listing regime, including that relating to individual and corporate WVR beneficiaries, biotech companies and companies seeking secondary listing in Hong Kong (which are perceived to expose shareholders to higher risks), as well as the continued development of the competition law regime in Hong Kong.

The introduction of a securities class action system in mainland China may also give a further boost to the development of a class action regime in Hong Kong. In 2019, through its revised Securities Law, China introduced a securities class action system in respect of misrepresentation on securities, insider trading and market manipulation.⁷⁰ The first securities class action was heard and decided by the Guangzhou Intermediate People's Court on 12 November 2021. Kangmei Pharmaceutical Co Ltd was ordered to pay a total of more than 2.4 billion yuan to compensate over 50,000 investors for their losses as a result

67 See the Law Reform Commission of Hong Kong, 'Report: Class Actions' (May 2012).

68 Under sections 213–214 of the SFO, the SFC is empowered to seek remedies from the Court of First Instance, including restitutionary remedies that would benefit a large group of victims (e.g., members of a listed company).

69 See the Law Reform Commission of Hong Kong, 'Report: Class Actions (May 2012)', Annex 1.

70 Securities Law of the People's Republic of China (2019 Revision), Order No. 37 of the President of the People's Republic of China, issued on 28 December 2019, effective on 1 March 2020.

of false statements and material omissions in its financial reports.⁷¹ Given the close judicial cooperation between China and Hong Kong, China's securities class action system may spur Hong Kong to follow suit in introducing a proper class action regime.

There has long been a debate that a proper class action regime in Hong Kong would adversely affect the economy by deterring investments and harming small to medium-sized businesses. There is no doubt that this debate will continue, especially if the government is proposing introducing a class action regime through an incremental approach starting with consumer cases. That said, the current representative proceedings mechanism has proved to suffer from a range of limitations. There is clearly need for a comprehensive multiparty litigation regime and it remains to be seen how this will develop in Hong Kong. The consultancy study that was supposed to complete in mid-2022 is something to watch out for in 2023.

71 Timothy Heritage, 'Chinese court rules against Kangmei in "milestone" case', Reuters (13 November 2021) available at: <https://www.reuters.com/business/healthcare-pharmaceuticals/chinese-court-rules-against-kangmei-milestone-case-2021-11-12/>.

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