

THE CLASS ACTIONS
LAW REVIEW

SIXTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>Camilla Sanger</i>	
Chapter 1 AUSTRALIA.....	1
<i>Robert Johnston, Nicholas Briggs and Felicity Karageorge</i>	
Chapter 2 BRAZIL.....	17
<i>Sérgio Pinheiro Marçal and Lucas Pinto Simão</i>	
Chapter 3 ENGLAND AND WALES.....	25
<i>Camilla Sanger, Peter Wickham and James Lawrence</i>	
Chapter 4 FRANCE.....	47
<i>Alexis Valençon and Nicolas Bouckaert</i>	
Chapter 5 GERMANY.....	60
<i>Henning Bälz</i>	
Chapter 6 HONG KONG.....	69
<i>Wynne Mok and Jason Cheng</i>	
Chapter 7 INDIA.....	81
<i>Sumeet Kachwaha and Ankit Khushu</i>	
Chapter 8 JAPAN.....	92
<i>Oki Mori, Aki Watanabe and Natsumi Kobayashi</i>	
Chapter 9 LUXEMBOURG.....	105
<i>François Kremer and Ariel Devillers</i>	
Chapter 10 NORWAY.....	113
<i>Andreas Nordby and Jan Olav Aabø</i>	

Contents

Chapter 11	PORTUGAL.....	124
	<i>Nuno Salazar Casanova and Madalena Afia Rosa</i>	
Chapter 12	SCOTLAND	134
	<i>Colin Hutton, Graeme MacLeod and Kenny Henderson</i>	
Chapter 13	SINGAPORE.....	144
	<i>Sim Chong and Kent Chen Sixue</i>	
Chapter 14	SPAIN.....	155
	<i>Alejandro Ferreres Comella and Cristina Ayo Ferrándiz</i>	
Chapter 15	UNITED STATES	164
	<i>Timothy G Cameron and Megan Eloise Vincent</i>	
Appendix 1	ABOUT THE AUTHORS.....	177
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	187

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, as reflected in this sixth 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 technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering 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 such claims, and local laws are being updated to facilitate such actions before the courts.

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

Camilla Sanger

Slaughter and May

London

February 2022

HONG KONG

*Wynne Mok and Jason Cheng*¹

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 Kong,² the District Court³ and the Small Claims Tribunal.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 regimes 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 rather 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 sub-committee 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 opinion.⁸ Upon completion of the public consultation in May 2012, the LRC published its Report on Class Actions (the LRC Report) proposing, in particular, that Hong Kong introduce a multiparty litigation model with an

1 Wynne Mok is a partner and Jason Cheng is an associate at Slaughter and May.

2 Order 15, Rule 12(1), 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/index/index.htm>.

‘opt-out’ approach.⁹ The opt-out model envisages that upon the court certifying a class of persons as suitable for a class action suit, all the members of that class (except foreign parties) would be automatically bound by the outcome, unless any of them indicate 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 the general consensus was that, due to the number of potential claimants involved whose claims, individually, might be relatively insignificant, they are suitable to be dealt with by way of class actions. It was recommended that funding for class action litigations in consumer claims would 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 foresaw the need to establish a general class action fund to cater for the need 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. Similar to consumer claims, competition claims involve a potentially large pool of victims of anticompetitive conduct with individual claims of insignificant amounts, and 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 story of a class action regime in Hong Kong, in recent years, has 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 Among the consultation issues raised, concerns included the viability of class action lawsuits as means of redress for minority shareholders.

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, ‘Consultation Paper to Concept paper on WVR’ (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>.

In June 2015, the HKEX released the consultation conclusions on whether to allow companies with WVR structures to list on the Exchange.¹² While a small number of respondents stated that the introduction of a class action regime was a necessary prerequisite to allowing WVR companies to list, twice as many respondents disagreed. Those who disagreed noted that in the US, class action cases are most often brought to seek remedies for misconduct related to disclosure of information,¹³ but not for the type of governance issues usually 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, which provided important protection against corporate behaviour that amounts to oppression or unfair prejudice, and was therefore much better placed to protect shareholder rights than legal counsels in class action lawsuits who may have different motives. Still others were concerned about the higher 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. In response, it was concluded that a class action regime was not a necessary prerequisite for the acceptability of WVR structures. The new Listing Rules Chapter 8A permitting listing of companies fulfilling certain criteria with WVR structures came into effect on 30 April 2018, without the prior implementation of a class action regime.

