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Views expressed by the contributors are not necessarily those of JWB. While every effort has been made to ensure that the information contained in this booklet is correct, the contributors, editorial team, and JWB disclaim all liability and responsibility for any error or omission in this publication, and in respect of anything, or the consequences of anything, done or omitted to be done by any person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.
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PREFACE

Migrant workers are among the most common international travellers in the region. And yet, for all of the work by civil society, national governments, and international organisations to improve their migration and working conditions, access to justice remains a frustratingly domestic idea, limited to the jurisdiction they happen to find themselves in.

This manual seeks to address this glaring gap in service provision within Hong Kong, one of the most popular destinations for migrant workers from across Asia. By creating a guide to the legal options available to those who cannot remain in Hong Kong to pursue their claims, we seek to make it easier for advocates to help victims of labour exploitation or human trafficking seek just compensation against their abusers, even after going home. We also hope additional civil cases will send a message to bad employers and brokers, who sadly exist in every country, that they can no longer use a worker’s departure to flout Hong Kong law and avoid responsibility.

A note on audiences: this manual was designed for Hong Kong lawyers, Hong Kong direct service providers, and counterpart lawyers and entities in the clients’ home countries. For lawyers who are new to migrant worker issues, this manual provides an overview of common legal problems that migrant workers face on the job. For Hong Kong direct service providers, this manual can serve as a screening tool, helping paralegals and other staff identify potential claims prior to seeking a consultation with a lawyer. Finally, lawyers and service providers in clients’ home countries can use this manual to make an initial assessment of possible Hong Kong-based claims, and weigh the pros and cons of attempting to bring legal action from abroad.

Finally, this manual is a work in progress. Many of the issues we have sought to address involve novel questions of law that the courts have not answered. The logistical hurdles involved in cross-border pro bono litigation are also not fully understood. As such we gladly welcome your feedback on how we can improve this document. Please feel free to e-mail us at the address below with your input.

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Chapter 1

AN INTRODUCTION TO
HONG KONG’S MIGRANT DOMESTIC WORKERS

By Professor Carol G.S. Tan,
University of London
CHAPTER 1: AN INTRODUCTION TO HONG KONG’S MIGRANT DOMESTIC WORKERS

1. Editorial preface

1.1. This chapter provides a general overview of the socio-political context migrant domestic workers encounter when they come to Hong Kong to work. While the chapter does not attempt to provide an in-depth description of the historical, social, political and legal context in Hong Kong, it seeks to give practitioners who are new to this field a more complete sense of the clients they are likely to serve, and a fuller context as they pursue the legal remedies detailed in the following chapters.

1.2. Professor Tan opens the chapter by briefly describing the history of migrant workers in Hong Kong within the broader discussion of globalisation. She introduces Hong Kong’s socio-political context through a critique of the media and migration literature’s portrayal of migrant domestic workers as mostly victims or lawbreakers. She then notes Hong Kong’s historical and current reliance on migrant domestic workers, and by extension the migrant domestic workers’ contributions to Hong Kong’s society. This discussion interweaves basic legal concepts central to understanding the Hong Kong context, including the unique immigration status of migrant domestic workers, the two-week live-in rule, and the standard employment contract.

1.3. The chapter concludes by sharing the often unexplored aspects of migrant domestic workers. Professor Tan specifically highlights the law that facilitates and regulates migrant domestic workers in Hong Kong through the stories of those who have exercised control over the unjust situations they have found in Hong Kong by pursuing litigation. Through the course of her discussion, Professor Tan provides a client-centred framework for practitioners to effectively serve migrant domestic worker clients, who are contributors to the Hong Kong economy, international travellers and litigants entitled to justice.²

¹ For detailed descriptions and discussions of the historical, social, and political context migrant workers encounter when they come to Hong Kong, see the multiple studies, primers, legal papers and books listed in the Resources section of the website Hong Kong Helpers Campaign, accessible at http://hkhelperscampaign.com/en/resources/ [visited on 1 November 2015].

2. Introduction

2.1 Few visitors to Hong Kong fail to notice its army of female migrant domestic workers. Although domestic work is almost unique in that it occurs mainly in the privacy of the home, Hong Kong’s migrant domestic workers (“MDW”) are highly visible. They can be observed collecting their young charges at the school gates, accompanying the elderly, doing the grocery shopping and walking their owners’ dogs.

2.2 The visibility of MDWs results from the particular circumstances in which they work and live in Hong Kong. A lack of dedicated recreational facilities and the legal requirement that domestic workers must live in their employers’ homes combine to result in most domestic workers having no option but to spend their leisure in public spaces. Parks, promenades, roadsides, and overhead walkways become the sites in which domestic workers conduct many activities that others can do in greater privacy. They eat, sleep, read, dance, socialise, play and pray. On their rest days domestic workers form a live diorama in the shadow of the city’s skyscrapers.

2.3 Hong Kong’s migrant domestic workers are also highly visible in the press but, again, their interests are rarely dominant. They are likely to be portrayed as victims of exploitation or as law breakers. The territory is dependent on its MDWs, but only as a form of cheap labour. As a result, in every socio-economic policy change in which domestic workers have featured, though their voices are often recorded in the press, the interests of employers and others have usually prevailed.

2.4 Less likely to make the headlines is the fact that, each year and for well over a decade now, many migrant domestic workers sue their employers. Whilst the conditions of work for MDWs can and need to be improved, Hong Kong’s MDWs, in fact, possess a number of socio-economic rights. Many of these rights are embodied in the employment contract between the domestic worker and her employer, and litigation is thus the main route through which a domestic worker can enforce those rights. Before discussing the many ways in which MDWs have exercised some control over the unjust situations they have found in Hong Kong, including by pursuing litigation, I turn first to the history of MDWs in Hong Kong, the laws that regulate MDWs and the socio-political context MDWs encounter when they come to Hong Kong to work.

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3 In 2011, there were 276,737 migrant domestic workers compared with only 1,653 Supplementary Labour Scheme workers. The figures for 2012 were 307,151 and 3,452 respectively.

4 Those campaigning for full recognition of domestic work (as work) mostly prefer the term “migrant domestic worker” rather than “foreign domestic helper”, the term that is used by the Hong Kong government and indeed widely used in Hong Kong. Neither term is unproblematic. For a range of views on the two terms see “Is ‘Domestic Helper’ A Loaded Term?” available at http://hkhelperscampaign.com/en/domestic-helper-loaded-term/ [visited on 15 Oct 2015].

5 For a few years in the mid 1990s, the use of school and other buildings as centres for the use of MDWs on their rest days was mooted and a few were started but these efforts were not sustained.

3. Globalisation and the History of Migrant Workers in Hong Kong

3.1 According to one government report, migrant domestic workers “first started to work in Hong Kong in the late nineteen sixties” but their popularity dates from “the early eighties”. It is now a top destination for MDWs, boasting one of the highest densities of MDWs in the world. At the end of 2014, there were 330,650 MDWs in Hong Kong making up approximately 4.6% of the entire population of the territory, with workers from the Philippines and Indonesia accounting for nearly 98% of all Hong Kong’s MDWs.

3.2 On one view, as crosses borders to reach its most conducive locations, so too do workers capital migrate to the locations in which they are in demand. Excess labour in one country and a shortage in another is the typical example of push and pull factors at work. These processes, which were initially male-dominated, became a feature of the Pacific Asia region in the 1970s and 1980s. In most of the countries in this region, rapid economic growth led to rural-to-urban migration, feminisation of the work force, decreased fertility and the movement of labour from small-scale industries to the export-oriented activities of the multinationals. This was followed by labour shortages which led to demands for and action to import labour. By the end of the 20th century, a third of all countries had become significant labour receiving countries with only two fifths of these countries being those considered to be high-income countries.

3.3 One reason why so many households in Hong Kong have a full time domestic worker is the affordability of her wages, the “minimum allowable wage” being determined by the government with the needs of ordinary families in mind. As Veronica Pearson pointed out over a decade and a half ago, where previously only the wealthy employed a domestic helper, “what is different about the phenomenon of the [Filipina Domestic Helpers] is that they now are affordable by people with quite modest household incomes”.

3.4 Hong Kong offers some of the best terms and conditions an MDW will find in Asia. That is to say that the law requires her employment to be evidenced by a written standard-form contract, and is subject to a number of minimum terms and conditions. She is entitled to a rest day of 24 hours’ duration in every seven day period.

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7 Census and Statistics Board, Hong Kong Government 1995, F2.
9 Table 2.12, Hong Kong Annual Digest of Statistics, 2015, available at http://www.censtatd.gov.hk/hkstat/sub/sp140.jsp?productCode=B1010003 [visited on 10 November 2015]. This table shows that the total number of MDWs in 2014 was up from 320,988 in 2013 and 312,395 in 2012. It also shows that Philippines nationals, who had made up the largest nationality group of domestic workers in Hong Kong, were outnumbered by Indonesian nationals in the years 2009, 2010 and 2011. Since then the number of Philippines nationals has again exceeded the number of Indonesian nationals.
10 See the study by Raymond K.H. Chan and Moha Asri Abdullah, Foreign Labor in Asia: Issues and Challenges (Commack, New York: Nova Science, 1999), p 9. This work is primarily a study of Taiwan, Hong Kong, Singapore and Malaysia as newly industrialising countries. The authors point out immediately that in all these countries, migrant labour is temporary i.e. the migrant remains in the country only for the duration of his employment and that such labour is usually admitted by governments according to pressure from employers who express the need for migrant labour, because of domestic labour shortages.
12 Veronica Pearson, “The Past Is Another Country: Hong Kong Women in Transition”, (1996) 547 The Annals of The American Academy of Political and Social Science 91, 100. At that time, that level of income was about $20,000 per month and above, citing Census and Statistics Department Monthly Digest of Statistics (Hong Kong: Hong Kong Government, March 1995), pp F3-F4. Note also that Pearson refers only to Filipina migrant domestic workers because at that time, migrant domestic workers were overwhelmingly from the Philippines.
CHAPTER 1: AN INTRODUCTION TO HONG KONG’S MIGRANT DOMESTIC WORKERS

3.5 These terms and conditions are the product of mandatory and overlapping contractual terms, employment legislation, immigration law and administrative provisions. In this constellation of laws and of immediate importance to the domestic worker is the contract of employment, enforcement of which lies with the employee. Whilst both employer and employee are placed in a web of law and regulations that also involve duties owed vertically to the state, without the MDW making a complaint, the employer is unlikely to face any action by the state. In pursuing her dispute with her employer, the MDW will, depending on amount of her claim, either start an action in the Minor Employment Claims Adjudication Board (“MECAB”) or the Labour Tribunal.

3.6 A brief word should be made on certain aspects of the socio-legal environment in Hong Kong relevant to the enforcement of rights. These too are comparatively good. First, there is a relative absence of extortion and abuse by the personnel of the authorities (police, immigration and labour departments and the relevant tribunals). A migrant worker can usually seek the assistance of the police when retrieving her belongings from her employer’s residence. Second, the dispute resolution mechanisms are relatively efficient (and free to the parties) so that claims come to a conclusion without too long a delay. Third, civil society is vibrant; there are now a variety of resources for MDWs which include migrant worker trade unions, advocacy groups, NGOS and informal migrants’ societies.

3.7 Despite the presence of the relatively good formal parameters outlined above, infringements of the socioeconomic rights of MDWs are common. Many domestic workers are paid little or no salary for the first few months on the excuse that the wages are re-directed towards the repayment of loans taken out by the migrant worker, ostensibly to pay for the costs of migrating for work. Thereafter, many MDWs are paid a wage less than the minimum mandated by the law. Results of surveys carried out in 2004 and 2005, for instance, showed between 42% and 67% of

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13 Many of these rights are express terms of the government-prescribed domestic helper contract ID407 which can be found on the Immigration Department’s website.

14 This wage is amended from time to time. It was, for instance, revised downwards after the Asian financial crisis of 1997. It currently stands at HK$4210. This is not the statutory general minimum wage for brief details of which see paragraph 25 of this chapter. Inclusion in the minimum wage is one of the reforms sought by some campaign groups.

15 Concerns in 2013 over ‘premature’ termination of contracts by MDWs acting in concert with employment agencies led to a greater scrutiny of applications for new visas for MDWs. Those considered to have terminated their contracts for ‘job-hopping’ purposes may be refused a new visa. See Press Release “Immigration Department Implements Measure to Deter Abuse of Arrangements for Premature Termination of Contract By Foreign Domestic Helpers”, 30 Aug 2013: www.infor.gov.hk/gia/general/20130830/P2013083000757_print.htm [visited on 17 April 2014].

respondents stating that they had not been paid their full salary.\textsuperscript{17} Other regular breaches of the law include not granting rest days or payment in lieu of rest days forsaken. When it comes to suing one's employer, the combination of migrant status, the costs of migration and other factors provide for the MDW a formidable set of constraints which may have a bearing on her agency or its exercise. In this regard, four facts associated with her employment militate against an MDW instituting a claim.

3.8 First, as already mentioned, underpayment of wages is a common breach. The fact that many MDWs do not receive much money at all for several months\textsuperscript{18} may account for why an MDW may feel that she has to work until she has repaid her loans and accumulated some wages. The risk of unemployment is likely to weigh heavily when an MDW considers her choice between continuing employment in sub-contract conditions and terminating her employment.\textsuperscript{19}

3.9 Second, there is the 'two week rule' of the Hong Kong Immigration Department, which again militates against an MDW bringing a claim. This rule applies whether it is the MDW or her employer who terminates the employment. If the MDW exercises her right to terminate her employment, she risks having to leave Hong Kong before she starts the process of becoming an MDW with her new employer. This is expensive and is thought to deter a migrant worker from terminating her contract for breaches of contract by her employer.\textsuperscript{20}

3.10 Third, the MDW resides in her employer's home.\textsuperscript{21} In practice, this means that the choice is between continuing in employment and bringing a claim. Paralegal advice centres routinely advise MDWs not to return to the employer's residence except to collect their belongings. It is likely that few women give notice before leaving and being a live-in employee, if she gave notice, it is likely that her employer would require her to leave immediately.

3.11 Fourth, when an MDW, assuming she is no longer in employment, brings a claim, she is usually granted a visa to remain in Hong Kong but which prohibits her from being employed. The ban on working undoubtedly militates against bringing a claim. It makes the costs of seeking redress very high. The availability of free food and shelter for the duration of her unemployment, whilst not making up for the opportunity costs (which cannot be a part of the claim), is critical.

3.12 With the growing realisation that globalisation has not benefitted people and regions equally, precisely because globalisation’s costs must be carried by some and that

\textsuperscript{17} Asian Migrant Centre, Underpayment: Systematic Extortion of Indonesian Migrant Workers in Hong Kong (Hong Kong: Asian Migrant Centre, 2005) and also Asian Migrant Centre et al Underpayment 2: The Continuing Systematic Extortion of Indonesian Migrant Workers in Hong Kong (Hong Kong: Asian Migrant Centre, 2007).

\textsuperscript{18} See text and notes at n 17 above. See also the author's "Why Rights are Not Enforced: The Case of Foreign Domestic Helpers" (2000) 30 Hong Kong Law Journal 354 which discusses inter alia the structural difficulties and common breaches perpetrated by employers with Indonesian migrant domestic workers in mind.

\textsuperscript{19} See, for instance, the circumstances of Sringatin, the MDW who is the current Vice-Chair of the Indonesian Migrant Workers Union, a union whose members are made up almost exclusively of Indonesian domestic helpers: Danny Lee “Helper Moved to the Fore as Migrant Workers’ Champion” South China Morning Post 27 Jan 2014: www.scmp.com/news/hong-kong/article/1414266/helper-moved-for-migrant-workers-champion. Sringatin completed her two year contract despite breaches of her employment contract by her employer having been advised by her sister that it would be hard for her to find a new job.

\textsuperscript{20} See n 15 above regarding the risks of the tougher attitude of the Immigration Department announced in 2013.

\textsuperscript{21} Migrant domestic workers have for some years been required to live with their employers. One of the campaign demands of domestic workers and support groups is for the abolition of this rule. See for example the HK Helpers Campaign launched in 2013 which lists abolition of the live-in rule as one of their three ‘simple, winnable, demands’: http://hkhelperscampaign.com/ [visited on 17 April 2014].
these costs have been shouldered disproportionately by women, a number of studies have directly addressed the issue of the need to protect migrant domestic workers as vulnerable labour. This discourse has, not surprisingly, attracted feminist critique for its exclusive emphasis on the worker’s “passivity and powerlessness”, an emphasis which also essentialises and infantilises MDWs. Their power to influence the course of their own lives is ignored and the underside of protection – greater surveillance and control over women – is given insufficient attention.

4. Media Stereotypes

4.1 In many studies and media stories, MDWs are portrayed as criminals or victims. Reports from international bodies such as the International Labour Organisation (“ILO”) have also served to underscore the victim characterisation of migrant domestic workers. This is due in part to the ILO identifying migrant domestic workers as one of the three most vulnerable groups of migrant workers. While it is obvious enough that an imbalance in stories in which the helper is charged with a crime is prejudicial, the risk accompanying the victim discourse is less obvious but no less real.

4.2 Migrants the world over tend to receive negative press publicity. They are usually blamed for unemployment, for pushing down wages, for an increase in crime and for being a drain on the public purse. Hong Kong is no exception. In 2014, I commented that newspaper articles about migrant domestic workers in Hong Kong tended to highlight stories of MDWs who broke the law or who had been abused. In the preceding eighteen months, while the horrific abuses suffered by Erwiana Sulistyniangsih at the hands of her employer were continuing to emerge, multiple news stories focused on the arrests of several domestic helpers in Nim Shue Wan village, Discovery Bay, where a number of Filipina domestic helpers had long resided.

4.3 Since that casual observation, I have had the opportunity to embark on a study of articles appearing in the Hong Kong Economic Times (thought to be the most reliable of the local newspapers in Chinese). A preliminary survey confirms that cases where an MDW has been abused form one of a few regular categories of reporting. Where present day Hong Kong employees are concerned, it is probably true that MDWs are in a unique category of employees who are most likely, if they are a victim of crime at all, to be a victim of a crime perpetrated by their employer (or someone in the employer’s household) and at the same time more likely to be accused of a crime against her employer than against others. Perhaps no other type of work renders the worker more vulnerable to crime and to be accused of a crime in her workplace.

24 Tan (see n 6 above), p 1.
25 Several of the MDWs who had been living in Nim Shue Wan village close to the family-oriented and multinational residential area of Discovery Bay on Lantau Island were arrested in July 2013. Some employers prefer their MDW to live elsewhere for reasons of their own privacy or lack of space in their home and though their employers were potentially equally in breach of the law none of the six MDW's employers were arrested: “Six ‘stay-out’ Filipinas arrested” Hong Kong News 1 Aug 2013: http://hongkongnews.com.hk/six-stay-out-filipinas-arrested/ [visited on 18 April 2014].
4.4 One difficulty with the reporting of crimes where an MDW is accused or convicted is the general lack of positive stories of MDWs in the press. A more particular prejudicial deficit is that the stories of theft of the employer’s property very rarely mention that the majority of the complaints of theft are made only when the relationship between the employer and employee is about to end or is in the process of coming to an end. A theft would, from the perspective of the employer, make it cheaper to end the MDW’s employment. As a result, an accusation of theft has often been used as part of the employer’s termination strategy.

4.5 The stories in which MDWs are victims, especially those where they have been victims of abuse at the hands of the employer or someone in the employer’s household, serve to raise public awareness of ‘the plight’ of MDWs and have led to calls for law reform from workers’ and non-workers groups. The high profile cases of abuse, especially, have the potential to become significant milestones for change and it is right that the press devote column inches to them. However, the victim discourse has the effect of according to MDWs less agency in determining their own futures than they in fact possess and exercise every day. Focusing on the law and the way in which it structures and limits the MDWs’ choices risks portraying them as ‘mere’ victims whose weak bargaining position is worsened by the structures imposed by legislatures and governments.

5. Migrant Domestic Workers as Contributors to Hong Kong’s Economy and Society

5.1 In the remainder of this section, I turn to one glaring omission in the press. There has been a marked absence of sustained discussion of the contribution of MDWs to Hong Kong’s society and its economy. In its place is an unexpressed dependence on MDWs. The dependence of Hong Kong society on MDWs can mean a number of things. Its most important aspect is in fact a dependence on the availability of a cheap source of flexible, round-the-clock labour. It is around the frequent discussion of the MDWs’ minimum allowable wage and less directly from the discussions of key economic and social reforms in Hong Kong where we can detect that access to the cheap labour of migrant domestic workers is regarded as if it were an entitlement. These discussions reveal much regarding social attitudes towards migrant domestic workers and I shall turn to each briefly.

5.2 In the past two decades, the wage for migrant domestic workers has featured in the Hong Kong Economic Times nearly every year in tandem with the annual review conducted by the government. All increases in the minimum allowable wage have met with vociferous opposition from employers and those acting as spokespersons for employers, even those increases which followed quite a drastic wage cut in the wake of the Southeast Asian currency crisis of 1997 and the recession in 2008. Those opposed to the increase in wages have been quick to point to the relative weakness of the Philippine peso to make the argument that the decreased wage has had less effect on remittances than might have been thought. To put that wage in context, the minimum allowable wage of the MDW is so low that a part time domestic worker (necessarily a Hong Kong resident) would cost more than a full time MDW. Households requiring domestic service have long realised this. The courts in Hong Kong also had occasion to consider this fact in personal injury cases.26

26 In Yam Shun Sim v Kai Muk Yim and Leung Wai Man HCPI 69/2003, 11 May 2004, Sakhrani J. found on the evidence that the plaintiff required the assistance of a domestic helper for 4½ hours each day. The judge had to
5.3 The dependence on the low cost of domestic workers was also seen in the exclusion of migrant domestic workers when the introduction of the Minimum Wage Ordinance, Cap 608 was debated. Of the estimated one in eight households employing an MDW, the government argued that 30 per cent of households had an income that would make it impossible to afford an MDW if the MDW had to be paid the minimum wage. At present the minimum allowable wage is HK$4,210 per month, and employers are required to provide the domestic worker with suitable accommodation, reasonable privacy, free food or a food allowance of HK$995 per month. At present only Hong Kong residents with a monthly income of no less than $HK15,000 or assets of comparable value are eligible to hire a domestic helper.

5.4 An earlier example of the unstated dependence on the cheap labour of migrant domestic workers occurred when, in 1995, the Legislative Council passed the Mandatory Provident Fund Schemes Ordinance, Cap 485, which at first included MDWs. In a territory with limited state welfare provision, the Mandatory Provident Fund Schemes (“MPF”) marked the first time in the history of Hong Kong that an effort was made to ensure that a large swathe of society was enrolled on a scheme which would provide some financial security in retirement. It obliged employers to contribute towards their employees’ pension. Employees too, unless their wages were low, made a monthly contribution towards their pensions. For the MDW earning only the minimum allowable wage, only her employer would have had to make a 5 per cent contribution towards her pension. When the Ordinance was passed and until the time in 1998 when the matter was laid to rest by the passing of subsidiary legislation to exclude domestic workers, the Hong Kong Economic Times carried a number of articles in which the opposition to the inclusion of MDWs was dominant.

5.5 In 1999, not long after the MPF matter had been laid to rest, the government announced and later introduced an Employees Retraining levy. Following in the footsteps of Singapore’s government, the Hong Kong government made it mandatory for every employer wishing to employ an MDW to pay a levy. The rationale of the levy was to collect revenue that would be put towards the training of local people to enable them to take up jobs in the sectors employing foreigners. In its conception, such a tax was also meant to make employers of foreign workers think twice before employing a foreign worker. At the same time, the employment prospects of local domestic workers were also meant to improve. However, the gap in pay between foreign and local domestic helpers was so great that the levy would not have been enough to achieve this aim.

5.6 Similar to the MPF issue, the most powerful stakeholders were the employers. Arguments over the levy demonstrate the power of employers in shaping government policy and action. The amount of tax – HK$400 – was the same as the reduction in the minimum allowable wage which was announced on the same day. The timing of these changes suggests a placatory stance towards employers: to determine if it was reasonable for the plaintiff to have hired a full time domestic helpers. In his view, it was. Sakhrani J. (at para 62) explained that “[t]he figures show that it was much more economical to hire the Indonesian domestic helper than to employ a part time local domestic helper. The unchallenged evidence was that it would cost $48 per hour for employing a local domestic helper. For 4½ hours each day that would come to $216. For a month that would come to $6,480 … Looking at it from that point of view, it was, in my view, entirely reasonable to hire a full time Indonesian domestic helper.”

27 This Ordinance was passed in 2010. Its main provisions came into effect on 1 May 2011. Domestic workers are excluded by s 7(3).
28 It has been estimated that an MDW would earn about 50 per cent more of her current wage were the statutory minimum wage to apply. This is a reasonable estimate.
29 Pursuant to the provisions of the Employees Retraining Ordinance, Cap 423.
make the levy acceptable, employers were informed that in contracts entered into in future, the domestic helper’s wage was, conveniently, correspondingly lower. After much pressure from employers, employers’ organisations and legislators led by Regina Ip, the government first suspended the levy payable for the employment of MDWs and later abolished it in 2008. The reduction in the minimum allowable wage was not, however, reversed.  

5.7 These examples show that although MDWs are visible in the discussions of these important economic reforms, their interests are always subordinated to those of other stakeholders, because there is strong, nearly always unstated, support for maintaining the low cost of employing a migrant domestic worker. Furthermore, the daily dependence upon MDWs is not explored, let alone developed into a discourse that is appreciative of the labour that MDWs provide.

5.8 In focusing on the structures that oppress and devalue women migrant workers, we lose their own voices in their many different registers and with that we lose their personal stories. For example, we fail to note the changes that occur as the person finds herself having to make sense of the different situations she encounters in becoming a migrant worker. In fact, though domestic work is nearly everywhere of a low status, the work of being a full time domestic worker in Hong Kong is difficult and demanding. It is regularly physically tiring because the working day is very long (a typical day starts before 6 a.m. and finishes at 11 p.m.), the work is monotonous and often the worker may lack the skills or training for particular aspects of the job such as child or infant care. The women who succeed, and many do, use a variety of weapons and modes of resistance that they find at their disposal. Two ways in which we can counter the criminality and victimhood discourse is through the lens of travel and litigation.

6. Migrant Domestic Workers as World Travellers

6.1 As practitioners seeking to provide client-centred services, we must refocus the discussion not only to appreciate the labour that MDWs provide but also to better understand the multi-faceted lives of MDWs as consumers of legal services. Picturing MDWs primarily as workers or as victims – whether of globalisation or state political and economic failure – oversimplifies MDWs as people and obscures the fact that the migrant domestic worker is also a traveller.

6.2 Like other travellers to Hong Kong, many MDWs enjoy posing for photographs in front of the city’s landmarks, particularly those that speak of Hong Kong’s modernity and wealth. In the words of one domestic worker, the city is “Hong Kong super Megapolitan.” Like many travellers to Hong Kong, Eni, the diarist in Diary Buruh Migran (Diary of a Migrant Worker), first encounters Hong Kong at its impressive airport. “Fantastik!” she exclaims as she notes how efficient HKIA is and how quickly she is able to make her way through all the procedures and to collect her

30 As for those who bore the brunt of the saga, a few domestic workers pursued judicial review of the government’s decision to reduce their wages. One of their arguments was that the levy was a tax on migrant domestic workers and as such it was unlawful because it had not been approved by the legislature as required by art 73(3) of the Basic Law: Julita F. Raza and Others v Chief Executive in Council and Others (2005) HCAL 30/2003 and (2006) CACV 218/2005. The domestic workers appealed the decision of the High Court unsuccessfully. See Julita F. Raza and Others v Chief Executive in Council and Others [2006] HKCA 296.

31 Arsy Kirana, Diary Buruh Migran (Diary of a Migrant Worker) (Yogyakarta: Revive!, 2014), p 80. All translations are mine.

32 Kirana, ibid, p 51.
luggage. Some years later she has the chance to visit Japan with her employer’s family. She is as pleased to see snow as anyone born in the tropics. She learns about “ski school” and “gondola” from her English-speaking employer but most of all and like other travellers to Japan, she is fascinated by the all-singing-all-dancing Japanese toilet seats. Back in Hong Kong, Eni and her friends who are fellow domestic workers enjoy pepperling their conversations with Cantonese phrases and English words, not unlike the way many other sojourners would do to signal their shared experience of living in an overseas location and as a way of demonstrating the new skills acquired through their time abroad.