II THE YEAR IN REVIEW

It was recommended in the LRC Report that a working group comprising representatives of the major stakeholders should be formed to consider the details of the proposed class action regime. In May 2012, the Hong Kong Department of Justice (DoJ) formed a cross-sector Working Group on Class Actions (Working Group) comprising representatives of the major stakeholders including the private sector, legal profession and Consumer Council.

The Working Group focused its study on implementing the 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, as well as the relevant procedural rules and ancillary measures.¹⁴

Several years after its formation, 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

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.

PricewaterhouseCoopers Advisory Services Limited to conduct the consultancy study. It is expected that the study will complete in mid-2022. A report will then be presented to the Working Group for consideration.¹⁶

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 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

As the covid-19 pandemic hit the city, many businesses were seriously affected. 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 As recently as 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 situations such as these, the presence of a class action regime would have facilitated access to justice for victims concerned.

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 can be decided in a single set of proceedings rather than manifold proceedings, all of which seek substantially the same reliefs.

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.

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>.

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 as to 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.²⁰ 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.²¹

The courts have historically adopted a very 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.²² 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 injunction was the main remedy in representative proceedings.²³ The strict interpretation of ‘same interest’ may account for why representative proceedings in Hong Kong were 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 or some common element in the causes of action of the represented class members.²⁴ Once a common ingredient is established, class members can rely on the judgment on the common ingredient as *res judicata* and proceed to prove the remaining elements of the cause of action in separate proceedings.²⁵ Behind this relaxation of the same interest requirement is the aim of making representative actions ‘not a rigid matter of principle but a flexible tool of convenience to facilitate the administration of justice’.²⁶

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

- a removing the requirement that there be a single contract between the class of plaintiffs and the defendant;²⁷
- b allowing separate defences to be pleaded by the defendant against different members of the plaintiff;²⁸ 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 new plaintiff is treated

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

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

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

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

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

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

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

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

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

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.²⁹

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.³⁰

Notwithstanding that it has become easier to commence representative proceedings given the more liberal approach to the interpretation of 'same interest' adopted by the courts, the LRC Report highlighted the following deficiencies of the current representative proceedings regime:

- 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 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 his or her 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.³¹

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.

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, where, after proceedings have been commenced, the plaintiff seeks to appoint any one or more of the existing defendants as representative defendants, an order is required.³²

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

30 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.

31 See The Law 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.

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

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.³³ 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 a 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.³⁴

Representative defendant

A claimant does not require leave to bring an action against representative defendants, or select the person he or she will sue as a representative defendant. However, at any stage after commencement of proceedings, the plaintiff would need to obtain an order should he or she wish to appoint one or more of the existing defendants as representative defendants.³⁵ The application is to be made by summons before the master, and should be made as soon as practicable. The representative capacity of the defendants must be endorsed on the writ and should also be stated in the title of the action.³⁶

The court would not leave the matter of the appointment of the appropriate representative defendants to the plaintiff or defendants, and would instead make a representation order after satisfying itself that the representatives are proper persons to defend on behalf of others.³⁷ Therefore, the wishes of the plaintiffs and defendants would not dictate the choice of representative defendants. Individuals may also be appointed as representative defendants to defend on behalf of others against their own will.³⁸ In exercising its discretion, however, the court may take into account the individual's unwillingness to act in a representative capacity, and consider other factors, such as whether the duties imposed upon the representative defendant(s) would be unduly burdensome, including the obligation to inform persons potentially falling under the class of defendants, and the costs and time involved in acting as the representative 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 that person, with amendment later if their identity becomes known.³⁹

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

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

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

36 Order 6, Rule 3(b), Rules of the High Court.

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

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

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

iii Defining the class

In a representative action, the writ should clearly and precisely define the class of persons sought to be represented,⁴⁰ and should be endorsed with the representative capacity of the plaintiff or defendants. The representative capacity of the plaintiffs or the defendants should also be included in the title of the writ and the statement of claim.

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 members of the class of the proceedings. It is not sufficient to state that the representative represents some of the members of a class without defining who are to be excluded.⁴¹ If persons have been excluded from the definition of class, they should be made parties in their personal capacity. The court would consider any potential conflict of interest (or absence thereof) between the members within the represented group in allowing or disallowing the representative action.⁴² There do not appear to be bars to overseas persons being included in a class provided the common interest test is satisfied.⁴³ As explained above, the defined class should have sufficient common interest between them to satisfy the common interest test.