6.3 In fact migrant domestic workers are travellers for reasons familiar to most who have gone abroad. Going overseas to escape the boredom of rural life, to mend a heart far away from where it was broken, to obtain a measure of privacy from their families, to seek adventure or to test their own mettle – which traveller would not recognise these as reasons for travel? Working abroad involves a multiplicity of experiences – a broadening of the mind, discovering oneself, learning self-reliance, and practising perseverance. One of the first things that Eni says when she arrives in Hong Kong is “Yes, I have arrived in Hong Kong … Here I shall face a new life.” She is full of trepidation about being on her own and far away from her family, about living with her employer and about the demands of her job. With no one by her to sound the battle cry, she says to herself “I must be independent, I must fight.” Her arrival is a physical arrival in an alien city but it is also an entry into a new and challenging phase of her life.33

6.4 In researching the travels of Eastern Javanese women, the scholar Catharina Purwani Williams interviewed thirteen women who had been domestic workers in Hong Kong.34 These interviews, and her discussion of them, provide insights into the lives of women migrant domestic workers and what they experiences meant to them. Most of the thirteen women had started working overseas when they were between the ages of 17 and 23. She quotes a 20-year-old returnee from Hong Kong as saying that working abroad had given her a lot of confidence – “I know now I can go and do things for myself.”35

6.5 For Indonesian migrant workers, their status abroad carries economic and cultural significance back home. Together, the remittances they send home amount to more than the national revenue from agriculture or mining, earning them the moniker *pahlawan devisa* (remittance or foreign exchange heroes). Many migrant workers have mixed feelings about this title. To quote Eni again, she saw that, in reality, migrant workers were one of Indonesia’s export commodities. If they were indeed *pahlawan devisa*, why were they not celebrated as heroines rather than being segregated from the rest of society as was precisely her experience at Jakarta airport. Nonetheless the phrase still has some purchase and can be invoked to the advantage of a young woman seeking to work abroad. It implies sacrifice for family and country and gives domestic work a veneer of respectability.

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33 Kirana (*see n 31 above*), p 52.
35 Williams, *ibid*, p 129.
6.6 Migrating to find work chimes with the rooted idea of *merantau* (to wander) found in the region. It allows young women to “spread their wings further” without being seen to be openly transgressing social and familial boundaries. For Williams this is a romantic view of a complex reality in which different stages of their journey and the material conditions of each stage are pertinent. Williams explains,

“the appeal of travelling and working abroad – apart from the money – was the opportunity to escape from family constraints and live in a different community overseas for an extended period. Some simply wished to experience different spaces and places, which in their words was “*memperluas cakrawala*”, which literally means to expand their horizons. Others found it difficult to find suitable employment in the local labour market … that would guarantee a reasonable income. Still others travelled abroad as domestic workers in a search for personal autonomy”.

6.7 Dividing the migration experiences of the women into four stages (leaving home, in-transit, working abroad and returning home), Williams found that most of the women she interviewed lacked economic and social capital, reported that they themselves made the decision to work abroad, and that their primary aim was economic – “helping their families financially”. Their individual stories showed some variation; some were responding to a specific need such as the need to rebuild a house after an earthquake, to a general desire “to learn new skills and to meet new people”, to the boredom of unemployment, or because they had tried and failed to find a job for which they had been trained. To be modern through experiencing modern city life was also reported as a motivation by some of her informants.

6.8 Throughout all four stages of the migration experience, many complaints are made about domestic worker employment agencies (whether operating in Hong Kong or in a sending country such as Indonesia). It is often assumed that migrant workers, particularly those from Indonesia, are universally exploited by such intermediaries. The research done by Williams at the very least cautions against too simplistic a view. Of those she interviewed, several were aware of the risks of being misinformed or charged high fees by intermediaries. They avoided dealing with anyone they did not trust, using instead friends and family or someone recommended by friends and family.

6.9 The desire of the would-be migrant worker from Indonesia to spread her wings is restricted by government requirements. Unmarried women must obtain the written consent of her parents (usually that of the father) before being allowed to migrate for work. Many women decide to run away if their parents forbid them from becoming migrant workers. In *Diary Buruh Migran*, Eni resorts to forging her mother’s signature because she is sure that her mother would not consent.

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36 Williams (see n 34 above), p 132.
37 Williams (see n 34 above), p 136.
38 Williams (see n 34 above), p 140.
39 Kirana (see n 31 above), pp 17 – 20.
40 See Williams (n 34 above), p 147.
reports in the late 1990s which highlighted the physical and sexual abuses suffered by domestic workers. Some parents were also concerned about what they assumed was a close association between domestic work and prostitution. 41 Williams observed how women exercised their agency “to obtain consent to travel, by promising to contribute to the household income”. 42 She reminds us that the requirement of a parent or guardian’s consent before migrating for work evidenced a daughter’s “continued subordinate position in the family hierarchy”. 43 While that is true, I would argue that the lengths to which daughters go to overcome their parents’ objections and the low social status of domestic work overseas even when it is well paid in comparison with domestic work at home, demonstrates the determination of many women intent on working overseas.

6.10 In the second stage of their journey, the determination to fulfil their ambition of a better life abroad, patience, maturity and courage continue to be the characteristics of those who survive. At this stage they have to live away from their families in the cramped environment of a hostel for trainee domestic workers. They have to adapt to the considerable restrictions on their personal freedom while at the same time enduring the uncertainty of when they will be given their wings to fly overseas. Often this pre-migration period is one in which their experiences are enlarged beyond anything they had previously encountered. Already, the possibilities of “being” are widened.

6.11 The diarist Eni, who is a devout Muslim, writes disapprovingly of women who converted to Christianity to hasten their departure overseas and of same sex coupling between women in the hostel. When she is later in Hong Kong, Eni also notes the way in which the women who have ‘butched’ themselves up and lived their lives in Hong Kong under tomboy names 44 feminise themselves prior to going home for their annual leave or for good. 45 She also reports that it is no secret that some women are given new names and new dates of birth before they leave Indonesia. 46 The new names are part of the commodification of Indonesian labour i.e. the process that transforms them into ideal domestic helpers in Hong Kong. This includes having short, easy to pronounce names to go with the short hairstyles, no make-up and no jewellery stipulated by many agencies. The faking of dates of birth are to overcome the minimum age limit or to make the individual woman younger than she is. This pre-migration period is also a time when many would-be migrants report bad experiences of doing their practical training as temporary employees to fussy employers in Jakarta.

6.12 Once the migrant worker has arrived at her destination, she has to adjust quickly and survive various everyday trials to attain her goals. This includes managing her relationship with her employer, consciously enlarging her social support network to replace the network of kin at home and avoiding dangers such as potentially destructive relationships with predatory men. One informant, Netti, told Williams that during her time in Hong Kong, she used her smile as a deliberate strategy to defuse

41 Williams (see n 34 above), p 146.
42 Williams (see n 34 above), p 147.
43 Williams (see n 34 above), p 148.
44 Kirana (see n 31 above), p 107.
45 Kirana (see n 31 above), p 73.
46 Kirana (see n 31 above), pp 43 - 44.
situations in her workplace that might otherwise have led to disagreements. In her work on migrant domestic workers in Taiwan, Lan Pei-chia discussed the many ways in which migrant women – many of them from the same countries as Hong Kong’s migrant domestic workers – coped with the demands of their employment by cleverly enacting subservience and inferiority as if their employment was a performance. Since open resistance and challenging their employers is not part of the role, acts of resistance are carried out ‘off stage’ or when in the company of friends. This included dressing up in glamorous outfits only when far from their employer’s home but also acts such as poking fun at the supposed class, material and linguistic superiority of the employer. To return to the idea of travel, we should note that, in order to poke fun at their employer in this way, the migrant worker has first to understand herself as being different from the people in the host country. She gains a greater sense of herself: she finds ways of separating her own culture from that of her employer.

Williams describes her informants as returning to occupy positions of greater power in their families after the period of working overseas. The returnee may be allowed to do nothing during her holiday. Sometimes her family may put pressure on her to do another tour of duty abroad; they may have become dependent on her wages. For other women, having contributed to their family’s finances, a second or subsequent contract means that they can save up for themselves.

Williams emphasises the importance of looking at the specificity of migrant women’s experiences at each stage of their journey and in the particular places in which they find themselves. These places are not merely physical locations but are ‘spaces’ in which their options and choices are constrained by their circumstances and by others with control over them.

For practitioners, one strategy for the avoidance of the common stereotypes that attribute too little agency and power to women domestic workers is to become conversant with the specificity of each stage of their client’s journey as the context for the choices made by their client.

Migrant Domestic Workers As Litigants

The dominance of stories of exploitation in the press and elsewhere mean that people are often surprised to hear that MDW (a few hundred each year) sue their employers. Moreover, many MDWs will pursue their claims without the benefit of specialist advice. Many of them are awarded at least a proportion of their claim. These litigants are, it is safe to assume, only a small proportion of MDWs who have grounds to sue their employers. Without a doubt, more needs to be done to increase access to justice. As I have previously argued, migrant workers who litigate are prisms through which we can gain insights to correct the stereotypes and discourses of victimhood.

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47 Williams (see n 34 above), p 158.
49 Williams (see n 34 above), 164.
50 Tan (see n 6 above). I discuss litigant narratives of Indonesian domestic workers in Hong Kong more fully in a forthcoming work: Carol G.S. Tan, “Enforcing Socioeconomic Rights: Everyday Agency, Resistance and Community
7.2 Listeners are surprised because they are more familiar with the structural constraints – including some created by the law itself – facing migrant domestic workers in Hong Kong. Of the law-created constraints structuring a migrant worker’s ability to direct her own fortunes are the earlier mentioned two week rule, which allows a domestic worker only two weeks to remain in the territory after her employment has ended; the prohibition on working while one’s employment dispute is yet to be concluded and the risk of homelessness once her employment is terminated. Other structural constraints are the great inequalities of wealth, class, education and language between the migrant worker on the one hand and her employer on the other. There is a similar gulf separating the migrant worker from the officers of the Labour Department or Labour Tribunal. These inequalities add to the challenge of taking legal action.

7.3 The migrant workers who were also litigants whom I interviewed displayed a range of ways in which they exercised control over the situations in which they found themselves. In one case, a migrant domestic worker was able to bring a case because she thwarted her employer’s plan to put her on a flight bound for her home country. In another, the MDW ran away when her employer was sending her back to the employment agency. In yet another, the MDW took the advice of a fellow MDW and recorded a conversation with her employer in which her employer admitted that she paid her less than the wage she was meant to receive. She did this because without such evidence there would be nothing to counter her employer’s evidence of signed receipts for higher amounts than she had received. Another MDW carefully chose the moment of her departure from her employment, weighing up her need to save more money against the fact that she was being underpaid her salary. Quite often, a MDW helped a would-be litigant by offering advice and temporary shelter or by passing on vital phone numbers through which help could be reached.

7.4 Not completely unlike other workers who litigate, each migrant worker who pursues an employment claim weighs up the opportunity costs and the uncertainty of pursuing a claim along with the strengths and weaknesses of her claim. If she proceeds, while she may have had free advice concerning the law and the strengths of her case, she must often speak for herself in the formal environment of a tribunal and put her questions to her employer. She must be prepared for unequal treatment in the tribunal and for disparaging comments from the Adjudicator or Presiding Officer. She must stay focused so that her attention is not diverted from the key points of her claim. Once an offer of a settlement is on the table, it is she who negotiates a settlement with her former employer. She alone decides the amount she is prepared to accept.

7.5 Through the lens of travel and litigation, we see that many MDWs are able to and do in fact exercise some autonomy. They may face family objections, yet take the decision to become a domestic worker overseas, sometimes choosing Hong Kong as their destination. Just as it was for Eni, they make that decision even though it had never been their ambition to be a domestic worker. Many do it being aware of the importance of money, while at the same time having other, more personal

objectives, including the romantic idea that they must give the overseas life a chance and in so doing give themselves a chance of a better life. The women who sued their more powerful employers made a variety of strategic decisions, a fact all the more remarkable when the range of strategies and opportunities for action were limited. When we comprehend migrant domestic workers as travellers and litigants, we should at least conclude that not all MDWs are powerless and that powerlessness is rarely absolute.

7.6 Viewing MDWs as travellers and litigants also allows us to recognise that while there are reasons not to kid ourselves that MDWs too are ‘expats’ in the sense in which that term is commonly understood, we should at the same time recognise that there are shared experiences between these two groups. As litigants, MDWs assert their principal status as workers. As travellers, we see that they work overseas to fulfil economic and personal aspirations. Freeing migrant domestic workers from being completely set apart as a group also serves as a reminder that migrant domestic workers are as varied in their individual circumstances as any occupational group.
Chapter 2

COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

Chart 2-1: Quick reference - An overview of remedies for contract claims

PROBLEM
- Excessive interest rates on loan agency fees
- Excessive agency fees
- Underpayment or non-payment of sums owed
- Intentional harms
- Harassment
- Not provided with reasonable amount of work
- Wrongful dismissal
- Performance of non-domestic work duties
  - Non-provision of food or food allowance
  - Poor or unsafe living conditions provided by agency or employer
  - Unintentional harms or accidents

POSSIBLE CAUSE OF ACTION
- Unenforceable under the Money Lenders Ordinance
  - Tort of breach of statutory duty
  - Illegality for being in excess of statutory limit
- Action for agreed sum
  - Tort of deceit
- Assault
  - Battery
  - False imprisonment
- Intimidation/harassment
  - Claim under Sex Discrimination Ordinance
  - Claim under Race Discrimination Ordinance
- Where there are circumstances affecting validity of contract formation
  - Duress
  - Undue influence
  - Unconscionability
  - Misrepresentation
- Where there are unilateral changes to or additional contract terms
  - Contract variation
- Where it amounts to a constructive dismissal by the employer
  - Claim for terminal payments
- Breach of Standard Contract
  - Breach of implied contract term
- Claim under Employees' Compensation Ordinance
  - Tort of negligence
- Claim under Occupiers' Liability Ordinance
 CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

Chart 2-2: Voiding a Bad Contract - An overview of “vitiating factors” in a contract

![Chart 2-2: Voiding a Bad Contract]

Chart 2-3: Common monetary and non-monetary disputes between migrant domestic workers and employers

![Chart 2-3: Common disputes]
Chart 2-4: Injuries and damages - An overview of remedies for common tort claims

HARM OR DAMAGE SUFFERED

- Intentional physical abuse:
  1. Assault
  2. Battery
  3. Psychiatric harm

- Intentional wrongful detention:
  1. Physical restraint on freedom of movement
  2. Psychological restraint on freedom of movement

- Harassment (i.e., nuisance phone calls, unwarranted surveillance, other intrusions of privacy, and/or unwanted sexual advances)

- Deception (i.e., being deliberately lied to or defrauded)

- Accident causing personal injury (including physical and medically recognised psychiatric injury)

POSSIBLE CAUSE OF ACTION

- Tort of trespass to the person
- Tort of intimidation
- Tort of breach of statute
- Tort of deceit
- Tort of negligence
- Occupier's liability

REMEDIES (subject to defences)

Tortious damages:
1. Nominal damages
2. Compensation damages
   - For pain, suffering and loss of amenities
   - Loss of earning capacity
   - Pre-trial loss of earnings
   - Future medical expenses
3. Aggravated damages
4. Exemplary (punitive) damages

Statutory protection and compensation:
1. Sex Discrimination Ordinance
2. Race Discrimination Ordinance
3. Employment Ordinance

Tortious damages:
The employer (wrongdoer) is "bound to make reparation for all the actual damages directly flowing from the fraud" (Doye v Cliby (Ironmongers) Ltd [1968] 2 Q.B. 158)

Statutory protection and compensation:
Misrepresentation Ordinance

Tortious damages:
Compensatory damages

Statutory protection and compensation:
1. Employers' Compensation Ordinance
   - Compensation in fatal cases
   - Compensation for case of permanent total incapacity
   - Compensation for permanent partial incapacity (including compensation for attention)
   - Compensation for temporary incapacity
   - Payment of medical expenses and cost of medicines
2. Breach of the Occupier's Liability Ordinance (No 36 of 1959) can be cause of action for tort claim.
1. Interpretation

The following abbreviations and commonly used concepts are used throughout this chapter:

**Abbreviations**

- **EO** means the Employment Ordinance (Cap. 57);
- **MDW** means migrant domestic worker;
- **MLO** means the Money Lenders Ordinance (Cap. 163);
- **MO** means the Misrepresentation Ordinance (Cap. 284);
- **SDO** means the Sex Discrimination Ordinance (Cap. 480);
- **Standard Contract** means the contract called the “Employment Contract for a Domestic Helper Recruited from Outside Hong Kong.” MDW employees must fill this out for entry visa applications, contract renewals with the same employer, or when changing employers.\(^1\) (See Chapter 2, Section 7,XV. for a sample of Standard Contract); and
- **UCO** means the Unconscionable Contracts Ordinance (Cap. 458).

**Commonly used concepts**\(^2\)

- **Affirmation of contract** means the express or implied act of treating a contract as continuing, despite knowing that one has the right to terminate the contract because the other party had breached the contract;
- **Assault** means an act that causes the victim to apprehend (i.e. anticipate) the infliction of immediate, unlawful force on their person.\(^3\) It does not involve the actual use of physical force, but the plaintiff has to be aware of the defendant’s intention to use such force;
- **Battery** means the intentional, direct, and immediate infliction of harmful or offensive bodily contact without the victim’s consent;\(^4\)
- **Breach of contract** means a failure to perform one’s contractual duties;
- **Consideration** means something of value exchanged in connection with the formation of a contract. “Something of value” can be tangible, intangible, monetary, or anything that benefits the other party, or creates a detriment for the giver, in exchange for the commitments set out in the contract;
- **Contract** means a legally enforceable agreement, voluntarily entered into by the parties, to do or not to do a particular thing;

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\(^2\) All definitions without a footnote are drawn from Black’s Law Dictionary; Hong Kong legislation; and Chen-Wishart, M. *Contract Law*. Oxford: Oxford University Press, 2015. The definitions are paraphrased or simplified for ease of understanding.

\(^3\) *Collins v Wilcock* [1984] 1 W.L.R. 1172.

\(^4\) *DPP v Morgan* [1975] 2 All ER 347.
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

Damages means an award of money provided as compensation for injury or loss. See Chapter 2 Section 7.XIII.(A)(i) for the rules governing the award of damages;

Duty of care means an obligation imposed upon a party to take reasonable care in all the circumstances. Whether a duty of care is owed in each case will depend upon the facts and is a question of law. Liability for negligence will arise only where one party owes a duty of care to another, and the duty holder fails to take reasonable steps to prevent injury to that person;⁵

Employment agency means a natural or legal entity that operates a business, the purpose of which is (a) to obtain employment for another person; or (b) to supply the labour of another person to an employer. This is regardless of whether or not the person who operates this business will derive any pecuniary or other material advantage from either the employer or the person the employer will hire;⁶

Fraud means a statement that is made knowingly, without belief in its truth (or omitted), or recklessly as to whether it is true or false;⁷

Harassment means conduct in which a reasonable person, having regard to all the circumstances, would have anticipated that he/she would be offended, humiliated or intimidated, or conduct which creates a hostile or intimidating environment for him/her;⁸

Negligence means two distinct but related things. The tort of negligence is a doctrine providing compensation to a victim who has suffered personal injury or property damage as a result of the wrongdoer’s careless act or omission. Negligence also refers to either the wrongdoer’s omission to do something which a reasonable person would do, or doing something which a prudent and reasonable person would not do;⁹

Occupier means a person with control over particular premises, regardless of whether they are the owner of the premises;¹⁰

Premises means any fixed or moveable structure, including any vessel, vehicle, or aircraft;¹¹

Rescission means an equitable remedy available at the court’s discretion that sets aside a contract, such that both parties are no longer bound by it; See Chapter 2, Section 4.II.(A), for the rules governing the availability of rescission;

Representation means an oral statement made by one party to another, which is intended to induce that other party to enter into a contract (either with the representor or some other party);

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⁷ Derry v Peek (1889) 14 App. Cas. 337.
⁸ Section 2(5), SDO (Cap 480). See Chapter 2, Section 7.XIV. for the text of the law.
¹⁰ Ibid, chapter 3.
¹¹ Lee Tat-man v The Queen [1964] HKLR 605.
¹² Section 2(3)(a), OLO (Cap 314). See Chapter 2, Section 7.X. for the text of the law.
Representor means the party making a representation;

Representee means the party to whom a representation is made;

Restitution means the cause of action or claim that one contractual party may make against another when the contract has failed (i.e., because the contract is void, or has been discharged by mutual agreement, or has been terminated for breach). The aim of restitution is to restore the parties to their pre-contractual positions;

Settlement agreement means an agreement between an employer and an MDW. These agreements are sometimes to obtain the MDW’s acceptance of fewer benefits than the MDW would otherwise be entitled to upon the termination of their contract, in exchange for avoiding the time and cost involved in litigation;

Termination of contract means bringing a contract to an end;

Visitor means a person with permission to enter a premises who is treated as an invitee or a licensee;

Voidable contract means a valid contract that the innocent party (i.e., a party who is not at fault in relation to the other party) may set aside, due to issues such as mistake, undue influence or misrepresentation. Note that some limitations to setting aside such contracts exist. See Chapter 2, Section 4(II)(b), for limitations on the setting aside of contracts;

Void contract means a contract that never formed, and thus does not exist to be enforced; and

Wages means all remuneration, earnings, allowances (including travelling allowances and attendance allowances), attendance bonuses, commissions, overtime pay, tips and service charges, however calculated, capable of being expressed in terms of money and payable to an employee in respect of work done or to be done under their employment contract.

2. Introduction

2.1 This chapter explains the most common claims that MDWs may have against their employer or an employment agent in Hong Kong. These include both contractual issues as well as injuries that an MDW may sustain during their employment in Hong Kong. It outlines the relevant facets of the law, and the requirements for obtaining remedies under those laws.

2.2 Section 3 of this chapter explains the key elements and provisions of an employment contract between an MDW and their employer (otherwise known as the Standard Contract).

2.3 Section 4 then outlines disputes that may arise between an MDW and another party in connection with the contract(s) they have entered into. These disputes may concern the validity or enforceability of an employment contract (either wholly or partly), monetary disputes (such as the non-payment of wages), or non-monetary disputes (such as altered work conditions). Importantly, some parts of this section may be applicable to agencies as well as MDW employers.

2.4 Remedies considered in section 4 of this chapter include contract rescission, restitution upon rescission, common law damages, and damages for breach of statute. Subsections 4.VI and 4.VII identify the common disputes that may arise between an MDW and an agency, with respect to referral services and loan contracts.

2.5 Section 5 of this chapter considers possible claims arising out of injuries an MDW may suffer, such as tort claims for negligence, occupier's liability, and intentional harms.
3. Circumstances where MDWs come in contact with contracts

3.1 In the course of locating and obtaining employment in Hong Kong, MDWs may enter into a number of different contracts. These include recruitment and agency contracts in both their home countries and Hong Kong, loan agreements to pay agency fees, and employment contracts to provide services. All of these arrangements can give rise to disputes for which different remedies may be available to an MDW.

3.2 This section further discusses the different types of contracts that an MDW may enter into. Particular attention is paid to the standard employment contract for domestic workers who are recruited from abroad to work in Hong Kong. As previously noted, this contract is formally referred to as the ‘Standard Contract’. See Chapter 2, Section 3.II., for further information on the Standard Contract.

I. Types of contracts MDWs may enter into

3.3 The table below identifies some of the different types of contracts that MDWs may enter into in the course of relocating to, and seeking employment in, Hong Kong.

Table 2-5: Types of contracts MDWs may enter into

<table>
<thead>
<tr>
<th>Type of contract</th>
<th>Jurisdiction</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement with home country agent</td>
<td>MDW’s home country</td>
<td>MDWs usually agree to pay a local agent a placement fee in return for training, the arrangement of medical examinations, and referral to Hong Kong agencies.</td>
</tr>
<tr>
<td>Agreement with Hong Kong employment agency</td>
<td>Hong Kong</td>
<td>MDWs usually agree to pay a Hong Kong employment agency a fee in return for training, temporary accommodation before employment, and referral to Hong Kong employers.</td>
</tr>
<tr>
<td>Standard Contract</td>
<td>Hong Kong</td>
<td>The Hong Kong Director of Immigration requires the employment of all MDWs to be governed by this contract. Amongst other things, the formal agreement covers an employer’s obligations, and an MDW’s scope of duties.14</td>
</tr>
<tr>
<td>Loan agreement</td>
<td>Hong Kong</td>
<td>MDWs may take out personal loans, either for their own financial reasons, or due to pressure from employment agencies to pay (often illegal) fees.</td>
</tr>
<tr>
<td>Agreements made with the employer at the same time or after the Standard Contract (SC) that claim to vary the terms of the SC. These agreements can be oral or in</td>
<td>Hong Kong</td>
<td>MDWs and employers may agree to terms different from the Standard Contract, such as paying MDWs bonuses or agreement to a lower wage. These are subject to factors affecting the enforceability of the</td>
</tr>
</tbody>
</table>

---

II. Standard Contract

3.4 The Standard Contract is a model contract that seeks to protect workers’ fundamental rights by establishing minimum labour standards for MDWs employed in Hong Kong.\(^{15}\) Employers and MDW workers are not required to use the Standard Contract, but they must ensure that their employment agreement has at least the same minimum protections and rights afforded under the Standard Contract.

3.5 For clarity, any reference to the Standard Contract in this chapter should be taken to include any employment contract between an employer and an MDW, whether or not the parties have used the Standard Contract or designed their own agreement. (Emphasis added)

3.6 Amongst other things, the Standard Contract includes provisions related to:

- the wage to be paid to an MDW employee;
- an MDW’s work duties;
- food and living conditions;
- mandatory ‘rest days’;
- the various fees the employer will cover (e.g., ticket and insurance fees); and
- an employer’s obligations when they dismiss the MDW employee.

See Chapter 2, Section 7,XV for a sample of Standard Contract.

4. Disputes

4.1 Various types of disputes may arise between an MDW worker and their employer. These include disputes about the validity or enforceability of an employment contract, either in part or in whole; monetary disputes, such as the non-payment of wages, or non-monetary disputes (such as altered work conditions). Each of these dispute types and their associated remedies is discussed further below.

I. Validity and Factors that can Void a Contract

4.2 The voluntary consent of contracting parties is critical to the enforceability of any agreement made between them. Even if a seemingly valid contract exists, but one (or both) of the parties did not voluntarily consent to its formation, they may be freed from its terms.

\(^{15}\) Migrant Forum in Asia. Standardised contract for migrant domestic workers. (n.d.). Available at http://www.mfasia.org/component/simpledownload/?task=download&fileid=MjAxMi9zdGFuZGFyZGl6ZWRjb250cmFjdF9maW5hbC5wZGYg (visited 24 September 2015).
4.3 Although parties to a contract are normally bound by the terms of their agreement when the contract forms, a contract may be subsequently declared void from the start. (void ab initio) In such circumstances, neither party will be bound by the original contract terms.\(^\text{16}\)

4.4 Whether by rescinding a voidable contract or the contract is declared void from the start, the MDW may also be granted an award by the court once the contract is declared void.

4.5 Actions that lead to voiding a contract are discussed below and include: duress, undue influence, unconscionable bargain, actionable misrepresentation and contravention of public policy. For each action, a general definition, requirements for proving the action took place, and a case study are provided.

(A) Duress

4.6 Employment agencies and other entities may seek to pressure MDWs into contracts that are not legal. This can include pressuring MDWs into taking out large personal loans for payment of employment agency fees that are higher than those legally allowed. It can also include agreeing to contracts which contain conditions that are worse than those allowed under the Standard Contract.\(^\text{17}\) In the right circumstances, such pressure may amount to duress, which constitutes a legal defense to a binding contract coming into force.\(^\text{18}\) See Chapter 2, Section 4.I.(A)(ii) on requirements to prove duress.

4.7 Where a party can show duress, the relevant contract may be voidable, and the innocent party may then rescind it.\(^\text{19}\) See Chapter 2, Section 4.II.(B), for barriers to setting aside contracts.

(i) General definition

4.8 Legally, duress is the use of ‘illegitimate pressure’ to compel a party to enter a particular contractual arrangement.\(^\text{20}\) As outlined in the table below, duress may take a number of different forms, depending on the type of pressure being exerted.