The class must also contain 'numerous persons'.⁴⁴ This is so given the objective of the representative proceedings rule was to facilitate disposition of cases where parties were 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.⁴⁵

Where the class is too small to constitute a class of 'numerous persons', the class is 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.⁴⁶

iv Binding effect on the class

The fundamental principle of a representative action is that, if the representative action is properly conducted, any member of a 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 not named parties to the proceedings.⁴⁷ Not only are judgments given after trial binding on those represented, but also judgments entered in default of notice of intention to defend. 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, in

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

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

42 *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).

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

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

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

46 *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.

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

order to bring the matter to trial. 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.⁴⁸

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.

Leave is however 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.⁴⁹

A represented member only has limited tools at his or her disposal to resist the enforcement of a judgment, namely that there are facts and matters particular to his or her case so that he or she is entitled to be exempted from liability arising from the judgment.⁵⁰ An example is that 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. He or she also cannot 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.

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.

Speed of the litigation

It is difficult to generalise the time it takes 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 make 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. 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 proceeding, such efficiency may not be achieved on an individual case basis. Various issues peculiar to representative proceedings tend to lengthen the time required to obtain substantive judgment in

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

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

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

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

Historically it was not 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.⁵¹ Courts have also declared that the defendant owed the plaintiff class a lump sum without making any individual assessments,⁵² and allowed damages in different measures where such claim was an adjunct to the primary equitable relief claimed such as injunction.⁵³

Damages and costs

The usual measure of damages in Hong Kong is compensatory damages, which puts the innocent party in the position it would have been in had the contract been properly performed or if the tort had not occurred. Punitive or exemplary damages are rarely awarded by Hong Kong courts. The very limited circumstances in which punitive damages may be awarded include 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 that other represented members of the class who are not named parties are not liable. It remains to be seen whether this seemingly unfair position will change when a comprehensive class action system is finally introduced in Hong Kong. For 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.⁵⁴

In respect of funding, Hong Kong still maintains the common law offences of champerty and maintenance. While the offences no longer apply to arbitrations,⁵⁵ their continued applicability in relation to general litigation has been reaffirmed by the Court of Final Appeal, the highest court in Hong Kong.⁵⁶ 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

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

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

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

54 Hong Kong Civil Procedure 2022, vol 1, [15/12/44].

55 Arbitration Ordinance Part 10A.

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

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.⁵⁷

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

Settlement

A representative may discontinue or settle the proceedings prior to judgment. However, in such case, the represented members may commence their own proceedings, or they may 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, as after a judgment is issued, no class members may bring further action in respect of matters adjudicated in the first action.⁵⁸

IV CROSS-BORDER ISSUES

In principle, 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.⁵⁹

V OUTLOOK AND CONCLUSIONS

Hong Kong's existing representative proceedings system 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.⁶⁰ 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

57 *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 involved a delicate balance between different public policies, and that it is more appropriate to be dealt with by way of legislative enactments, rather than for the courts to decide on an individual case basis. See *Re A* [2020] HKCU 705.

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

59 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.

60 See The Law Commission of Hong Kong, 'Report – Class Actions, (May 2012)'.

legal actions under the SFO.⁶¹ However, in reality, alternative dispute resolutions cannot be a complete substitute for a comprehensive class action regime. Further, given the heavy caseload of the regulators which necessitates prioritisation of cases, and the amount of time it might take for them to investigate the matter and pursue claims through to trial, the availability of a comprehensive class regime is believed to supplement the current statutory regime and likely improve access to justice.

Looking forward, the LRC Report has proposed implementing the class action regime incrementally. It has identified 16 types of cases that might be suitable for class action proceedings, such as insurance, labour disputes, consumer, securities and competition cases.⁶² There have been recent developments that might accelerate the discussion on the introduction of a comprehensive class action regime in Hong Kong. These include 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), and 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, the PRC, through its revised Securities Law, introduced a securities class action system in respect of misrepresentation on securities, insider trading and market manipulation.⁶³ 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 more than 50,000 investors for their losses as a result of false statements and material omissions in its financial reports.⁶⁴ With the close judicial cooperation between the PRC and Hong Kong, the increased enthusiasm for class actions in the PRC might spark new interest in Hong Kong for 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 businesses. The covid-19 pandemic and its adverse impact on the global economy may, unfortunately, add uncertainties to the development in Hong Kong of a comprehensive class action regime.

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

62 The Law Commission of Hong Kong, 'Report – Class Actions, (May 2012)', Annex 1.

63 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.

64 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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