\(^{20}\) Mason, Lee. *Contract Law in Hong Kong*. Sweet & Maxwell, 2011, para. 14.001; In *R v A-G for England and Wales* [2003] EMLR 24 (PC) (NZ), Lord Hoffmann stated that duress requires both “pressure amounting to compulsion of will of the victim” and “illegitimacy of the pressure.”
4.9 **Table 2-6: Types of duress claims**

<table>
<thead>
<tr>
<th>Type</th>
<th>Definition</th>
<th>MDW Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duress to the person</td>
<td>Actual or threatened physical violence to a person, or the unlawful constraint of a person (or their family) in order to induce contractual relations.</td>
<td>An employment agency states that it will harm an MDW’s family if the MDW does not agree to take out a loan to pay agency fees.</td>
</tr>
<tr>
<td>Duress to goods</td>
<td>Actual or threatened violence to, or the unlawful detention of, a person’s goods to induce contractual relations.</td>
<td>An employer confiscates an MDW’s passport and mobile phone until the MDW agrees to a salary lower than that stated in the Standard Contract.</td>
</tr>
<tr>
<td>Economic duress</td>
<td>The use of illegitimate economic, commercial, or financial pressure to induce contractual relations.</td>
<td>An MDW’s employer threatens to reduce the MDW’s wages unless they agree to vary certain terms of the employment contract.</td>
</tr>
</tbody>
</table>

(ii) **Proving duress**

4.10 For an MDW to prove that they entered into a contract as the result of duress, they must be able to show that:

- the pressure imposed upon them effectively amounted to a “compulsion of [their] will” and caused them to enter into the contract;\(^{22}\)
- the pressure exerted was sufficiently illegitimate; and
- there was not a practical alternative to entering into the contract.\(^{23}\)

4.11 Each of these three requirements is discussed in further detail in the table below.

**Table 2-7: Elements of duress**

<table>
<thead>
<tr>
<th>Element</th>
<th>Illustration</th>
</tr>
</thead>
</table>
| Causation | • Duress to the person: an MDW must be able to show that the pressure placed upon them was **one cause** for entering into the contract.\(^{24}\) **It does not have to be the only cause.**  
• Duress to goods or economic duress: an MDW must be able to show that “**but for**” the pressure placed upon |

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\(^{24}\) In Barton v Armstrong [1973] UKPC 2, duress does not have to be the predominant reason; in fact, the victim is entitled to relief even if he fails to show that he would not have entered into the contract without the threat.
### Illegitimate pressure

In establishing illegitimacy, relevant factors include:

- The unlawfulness of the pressure. Threats to commit an otherwise lawful act (such as instituting legal proceedings) will typically not be considered illegitimate.\(^{26}\) However, threats to breach a contract will be;\(^{27}\)
- The nature of the demand. Demands to perform an illegal act or to enter into a contract prohibited by statute are illegitimate.\(^{28}\) Even lawful pressure can be illegitimate if it involves a wrongful demand (for instance, a blackmailer threatening someone that they will disclose the person’s illegal acts to authorities\(^{29}\));
- Whether the party exerting the pressure acted in good or bad faith;
- Whether the victim protested at the time the pressure was exerted;
- Whether the victim affirmed the contract; and
- Whether the pressure was simply related to the “rough and tumble of… normal commercial bargaining.”\(^{30}\) It is rare to establish illegitimacy in the course of arm’s length negotiations in a commercial context.\(^{31}\)

### Lack of a practical alternative

- A ‘practical alternative’ is one that a reasonable person would have pursued under the alleged pressure.\(^{32}\)

Practical alternatives may include taking legal proceedings.\(^{33}\)

#### (iii) Case study

4.12 One MDW sought to recover HKD $9,633 she paid her agent in excess of the statutory maximum agency fee.\(^{34}\) The court proceedings revealed that if the MDW had not paid the requested fee to her agent, the agency would not have completed the necessary procedures required for her to transition to a new

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\(^{25}\) *Dimskal Shipping Co SA v International Transport Workers Federation*, [1992] 2 A.C. 152, 165. The court held that the economic duress needs to be a decisive cause, although not necessarily the only cause, of the victim’s decision to enter into a contract; In *Huyton v Cremer* [1999] 1 Lloyd’s Rep. 620, 636. In other words, but for the duress, the contract would not have been entered into at all, or at least made in such terms. Note the difference between duress to the person and duress to goods: *Pao on v Lau Yiu Long* [1980] A.C. 614, held that “duress to goods has never been a ground for avoiding a contract and is entirely different from duress to the person, notwithstanding that that may have been extended to include mental duress.”

\(^{26}\) *Alec Lobb Ltd v Total Oil G.B. Ltd* [1983] 1 W.L.R. 87.

\(^{27}\) *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2011] 1 All ER (Comm) 46.

\(^{28}\) *Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corporation Ltd* [2007] 3 HKLRD 439.

\(^{29}\) *Thorne v Motor Trade Association* [1937] A.C. 797, 822.

\(^{30}\) *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] B.L.R. 530 at [131].

\(^{31}\) *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714.


employer. This would have effectively forced the MDW to leave Hong Kong and return to Indonesia.

4.13 Under the circumstances, the Court ultimately determined that such pressure constituted duress because:

- it induced the victim to enter into the contract;
- the agency fee demanded was illegal and hence constituted illegitimate pressure; and
- the victim had no practical alternative but to pay the fee, or else they would be deprived of employment in Hong Kong and could not earn a living.

(B) Undue Influence

4.14 A contract may be voidable if a party entered into it on the basis of undue influence. This calls into question whether at least one of the parties freely entered the contract.\(^{35}\)

(i) General definition

4.15 A contract is formed under undue influence when one contracting party has a position of power over, or a relationship of trust and confidence with another party, and takes advantage of this position to induce that other party to enter into the contract.\(^{36}\)

4.16 Undue influence is a wider doctrine than duress, and does not require illegitimate threats or indeed any threats at all.\(^{37}\) However, with the development of duress and in particular economic duress, the two concepts overlap more and more. Depending on the facts of the case, the MDW may file a claim for both duress and undue influence.\(^{38}\)

(ii) Proving undue influence

4.17 For an MDW to prove that they entered into a contract as the result of undue influence, they must show that:\(^{39}\)

- the other party had the capacity to influence them;
- the other party did in fact exercise that influence;
- the exercise of that influence was undue, meaning that the other party abused their influence over the MDW; and
- the exercise of that influence was a (but not necessarily the only) cause of the party entering into the relevant contract.

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\(^{36}\) S. Hall, Law of Contract in Hong-Kong (Cases and Commentary), (Hong-Kong: LexisNexis, 3rd ed, 2011), p 692. Undue influence is “an equitable wrong committed by the dominant party against the other which makes it unconscionable for the dominant party to enforce their legal rights against the other.” Royal Bank of Scotland plc v Etridge (No. 2) [2002] 2 AC 773, [103].

\(^{37}\) Mason (See n 20), para. 15.008.

\(^{38}\) Fisher (See n 35) p 262.

\(^{39}\) Fisher (See n 35) p 263 and Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923.
4.18 There are two types of undue influence. ‘Actual’ undue influence involves overt acts of improper pressure, whilst ‘presumed’ undue influence may be inferred from the relationship between the contracting parties.

(iii) Proving actual and presumed undue influence

(a) Actual undue influence

4.19 To establish actual undue influence, there must be:

- overt acts of improper pressure or coercion; and
- the lack of exercise of free will.

4.20 Factors such as the person’s age, literacy, mental capacity and gender may also have a role in affecting the exercise of free will. These can all be taken into account in establishing undue influence.\(^{40}\)

(b) Presumed undue influence

4.21 To establish presumed undue influence\(^{41}\) there must be:

- **Existence of a relationship of trust and confidence** between the claimant and respondent which gives rise to a rebuttable presumption of a **capacity to influence**.\(^{42}\)
  
  Presumed undue influence is relevant for MDWs, as courts have established that examples of relationships which require the claimant to establish a relationship of trust and confidence include that of employer and employee. A employer-employee relationship does not automatically raise the presumption that undue influence has been exercised. An MDW will have to show evidence of a relationship of trust and confidence with his or her employer to establish a case of presumed undue influence;\(^{43}\)

- **Proposal of a transaction** by the respondent to the claimant, which shows the exercise of influence; and

- **Evidence that the transaction ‘calls for an explanation’**.\(^{44}\)

4.22 Once a claimant can demonstrate the three elements above, a **rebuttable presumption of undue influence** will arise. At that time, the burden of proof will shift to the defendant, who must then prove that undue influence was not exercised, and that the plaintiff acted on his own free will.\(^{45}\)

\(^{40}\) Justice Starke in *Johnson v Buttress* [1936] HCA 41 [3].

\(^{41}\) We excluded the case of ‘special relationships’ imposed by law between the parties that creates an unrebuttable presumption of a capacity to induce influence, as such relationships concern parent/child, guardian/ward, doctor/patient, solicitor/client and thus does not concern MDW. See B. Ho, *Hong Kong Contract Law* (Hong Kong: Butterworths 2nd Ed) 222-223.

\(^{42}\) Ho (see n 61) p 266.

\(^{43}\) Mason (see n 20), para. 15.016-15.018.

\(^{44}\) The requirement of showing that the agreement was one in which ‘an explanation is called for’ was set in *Royal Bank of Scotland v Etridge* [S]omething more is needed before the law reverses the burden of proof, something which calls for explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted’ (para 24). See Fisher (n35) p 267-268.

\(^{45}\) Fisher (see n35) p 271 and Etridge case para 20; for instance by proving that the plaintiff obtained independent legal advice.
4.23 Where the defendant successfully rebuts the presumption of undue influence, the claim fails.

(iv) Case study

4.24 In one case,\(^\text{46}\) the court voided an employment contract between an MDW claimant and her employer on the basis that the MDW had been “lured into [the employment contract by the undue influence of the agency]” in conspiracy with the employer.\(^\text{47}\)

4.25 The claimant had come from Indonesia and could not read English. Knowing this, her employer conspired with the employment agency to convince her to agree to an oral employment contract with wages totalling only HK$2000 per month. This amount was significantly less than the legally mandated minimum wage.

4.26 The judge held that the employer had taken advantage of the claimant’s circumstances and her lack of awareness regarding local minimum wage protections. Accordingly, the employer’s conduct was deemed to be “unconscionable” and an “affront to justice.”\(^\text{48}\) The contract was found to have been created as a result of undue influence and was set aside.

4.27 As this case shows, some MDWs may be unfamiliar with Hong Kong’s employment protection laws, and face language barriers hindering their access to independent advice. In such circumstances, they may rely heavily upon agencies and their employers to explain the terms of an employment contract to them. Such situations can lead to a finding that a relationship of trust and confidence exists between an MDW and the agencies and/or employers, creating the possibility that an unfair employment contract might be voidable on the grounds of undue influence.

(C) Unconscionable bargain

4.28 Contracts that contain a bargain considered “unconscionable” can be rendered voidable and thus set aside.

(i) General definition

4.29 If “unconscientious advantage has been taken of [the victim’s] disabling condition or circumstances,”\(^\text{49}\) the contract can be set aside.\(^\text{50}\)

(ii) Proving unconscionability

4.30 To prove legal unconscionability, there must be:

- a claimant who suffers a ‘special disadvantage’,\(^\text{51}\) and

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\(^{46}\) *Lilik Andayani v Chan Oi Ling* [2001] 2 HKLRD 572. See Chapter 2, Section 7.II. for a brief summary of the case.

\(^{47}\) Ibid. Claim will overlap moment of duress and in particular economic, at 577-578.

\(^{48}\) Ibid.


\(^{50}\) *Ming Shiu Chung v Ming Shiu Sum* [2006] 9 HKCFAR 334.
a respondent who knew or ought to have known of that disadvantage, and
nevertheless unconscientiously took advantage of it.\textsuperscript{52}

(iii) Unconscionable Contracts Ordinance (Cap. 458)

4.31 In addition to the common law doctrine of unconscionability, the Unconscionable
Contracts Ordinance (Cap. 458) ("UCO") may also provide MDW with a remedy
against certain employment agency agreements. However, this remedy appears
to be untested at the time of this manual’s publication.

4.32 The ordinance covers unconscionable contracts entered into with respect to the
sale of goods or supply of services, where one of the parties is a consumer.\textsuperscript{53}

4.33 Section 6(1) of the UCO provides a non-exhaustive list of factors that a court may
consider in determining whether a contract was unconscionable at the time it was
made, and in light of the relevant circumstances. These factors include:

- the relative strength of the parties’ bargaining positions;
- whether the consumer was required to comply with conditions that were not
  reasonably necessary for the protection of the other party’s legitimate
  interests;
- whether the consumer was able to understand any documents relating to
  the supply or possible supply of the goods or services;
- whether undue influence or unfair tactics were used against the consumer;
  and
- the circumstances under which the consumer could have acquired identical
  or equivalent goods or services from another.

(a) Does the UCO apply to MDW-employment
agency contracts?

4.34 Whether the UCO will apply to a contract between an MDW and an employment
agency will depend on whether the MDW is interacting with the agency in the
capacity of a ‘consumer’.

4.35 According to Section 3(3) of the UCO, a respondent bears the burden of proving
that a claimant was not dealing with them as a consumer. Thus, in the context of
MDW employment agency contracts, the relevant agency will need to show that
an MDW was not a consumer within the context of the UCO.

4.36 At the date of publication, the Hong Kong courts do not appear to have
addressed the issue of whether MDWs are regarded as ‘consumers’ in the
context of employment agency contracts. On the one hand, it might be argued

\textsuperscript{51} ‘Special disadvantage’ refers to ‘a disabling condition seriously affecting one's ability to make a judgment to
own best interests, for example, poverty, illness, ignorance, inexperience, physical infirmity, impaired mental
faculties, illiteracy, lack of education and lack of explanation.’ See ibid at 461-462.
\textsuperscript{52} “The conduct proscribed is that which ‘falls below the standards demanded by equity… it is victimisation which
can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable
circumstances.’” (Lord Selborne in \textit{Earl of Aylesford v Morris} (1872-73) LR 8 Ch App 484, CA in Chancery, para
490).
\textsuperscript{53} Section 5(1), UCO (Cap 458). \textit{See} Chapter 2, Section 7.XVII. for the text of the law.
that MDWs are only seeking employer referral services when they approach employment agencies, and as such they do not have a profession yet. However, on the other hand, given that employment agencies provide job matching services to MDWs, they might also be framed as consumers in this context.

4.37 Ultimately, test litigation will be necessary to determine whether – and the extent to which – the UCO can protect MDWs with respect to unconscionable contracts with employment agencies. The following sub-sections lay out the definition of ‘consumer’ and ‘business’ for reference.

(b) Definition of ‘consumer’

4.38 As per Section 3(1) of the UCO, a person is regarded as a ‘consumer’ if:

- they neither make the contract in the course of a business, nor hold themselves out as doing so;
- the other party does make the contract in the course of a business; and
- the goods or services provided pursuant to the contract are of a type ordinarily supplied or provided for private use, consumption or benefit.

(c) Definition of ‘business’

4.39 According to Section 2(1) of the UCO, a ‘business’ includes:

- a profession;
- the activities of a public body or public authority; and
- the activities of a board, commission, committee or other body appointed by the Chief Executive or Government.

(iv) Case study

4.40 In *Semana Bachicha v Poon Shiu Man*, the court set aside a settlement agreement that would limit the MDW’s compensation on the grounds of unconscionability. Given the MDW’s lack of legal representation at the time of the agreement, her economic and social disadvantage, and the marked unequal bargaining power between the MDW and her employer, the Court found that there was sufficient evidence of unconscionability.

(D) Misrepresentation

4.41 A misrepresentation is a false statement of existing fact that has induced a party to enter into a contract.

4.42 A contract induced by misrepresentation may be rescinded and set aside. The claimant may then seek restitution upon rescission of the contract, and/or

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55 Fisher (See n 35) p 193.
damages under tort or statute, depending on the type of misrepresentation established.

(i) Proving misrepresentation

4.43 To establish misrepresentation, the following elements have to be proved.

(a) Element One – The statement must have been one of fact and not opinion

4.44 To amount to misrepresentation, a false statement must be a statement of fact. It cannot be the speaker’s mere opinion or a statement of future intention. However, if the speaker fraudulently makes a statement of opinion or of future intention, the courts will treat it as if the speaker made a statement of fact.

4.45 A statement of law can also give rise to an actionable misrepresentation.

4.46 A statement is broader than a written document. A statement may be oral, written, or implied by conduct.

4.47 As a general rule, silence will not amount to a statement sufficient to constitute a representation. However, exceptions to this general rule include where:

- a party has taken active steps to conceal information;
- full disclosure of all material facts is required (for instance, because a fiduciary duty exists between the parties);
- a change in circumstances leads to a statement being untrue; and
- a contract of the utmost good faith is involved (e.g., an insurance contract).

(b) Element Two – The impact of the false statement on the claimant’s actions

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56 The Misrepresentation Ordinance (Cap 284) provides the statutory remedies available to a party who has entered into a contract on the basis of the other party’s misrepresentation. See also Chapter 2, Section 4.I.(D).(iii).

57 A mere estimation without any expertise is a statement of opinion. See Bisset v Wilkinson [1927] AC 177.

58 Mason (see n 20), para. 13.038.

59 Bisset v Wilkinson [1927] AC 177 and Section 4.I.(E) for fraudulent misrepresentation.

60 It used to be distinguished from a statement of fact, where the former cannot give rise to an actionable misrepresentation. Beesly v Hallwood Estates [1960] 1 WLR 549. However, such distinction was abolished in a House of Lords’ decision. Kleinwort Benson Ltd v Lincoln City Council [1999] 1 AC 153.

61 In Shum Kong v Chui ting Lin (unrep., HCA 16227/1999, 6 June 2001), the court found the conduct of showing a garage and garden next to a house to a customer constituted representation.

62 Fisher (See n 35) p 194.

63 Horstfall v Thomas (1862) 1 H&C 90.

64 Tate v Williamson (1866) L.R. 2 Ch. App. 55.

65 With v O’Flanagan [1936] Ch. 575.

66 P.S. Atiyah, An Introduction to the Law of Contract 221–22 (3d ed. 1981): “In a certain restricted group of contracts, good faith is peculiarly necessary, owing to the relationship between the parties, and in these cases — known as contracts uberrimae fidei — there is a full duty to disclose all material facts.”

CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

4.48 The second element considers whether the difference between a false statement and a true statement would amount to a reasonable person deciding to enter into or reject the contract.\(^{69}\)

4.49 For example, were an employment agent to tell an MDW that a potential employer lives with a partner in a small apartment, when in fact the employer and his/her partner lives in a large house with three young children who need to be cared for, there is could be sufficient difference between the agent’s claim and the truth that it would have impacted the MDW’s decision to take the job.

\[\text{(c) Element Three -- The representation must have induced a party to enter into a contract}\] \(^{70}\)

4.50 For misrepresentation to exist:
- the representation at issue must have been material (i.e., sufficiently important to influence a reasonable person’s decision to enter into the contract);\(^{71}\)
- the claimant must have known of the representation;
- the representor must have intended the representee to rely upon the representation; and
- the representee must have actually relied upon it.

\[\text{(ii) Types of misrepresentation}\]

4.51 There are three types of misrepresentation at common law. Each carries different evidentiary requirements and different remedies.

Table 2-8: Types of misrepresentations at common law

<table>
<thead>
<tr>
<th>Type</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fraudulent</td>
<td>The representor made a false statement:</td>
</tr>
<tr>
<td></td>
<td>- knowingly;</td>
</tr>
<tr>
<td></td>
<td>- without belief in its truth; or</td>
</tr>
<tr>
<td></td>
<td>- recklessly, careless as to whether it is true or false.(^{72}) The claimant must prove that the representor made their false statement as per any one of the above elements (e.g., knowingly).</td>
</tr>
<tr>
<td>Negligent</td>
<td>The representor had an honest belief that their statement was true, but failed to exercise reasonable care and skill to check its accuracy.(^{73}) The claimant must prove that a special relationship existed between them and the representor, such that the latter owed the claimant a duty to take reasonable care.</td>
</tr>
</tbody>
</table>

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\(^{69}\) Avon Insurance plc and Others v Swire Fraser Ltd [2000] CLC 665, 670.
\(^{70}\) Mason (See n 20), para. 13.056.
\(^{72}\) *Derry v Peek* (1889) 14 App. Cas. 337, 374.
\(^{73}\) Mason (See n 20), para. 13.085.
### Chapter 2: Common Legal Problems and Available Remedies

#### Type | Definition
--- | ---
Innocent | The representor had an honest and reasonable belief that their statement was true, although the statement was false.  

Innocent misrepresentation may be categorised as either 'innocent misrepresentation' or 'purely innocent misrepresentation'.

- 'Innocent misrepresentation' arises in circumstances where:
  - the representee cannot prove that the representor engaged in fraud or negligence at the time of making the statement; and
  - the representor cannot prove that there were reasonable grounds to believe in the truth of the representation, and they did so believe until the time of contract formation.

- 'Purely innocent misrepresentation' arises in circumstances where:
  - the representee cannot prove that the representor engaged in fraud or negligence at the time of making the statement; but
  - the representor can prove that there were reasonable grounds to believe in the truth of the representation, and they did so believe at the time of making the statement.

In the context of MDWs, innocent misrepresentation may be rare but could still arise in circumstances where an employment agency makes a statement to an MDW that was based on an honest belief, and supported by reasonable grounds. (e.g., statements from an employer) However, the statement turns out to be false.

#### (iii) The Misrepresentation Ordinance (MO)

4.52 In Hong Kong, there are both common law and legislative remedies available for misrepresentation. At common law, contractual and tort remedies exist, whilst the MO may also provide for damages. As further explained below, both channels of relief may be pursued by a claimant for the same type of misrepresentation.

4.53 Where claimants allege fraudulent misrepresentation, it may be more advantageous for them to seek relief under the MO than at common law, due to the lower standard of proof and potentially more generous damages available under the legislation.

4.54 For negligent misrepresentation, a claimant may pursue damages in two ways, namely, (1) by pursuing an action for negligent misstatement at common law, and (2) by seeking relief for negligent misrepresentation under the MO.

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74 Ibid, para. 13.087.
76 Ibid.
77 MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
78 Section 3, MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
79 Mason, L. (See n 20), para. 13.173.
4.55 Under Section 3(1) of the MO, which applies to both fraudulent and negligent misrepresentation, the plaintiff must only prove that the representor made a false statement which induced them to enter into the contract. If the plaintiff is successful, the burden will then shift to the respondent to prove that he or she had reasonable grounds to believe in the truth of the statement, and did believe so until the contract was formed, and thus that the case falls under innocent misrepresentation. The reasonableness will be assessed objectively.

4.56 The MO generally enables a claimant to seek relief for innocent misrepresentation, more easily than they could at common law. As opposed to common law, the legislation:

- removes two bars to rescinding the contract. First, it does not prevent a claimant from seeking relief where the misrepresentation was incorporated as a term of the contract, or second, where the contract has already been performed;
- recognises an action for damages for innocent misrepresentation;
- gives the court discretion to award damages in lieu of rescinding the contract, where doing so would create a hardship, and
- invalidates unreasonable terms that seek to exclude or restrict liability or remedies arising from misrepresentation.

4.57 The primary differences between misrepresentation at common law and misrepresentation under the MO, are further outlined in the table below.

Table 2-9: Differences between misrepresentation at common law at under the MO

<table>
<thead>
<tr>
<th></th>
<th>Common law</th>
<th>MO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presence of contract</td>
<td>No proof of contract between the representor and the representee is required.</td>
<td>Proof of a contract between the representor and the representee is required.</td>
</tr>
<tr>
<td>Availability of damages</td>
<td>Damages are available for all types of misrepresentation except innocent misrepresentation.</td>
<td>Damages are available for all types of misrepresentation except purely innocent misrepresentation.</td>
</tr>
<tr>
<td>Reduction of damages</td>
<td>Fraudulent misrepresentation: Fraudulent misrepresentation and “fiction of fraud”.</td>
<td>Fraudulent misrepresentation and “fiction of fraud”.</td>
</tr>
</tbody>
</table>

---

80 Ibid. para. 13.160.
83 Section 2, MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
84 Section 3(1), MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
85 Section 3(2), MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
86 Section 4, MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

Common law damages are not subject to reduction for remoteness and/or contributory negligence.

Negligent misrepresentation: damages are subject to reduction for remoteness and/or contributory negligence.

<table>
<thead>
<tr>
<th>Availability of rescission</th>
<th>Common law</th>
<th>MO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rescission is available for all types of misrepresentation established. See Chapter 2, Section 4.II.(A), for rescission.</td>
<td>Rescission is available for all types of misrepresentation, except in the case of non-fraudulent misrepresentation, where damages may be granted in lieu of rescission if the court sees fit. See Chapter 2, Section 4.II.(A), for damages in lieu of rescission.</td>
<td></td>
</tr>
</tbody>
</table>

(iv) Advantages and drawbacks to claiming under the MO

4.58 As per the table below, there are advantages and disadvantages to bringing a claim under the MO. While it appears that bringing a claim under a breach of the MO is generally the better option, legal practitioners are advised to consider both options.

Table 2-10: Advantages and drawbacks to claiming under MO

<table>
<thead>
<tr>
<th>Advantage</th>
<th>Drawback</th>
</tr>
</thead>
<tbody>
<tr>
<td>No need to establish that the representor failed to establish reasonable care.</td>
<td>If the representation induces the representee to contract with a third party, claims can only be brought at common law.</td>
</tr>
<tr>
<td>The respondent bears the burden of proving that there were reasonable grounds for believing the truth of their statement.</td>
<td>If the alleged misrepresentation is fraudulent, findings of contributory negligence will reduce the claimant’s available damages.</td>
</tr>
<tr>
<td>Damages as generous as those recoverable for the tort of deceit are available, even though the misrepresentation may only be negligent (i.e., fraud cannot be proved).</td>
<td>The starting time to be calculated for misrepresentation under MO is debated. If the period starts from the time of contract formation (i.e., the same as</td>
</tr>
</tbody>
</table>

87 'Fiction of fraud' means that "a representor is liable for damages as if they had made a fraudulent misrepresentation, even though the misrepresentation was not made fraudulently" (Chen-Wishart, M. (2015). Misrepresentation and non-disclosure. In Contract law. Oxford, UK: Oxford University Press (5th ed.), at 225.
88 Section 3(1), MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
89 Section 3(2), MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
90 'Contributory negligence' means the claimant is partly responsible for his own loss.
Advantage | Drawback
--- | ---
 | negligent misrepresentation), rescission for misrepresentation may be barred by the lapse of time more easily than being brought at common law where time begins to run at the moment the fraud was or should reasonably have been discovered.91

4.59 As explained above, remedies for misrepresentation include rescission of the contract and damages, either under the tort of deceit, the tort of negligence, or the MO. In the MDW context, rescission for misrepresentation may be the more desirable remedy when the MDW seeks to have the employment contract set aside. This is because misrepresentation as to working conditions (e.g., a statement from an employer that an MDW will be sharing a room with the employer’s children, when in reality the MDW will be sleeping in a small equipment room) and/or work duties (e.g., a statement from an employer that an MDW will be working for a young adult couple when in reality, the MDW will be required to care for the couple and their elderly parents) are amongst the more common forms of misrepresentation in the MDW context.92

4.60 In such cases, an MDW may prefer to cease employment entirely. To do so, the MDW would seek to rescind the contract and claim restitution upon rescission.

4.61 In other circumstances, where an employer makes a statement that attempts to change an MDW employee’s remuneration, that statement may amount to an enforceable term of the employment contract. Non-payment of this new salary could constitute either a breach of contract or misrepresentation. Since there are bars to rescission in misrepresentation, legal representatives should consider whether pursuing breach of contract would result in a better outcome for the client, as action for breach of contract may award an MDW expectation damages.93 See Chapter 2, Section 4.III. for variation of contract and see Chapter 2, Section 4.III.(C)(iv)(a) for the distinction between terms and representations.

II. Remedies When a Contract is Voidable

4.62 As discussed in the preceding sections, factors that may render a contract voidable, include:

- improper behaviour by one party to induce the other's consent to the contract;

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91 Time begins to run from the time of contract formation for negligent misrepresentation. In contrast, time runs from when the fraud could reasonably have been discovered for fraudulent misrepresentation.
92 The phenomenon is well known both at the international and national levels. See for instance ‘Protecting the Labour Rights and Human Rights of Migrant Domestic Workers – A Labour Regulation Approach’ at http://ohrh.law.ox.ac.uk/protecting-the-labour-rights-and-human-rights-of-migrant-domestic-workers-a-labour-regulation-approach/ (Sept 2015); and Understanding your rights from Helpers for Domestic Helpers p 58 on suitable accommodation.
93 Expectation damages are recoverable from a breach of contract in protecting the injured party's interest in realizing the value of the expectancy that was created by the promise of the other party. Hawkins v. McGee, 84 N.H. 114, 146 A. 641 (N.H. 1929),
• the impaired consent of one party, due to deficiencies in their knowledge or judgment; and
• the unfairness of the contract.94

(A) Availability of remedies

4.63 The table below shows whether rescinding the contract (rescission) is possible, and the measure of damages for the different factors that can render a contract void (i.e. vitiating factors) mentioned in this manual.

4.64 Note that rescinding a contract simply frees both parties from their obligations under the contract. Pursuing restitution or damages is a separate step.

Table 2-11 Remedies for vitiating contract

<table>
<thead>
<tr>
<th>Vitiating Factor</th>
<th>Remedies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duress</td>
<td>Rescission and restitution upon rescission: Available.</td>
</tr>
<tr>
<td></td>
<td>Damages: Available if duress causes loss or damage, and if duress has been established as a tort.95</td>
</tr>
<tr>
<td>Undue Influence</td>
<td>Rescission and restitution upon rescission96: Even if the contract has been completely or partially executed at the point that the claimant has obtained a benefit from the respondent which they cannot restore, an order for an account of profits, with allowance for work done by the respondent, can be made.97</td>
</tr>
<tr>
<td></td>
<td>For example, in one case a claimant singer/songwriter was allowed to rescind an exclusive management contract with the respondent agency, even though the agency had already undertaken substantial promotional work for them. The court achieved “substantial justice” by ordering an account of profits to provide the respondent agency with reasonable remuneration for the work already performed.98</td>
</tr>
<tr>
<td>Unconscionable Bargain</td>
<td>Rescission and restitution upon rescission: Available.99</td>
</tr>
<tr>
<td></td>
<td>Damages: Where additional loss is still suffered after rescission, equitable damages may be awarded.100</td>
</tr>
<tr>
<td></td>
<td>Other relief:</td>
</tr>
</tbody>
</table>

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95 Universe Tankships Inc of Monrovia v International Transport Workers’ Federation [1982] 2 All ER 67, 400; Damages are still available even if the right to rescission has been lost (Chitty, The Law of Contracts Vol 1 (Hong-Kong: Sweet & Maxwell 2004), para 7-056
96 Esquire (Electronics) Ltd v The HSBC [2007] 3 HKLRD 439.
100 Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447.
### Common Legal Problems and Available Remedies

<table>
<thead>
<tr>
<th>Vitiating Factor</th>
<th>Remedies</th>
</tr>
</thead>
</table>
| Fraudulent misrepresentation     | Pursuant to the UCO, the court may also enforce the remainder of the contract (i.e., the parts not affected by unconscionability) or amend the bargain by revising or altering the contract.  
**Rescission and restitution upon rescission:** Available.  
**Damages:** All losses directly flowing from the misrepresentation may be recovered, regardless of the foreseeability of such losses. This includes:  
- the difference between the actual value of the subject matter and the price paid (as a result of the fraudulent inducement);  
- consequential loss;  
- wasted expenditure in reliance on the misrepresentation; and  
- value of the lost opportunity of entering into a more profitable contract.  
**Other relief:** Exemplary damages may be available. |
| Negligent misrepresentation      | Rescission and restitution upon rescission: Available.  
**Damages:** At common law, only reasonably foreseeable losses flowing from the misrepresentation are recoverable. Damages may be reduced by the representee’s contributory negligence. Under the MO, the measure of damages is the same as fraudulent misrepresentation, unless the representor can prove reasonable grounds for making the statement. If rescission is found to be too drastic a remedy, the court may exercise its discretion under Section 3(2) of the MO to award damages in lieu of rescission. |

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102 Chitty (see n Error! Bookmark not defined.).  
105 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B. 158. "[T]he defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement".  
107 *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789.  
108 Chitty (see n Error! Bookmark not defined.).  
110 *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560.  
111 Section 3(1), MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.  
112 Factors to be considered include: the nature of the misrepresentation, the loss that would be caused if the contract was upheld and the loss that rescission would cause to the party making the statement (*William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016, 1042).
<table>
<thead>
<tr>
<th>Vitiating Factor</th>
<th>Remedies</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>rescission is barred, damages may also be unavailable, since the right to</td>
</tr>
<tr>
<td></td>
<td>rescission depends on the right to rescission.</td>
</tr>
<tr>
<td>Innocent misrepresentation</td>
<td>Rescission and restitution upon rescission:</td>
</tr>
<tr>
<td></td>
<td>Available.</td>
</tr>
<tr>
<td></td>
<td>Damages:</td>
</tr>
<tr>
<td></td>
<td>No common law right to damages.</td>
</tr>
<tr>
<td></td>
<td>Under the MO, the court may exercise its discretion to award damages in</td>
</tr>
<tr>
<td></td>
<td>lieu of rescission if rescission is found too drastic a remedy.</td>
</tr>
<tr>
<td></td>
<td>However, if rescission is barred, damages may also be unavailable, since</td>
</tr>
<tr>
<td></td>
<td>the right to damages depends on the right to rescission.</td>
</tr>
<tr>
<td></td>
<td>Other relief:</td>
</tr>
<tr>
<td></td>
<td>If the right to damages is lost because rescission is barred, only</td>
</tr>
<tr>
<td></td>
<td>indemnity may be available.</td>
</tr>
</tbody>
</table>

(B) Bars to rescission in general

4.65 The vitiating factors previously addressed render a contract voidable rather than void. In other words, the right to set aside the contract is not absolute and can be prevented.

4.66 The following instances can prevent a voidable contract from being made void:

- affirming the contract: after discovering the true state of affairs and knowing that they possess the right to rescind, the recipient of the statement chose to affirm the contract and continue performance;\(^\text{117}\)
- lapse of time;\(^\text{118}\) or
- impossibility of mutual restitution, i.e. where it is no longer possible to restore the parties to their pre-contractual positions. In the MDW context, this may be due to the service-provision nature of the contract where it is impossible to retract or reclaim service that the MDW already provided.

4.67 However, it appears that impossibility of precise mutual restitution may not prevent the courts from ordering restitution in the MDW context. In one case, although the exchange between the MDW and the agency involved the payment of money to the agency for processing the MDW’s file (i.e., a service), rescission

\(^{112}\) Government of Zanzibar v British Aerospace (Lancaster House) Ltd [2000] EWHC 221 (Comm).
\(^{114}\) Esquire (Electronics) Ltd v The HSBC [2007] 3 HKLRD 439.
\(^{115}\) Section 3(2), MO (Cap 284). See Chapter 2, Section 7.VII. for the text of the law.
\(^{116}\) ‘Indemnity’ means the compensation for expenditure incurred, pursuant to the terms of the contract.
\(^{117}\) Kennard v Ashman (1894) 10 TLR 213.
\(^{118}\) For fraudulent misrepresentation, time begins to run from the time when the fraud was, or reasonably could have been, discovered. For non-fraudulent misrepresentation, time begins from the time of contract formation. According to the Limitation Ordinance (Cap. 347) (hereinafter “LO”) s. 4(1), actions of contract must be brought within six years from the date on which the cause of action accrued.
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for duress was granted in the form of partial restitution. The MDW was awarded the extra sum paid, whilst the agency retained the statutory limit for agency fees for the services provided. This case may be viewed as one instance to circumvent the bar of impossible mutual restitution against rescission in the MDW context.

4.68 Even where impossible mutual restitution bars rescission, the courts may nevertheless grant monetary substitution at their discretion.\textsuperscript{120}

4.69 Although there appears to be no Hong Kong precedent dealing specifically with impossible restitution and MDW services, an analogy could perhaps be drawn to cases that involve provision of services.\textsuperscript{121}

4.70 The other bars to rescission apply differently to the various types of misrepresentation, as does the availability of damages. See Chapter 2, Section 4.II.(A), for details on the availabilities of remedies.

III. Variation of contract

4.71 A variation of a contract results in a change to its terms, and an alteration of the existing employer-employee relationship.

4.72 A contract may be varied as a result of:

- changing the existing terms;
- agreeing to new terms (whether written or oral) that are inconsistent with the terms of the original, written Standard Contract; and
- agreeing to terminate the existing contract and to substitute it with a new written or oral contract on new terms.\textsuperscript{122}

4.73 MDWs sometimes willingly or inadvertently agree to employment terms that are different from those in the Standard Contract. See Chapter 2, Section 3.II. for details of Standard Contract. Since the Standard Contract is the initial employment contract that the MDW enters into when she first contracts in her


\textsuperscript{120} In one case, the court took into account the agency’s contribution to a claimant musician’s success when granting monetary substitution, even though strictly returning the parties to their original positions prior to the contract was impossible. Accordingly, the agency was entitled to reasonable remuneration for their promotion of the claimant, including a small profit. O’Sullivan and Another v Management Agency & Music Ltd and Others [1985] QB 428, 469. Note also that although there appears to be no Hong Kong precedent dealing specifically with impossible restitution and MDW services, an analogy could perhaps be drawn to service-related cases, such as Boyd and Forest v Glasgow Ry (1915) S.C.(H.L.) 20. In that case, part of the construction work for a railway had been completed when it was discovered that the contract was induced by misrepresentation. Given that the services could not be reclaimed and restitution was impossible, the court held that equitable monetary compensation should be awarded. A similar approach has since been followed in cases such as Halpern v Halpern (No.2) [2007] EWCA Civ 291, [2008] Q.B. 195 at [70]-[73].

\textsuperscript{121} See e.g. Boyd and Forest v Glasgow Ry. (1915) S.C. (H.L.) 20. In this case, part of the construction work for a railway had been completed when it was discovered that the contract was induced by misrepresentation. Given that the services could not be reclaimed and restitution was impossible, the court held that equitable monetary compensation should be be awarded. A similar approach has since been followed in cases such as Halpern v Halpern (No.2) [2007] EWCA Civ 291, [2008] Q.B. 195 at [70]-[73].

\textsuperscript{122} P. Walsh and A. Smith, Hong Kong Employment Law: A Practical Guide, Hong-Kong: CCH Hong-Kong Ltd, 2\textsuperscript{nd} Ed, 2011, p 26.
home country to work for the employer in Hong Kong, the contract that the MDW and/or the employer seeks to vary will be the existing contract between them. Note that their contract may be different (but no worse) from the terms set out in the Standard Contract.

4.74 These terms purporting to vary the Standard Contract can range from the payment of higher wages in return for work in excess of that required by the Standard Contract, a lower wage for the same work, or drastically different work requirements, such as caring for elderly parents rather than for small children as initially agreed. Terms which deviate from those in the Standard Contract are only binding if they amount to valid, enforceable variations of the contract. The ways in which a contract may be varied, and the factors affecting the enforceability of the variations, are discussed further below.

4.75 Variations to the Standard Contract are often unwritten and are in the form of oral agreements. Whether or not they are enforceable depends on whether the new terms:

- contravene public policy;
- satisfy the need for contractual consideration; and
- constitute actual terms rather than mere representations.

(A) Challenging or enforcing varied terms

4.76 Challenging a contract variation is similar to challenging a contract’s overall validity, with similar results. An MDW might find invalidating a variation of the Standard Contract attractive, since it may entitle them to restitution upon rescission of the variation, and a right to no longer be bound by the varied term(s).

4.77 Note setting aside the varied term(s) does not set aside the entire contract. Instead, the court may enforce the contract without the varied terms.

4.78 On the other hand, MDWs may wish to enforce a contractual variation where the varied term(s) are beneficial to them. Whether the MDW may succeed in enforcing the varied term will often depend on whether the MDW has provided fresh consideration for the contractual variation.

(i) The need for fresh consideration

4.79 For an MDW and employer to vary the existing contract, there must be fresh consideration to support the contractual variation.

4.80 An agreement alone to change the terms of an existing contract may generate its own consideration, where the variation is capable of benefiting either or both parties. It is sufficient if either party might benefit from the variation. For example, an employer may agree to pay the employee more in exchange for the

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123 Note that the Standard Contract is the only contract acceptable to the Immigration Department and the HK Government whenever an application is made by an employer to employ an MDW from abroad. See Immigration Department, “Standard Employment Contract and Terms of Employment for Helpers”. Available at http://www.immd.gov.hk/eng/forms/forms/fdhcontractterms.html. (visited 16 November 2015).


125 Ibid.
employee's agreement to do more work than what is required under the existing contract.

4.81 A party seeking to enforce new terms that are inconsistent with the original written contract (i.e., the Standard Contract) must show they provided consideration for the new terms. This may be achieved by proving that they signed the written contractual document in consideration for the other party’s agreement to the new terms, allowing such new terms to amount to an enforceable collateral term or collateral contract. See Chapter 2, Section 4.III.(B), for details of the collateral term or collateral contract.\textsuperscript{126}

**(B) The collateral term or collateral contract**

4.82 In some cases, MDWs may have agreed to an oral or written variation that is inconsistent with one or more terms in the original signed contract. In order to rely on the varied term(s), the MDW would need to show that the varied contract should prevail (i.e. replace) the original provisions that were varied.

4.83 Where both parties agree to vary the Standard Contract by making some oral or written statement before the Standard Contract is signed, the variation may be enforceable as a collateral term or collateral contract.\textsuperscript{127}

4.84 Case authorities have shown that where an oral or written statement agreed upon by both parties purports to vary a formal written contract, that oral or written statement is collateral to the written document but may nevertheless supersede it.\textsuperscript{128}

4.85 For example, A and B negotiate on the basis of a written contract. However, A verbally states that the contract will be on terms more favorable than those contained in the written document. (e.g. working hours are actually less than those written in the contract) A’s statement may be enforceable if B signs the formal contract document at A’s request while relying upon A’s oral statement about better terms.\textsuperscript{129} B’s consent to enter into the written contract will constitute valid consideration for A’s oral statement, making such a statement legally binding. That statement will be treated as a collateral term or collateral contract. Its terms will supersede the relevant terms in the written contract.\textsuperscript{130}

**(C) Common scenarios in the MDW context involving variation of contract and enforceability**

4.86 Five situations pertaining to the enforceability of contractual variations in the MDW context, shall be considered in detail in this chapter. They include:

\textsuperscript{126} Although outside the MDW context, new terms that were agreed upon orally and required a carrier to ship the owner’s goods under deck, were held to supersede the written contract that allowed the carrier to ship the goods at their discretion. Consideration for the carrier’s oral assurance that the goods would be shipped under deck was provided in the form of the owner’s consent to enter into the written contract (i.e., the contract of carriage). See J Evans & Sons (Portsmouth) Ltd v Andrea Merzario Ltd [1976] 1 WLR 1078.

\textsuperscript{127} Shanklin Pier Ltd v Detel Products Ltd [1951] 2 KB 854.

\textsuperscript{128} Ibid.

\textsuperscript{129} Charnock v Liverpool Corp [1968] 1 WLR 1498.

\textsuperscript{130} Brikom Investments Ltd v Carr [1979] Q.B. 467.


- variation to pay less than the minimum allowable wage is unenforceable, as it is against public policy;\(^{131}\)
- variation to pay less than originally agreed to but more than the minimum allowable wage can still be held unenforceable, due to lack of consideration;\(^{132}\)
- variation to pay more supported by valid consideration;\(^{133}\)
- a statement attempting to vary a contract may be unenforceable if it is a mere representation;\(^{134}\) and
- enforceability of a variation of contract through written statements.\(^{135}\)

(i) Variation to pay less than the minimum standard is unenforceable as it is against public policy

4.87 Any variation of the original employment contract to pay MDWs below the minimum allowable wage cannot be enforced, as it is against Hong Kong public policy.

(a) The doctrine of public policy

4.88 ‘Public policy’ refers to the principle that injury to the public good (or public interests)\(^{136}\) may act as the basis for denying the legality of a particular contract or transaction.

4.89 If the terms that vary a contract are found to be against public policy, then the contract may be rendered unenforceable.\(^{137}\) Often, this scenario will arise because the relevant term or entire contract:

- is illegal;\(^{138}\)
- is injurious to good government in terms of domestic or foreign affairs;\(^{139}\)
- interferes with the “course of public justice”;\(^{140}\)
- is injurious to marriage and morality;\(^{141}\) or
- is economically against the public interest.\(^{142}\)

(b) The MDW context

4.90 Contracts or contract variations that provide remuneration to MDWs below the minimum allowable wage or undermine other minimum standards set in the Standard Contract are generally void for public policy reasons.


\(^{132}\) Chapter 2, Section 4.III.(C)(ii)

\(^{133}\) Chapter 2, Section 4.III.(C)(iii)

\(^{134}\) Chapter 2, Section 4.III.(C)(iv)

\(^{135}\) Chapter 2, Section 4.III.(C)(v)


\(^{137}\) Imperial Chemical Industries Ltd v Shatwell [1965] A.C. 656, 675, 678, 683, 693.

\(^{138}\) Langton v Hughes (1813) 1 M. & S. 593.

\(^{139}\) Amalgamated Society of Ry Servants v Osborne [1910] A.C. 87.

\(^{140}\) R v Andrews [1973] QB 422.

\(^{141}\) Baker v White (1690) 2 Vern. 215.

\(^{142}\) Attorney-General for Australia v Adelaide SS Co [1913] AC 781, p 796.
4.91 Although Hong Kong legislation does not expressly prohibit the employment of MDWs below minimum wage,\textsuperscript{143} the minimum standards and entitlements for MDW employment arrangements are set out in the Standard Contract. Administrative decrees have made these standards and entitlements compulsory.\textsuperscript{144}

4.92 Thus, although it is not impermissible under statute, any proposed contract variation that results in an MDW being paid less than the minimum wage allowed for under the Standard Contract will generally be void (and thus, unenforceable) for contravening public policy.\textsuperscript{145} This is the case even in circumstances where the MDW agreed to the lower wage.

4.93 Similarly, variations of the Standard Contract to lower the minimum benefits otherwise due to MDWs will also be void for contravening public policy, regardless of whether the employee agreed to the less favourable terms.

(ii) Variation to pay less than originally agreed to but more than the minimum allowable wage can still be unenforceable, due to lack of consideration

4.94 In cases where an employer initially agrees to a certain wage and then unilaterally lowers the amount at a later stage, the remedy will depend on whether the new amount falls below the allowable minimum wage.

4.95 Where the new wage is lower than the amount originally agreed, but still greater than or equal to the minimum wage, the new wage term may be unenforceable if it lacks consideration. See Chapter 2, Section 1(II), for definition of consideration.

4.96 Conversely however, where an employer agrees with the MDW to lower a previously agreed wage but keeps it above the minimum allowable wage, the employer could attempt to enforce the variation. The employer will do so by relying on "promissory estoppel", a legal doctrine that prevents the person making the promise to go back on their words. To successfully establish the claim promissory estoppel, the employer would have to prove that:

- the MDW has unequivocally promised that they will not insist on their legal rights to accept the original, higher wage;
- they (i.e., the employer) have relied on this representation to pay the MDW the subsequently agreed lower wage; and
- it is inequitable for the MDW to renege on their promise.\textsuperscript{146}

4.97 That said, in practice any such claim by an employer is likely to be unsuccessful, because it is highly unlikely that a Hong Kong court would find it inequitable for an MDW to insist on their strict legal rights under the contract to be paid the sum they initially agreed upon.

\textsuperscript{143} Immigration Law Ordinance (Cap 115) s 42(1). See Chapter 2, Section 7.III. for the text of the law.

\textsuperscript{144} The aim is to 'fulfil Hong Kong’s international obligation under the International Labour Convention No. 97’ (Lilik Andayani v Chan Oi Ling [2001] 2 HKLRD 572 at 576-577. See Chapter 2, Section 7.II. for a brief summary of the case).


\textsuperscript{146} Hughes v Metropolitan Ry (1877) 2 App. Cas. 439.
(iii) **Variation to pay more supported by valid consideration**

4.98 Contract variations must be supported by consideration.\(^{147}\) Doing more than what was promised under the original contract is considered good consideration to support a variation to pay the employee more.\(^{148}\) Thus, if MDWs perform more work than what is required by the Standard Contract, and that additional work is within their permissible job duties, that effort is likely to constitute good consideration for any promise by their employers to pay a higher wage.\(^{149}\)

4.99 If additional work is not required, any attempt to enforce the higher wage will require showing that some form of consideration did exist. As consideration can vary by case, the MDW should consult a lawyer to determine whether consideration can be proven.

(iv) **Statement attempting to vary the contract is unenforceable when construed as mere representation**

4.100 For a statement attempting to vary a contract to be enforceable, it must be made with an intention to be binding. If the speaker has no such intention when making the statement, it will be treated as a mere representation. See Chapter 2, Section 1, for the meaning of representation.

4.101 Generally, proof of intent to be bound will depend on whether the statement is sufficiently specific as to constitute a term that varies the contract. Accordingly, whether or not such statement is considered a term or a representation will depend on the circumstances of each case.

4.102 In seeking damages, the claimant must prove that a statement amounted to a term that varies the contract. That statement can be oral or written, and must purport to vary the original contract. Damages will only be available if the statement is found to be a term.\(^{150}\)

4.103 It should also be noted that making statements which turn out to be false could also create liability for misrepresentation. Misrepresentation will render the contract voidable and / or leave the misrepresentor liable to pay damages in tort or under the MO. See Chapter 2, Section 4.I.(D), for misrepresentation.

2. The distinction between terms and representations

4.104 The key differences between a term and a representation are outlined in the table below.

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\(^{147}\) *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1.


\(^{149}\) Note however that when an employer and an MDW first contract for the MDW to come to Hong Kong for employment, the two parties are free to agree on any amount of monthly salary for the MDW in the Standard Employment Contract, so long as it is higher than the minimum allowable wage mandated by the Hong Kong government.

Table 2-12: Differences between a term and a representation

<table>
<thead>
<tr>
<th>Definition</th>
<th>Term</th>
<th>Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition</strong></td>
<td>An enforceable undertaking to do (or to refrain from doing) something, or to guarantee the truth of something.</td>
<td>A statement that merely asserts the truth of a given state of affairs. It invites the representee to rely upon that statement, but does not give an enforceable guarantee of its truth.</td>
</tr>
<tr>
<td><strong>Time of making</strong></td>
<td>A statement amounting to a term may be made at the time of contract formation or at any time to vary an existing contract.</td>
<td>A representation may be made at any time to the other party. However, an actionable misrepresentation is one made before the time of contract formation to induce the other party to enter into the contract.</td>
</tr>
<tr>
<td><strong>Action arising from non-compliance</strong></td>
<td>Failure to comply with a term amounts to a breach of contract.</td>
<td>There is no available remedy if the representation is merely a statement of intent that was made honestly at the time it was made. However, knowingly making a false representation may amount to an actionable misrepresentation.</td>
</tr>
<tr>
<td><strong>Remedies</strong></td>
<td>Remedies include expectation damages, possible contract termination, and specific performance. See Chapter 2, Section 7.XIII. for the remedies for breach of contract.</td>
<td>Remedies include reliance damages, and possible rescinding of the contract, subject to certain bars. Refer to Chapter 2, 4.II.(A), for the remedies for misrepresentation.</td>
</tr>
</tbody>
</table>

3. How to distinguish between a term and a representation

4.105 Terms and representations are generally distinguished from one another on the basis of whether there is "evidence of an intention on the part of either or both of the parties that there should be contractual liability in respect of the accuracy of the statement".

4.106 The following factors should generally be taken into account when determining whether a statement constitutes a contractual term or a mere representation:

- the importance of the truth of the statement to the other party;
- the time between the making of the statement and the conclusion of the contract;

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152 Ibid; Unlike a term, a representation does not give a guarantee which is legally enforceable. If the representation turns out to be false, it does not amount to a breach, but only a misrepresentation.
153 In this case, putting the innocent party in the position he would have been in had the contract been properly performed.
154 I.e. putting the party in the position had the representation not been made.
156 Bannerman v White (1861) 10 C.B. N.S. 844; 142 E.R. 685.
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- whether the speaker was in a better position than the other party to know the truth of the statement,\textsuperscript{158} and
- whether the statement was subsequently omitted when the agreement was reduced to a written contract.\textsuperscript{159}

\textit{(v) Enforceability of a variation of contract through written statements.}

4.107 Although oral statements are the most common means of varying employment contracts in the MDW context, it is not unusual for an MDW to be presented with a new written contractual document which contains new terms, and purports to vary their existing employment contract.\textsuperscript{160}

4.108 Whether such a new written contractual document will be binding upon an MDW generally depends on whether:

- there is sufficient intention on the part of both parties to be bound by the terms in the new written contractual document; and
- the new written contractual document has been signed.

4.109 For a written document to constitute a valid and binding contract, the document’s language must show sufficient intention by both of the parties to be bound by the terms it contains. If the document contains a “subject to contract” clause, case authorities have held that the written document is not regarded as legally binding.\textsuperscript{161} Thus, a written contractual document will fail for lack of sufficient intention if the document’s language evidences that the parties do not intend to be bound by its terms.

4.110 Where a written document containing the new agreement has been signed by one or both of the parties, it is well established that the party signing will ordinarily be bound by its terms, whether or not they have read them and whether or not they are ignorant of their precise legal effect.\textsuperscript{162} Thus, a written contractual document containing the new agreement will likely be legally binding on the MDW if they sign it, provided the new agreement does not contravene the minimum benefits set out in the Standard Contract. (emphasis added)

4.111 In the case where an MDW has signed a new written contractual document but wishes to deny the legality of the new terms it contains, the MDW may resort to claiming the new agreement void by means of duress, undue influence, unconscionable bargain, and/or misrepresentation.

IV. Monetary employment disputes

4.112 Formally, a monetary employment dispute refers to a dispute regarding an MDW’s pecuniary entitlements in the course of their employment. This includes disputes about the payment of wages or payment in lieu of notice upon dismissal.

\textsuperscript{157} Routledge v McKay [1954] 1 W.L.R. 615.
\textsuperscript{158} Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623.
\textsuperscript{159} Heilbut Symons & Co v Buckleton [1913] A.C. 30.
\textsuperscript{160} Based on JWB and partner organization experience. Unfortunately, statistical evidence could not be found to gauge the actual frequency of this commonly reported issue.
\textsuperscript{162} L’Estrange v Graucob Ltd [1934] 2 K.B. 394.
Monetary employment disputes are one of the most common contractual claims that an MDW may have against their employer.

4.113 The majority of pecuniary claims that an MDW may have against their employer largely falls under two categories: (i) claims made pursuant to the Employment Ordinance (EO); and (ii) claims for common law damages for breach of employment contract.

4.114 The following subsections will cover the various issues MDWs encounter with payment of wages, as well as losses that may occur due to dismissal.

(A) Underpayment, non-payment, or late payment of sums owed

4.115 Common monetary employment disputes that may arise with respect to MDWs include the:

- underpayment (deduction from wages) and non-payment of wages due;
- late payment of wages due;
- non-payment of wages owed for work on rest days and non-payment of holiday pay and annual leave pay;
- non-payment of severance pay; and
- non-payment of maternity leave pay.

4.116 The definition of wages under the EO is quite broad. It includes all remuneration, earnings, allowances (including travelling allowances and attendance allowances), attendance bonuses, commissions, overtime pay, tips and service charges that are capable of being expressed in terms of money, and that are payable to an employee for the work already or to be done under their employment contract.

(B) Underpayment and non-payment of wages due

4.117 Under the EO, an employer is not permitted to make any deductions from their employee's wages or from any other sum due to him/her, except for situations falling within the exhaustive list of exceptions provided under the EO.\(^{163}\)

4.118 Accordingly, any deductions that fall outside of these exceptions, or where the employer unlawfully refuses to pay wages or other funds due to the employee, statutory remedies under the EO entitle the employee to file a claim to the Labour Tribunal to recover the funds in arrears. See Chapter 2, Section 4.IV.(B), for remedies for unlawful deductions from wages. See Chapter 2, Section 4.IV.(B), for remedies for non-payment of wages.

(C) Late payment of wages due

4.119 Wages are due on the expiry of the last day of the wage period.\(^{164}\) They must be paid no later than seven days after the expiry of the wage period.\(^{165}\)

\(^{163}\) Section 32, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
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4.120 Where an employer does not pay wages within seven days after the expiry of the wage period, the employer is required to pay interest on the outstanding amount from the date payment becomes due until the date of actual payment.\(^{166}\)

\((D)\) Non-payment of wages owed for work on rest days and non-payment of holiday pay and annual leave pay

4.121 Disputes may also arise between an employer and an MDW regarding non-payment of wages owed for work on rest days, and non-payment of holiday pay / annual leave pay.

\((i)\) Rest days

4.122 An employer may not compel an employee to work on a rest day.\(^{167}\) An employment contract is void if it contains any condition that subjects the payment of any annual bonus, any end-of-year payment, or any proportion of such payments to working on rest days.\(^{168}\)

4.123 An employee may work voluntarily on a rest day if their employer so agrees.\(^{169}\) However, in such circumstances it will be up to the employer and employee to determine if the employee is entitled to payment for working on a rest day.\(^{170}\)

\((ii)\) Holiday pay

4.124 Employees who have been employed under a continuous contract for at least three months immediately preceding a statutory holiday are entitled to holiday pay. The employer must make such payment no later than the day on which the employee is next paid their wages after that holiday.\(^{171}\)

4.125 Notwithstanding the fact that an employer may be required to provide holiday pay, the employer is restricted from making payment in lieu of granting a statutory holiday to the employee.\(^{172}\)

\((iii)\) Annual leave pay

4.126 An employee who has been employed under a continuous contract for not less than 12 months is entitled to annual leave with pay, for every period of 12

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\(^{164}\) The wage period is deemed to be one month under Section 22, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{165}\) Section 23, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{166}\) Section 25A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{167}\) Section 19, EO (Cap 57). Note that an employer may compel an employee to work on a rest day in the event of a breakdown of machinery or plant or in any other unforeseen emergency. See Section 19(2), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{168}\) See Chapter 2, Section 7.II. for the text of the law.

\(^{169}\) Section 20, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.


\(^{171}\) Section 40, EO (Cap 57). The rate of holiday pay is set out in s 41 of the EO. See Section 19(2), EO (Cap 57) See Chapter 2, Section 7.II. for the text of the law.

\(^{172}\) Section 40A, EO (Cap 57). See Section 19(2), EO (Cap 57) See Chapter 2, Section 7.II. for the text of the law.
months. Annual leave pay must be made no later than the day on which the employee is next paid their wages after their period of annual leave.

4.127 An employee who has been employed for a leave year but whose employment contract is terminated, is entitled to payment in lieu of any annual leave not yet taken, regardless of the reasons of termination. An employee who has been employed for at least three months but less than 12 months is entitled to pro rata annual leave pay if they are terminated for reasons other than lawful summary dismissal.

4.128 Employers may not pay remuneration to an employee in lieu of the employee taking all or any part of their annual leave, unless they are entitled to more than 10 days’ annual leave for a particular leave year. In that case, the employee may accept payment in lieu of the part of their annual leave entitlement which exceeds ten days. (E.g., if they are entitled to 14 leave days, they may taken payment in lieu of leave for 4 days).

(E) Non-payment of severance pay

4.129 Where an employee has been employed for a period of not less than 24 months ending with the date of termination, the employee is entitled to severance pay upon either dismissal by reason of redundancy, or upon being ‘laid off’.

4.130 Although ‘redundancy’ is not a legislatively defined term, statutory guidelines state that an employee is made redundant where their employer has either ceased (or intends to cease) carrying on a business for the purposes of which the employee was employed, or the requirements of that business for which the employee is employed no longer exist.

4.131 In the MDW context, where an MDW is employed in connection with a private household, that household is regarded as a business and the maintenance of the household is regarded as carrying on the employer’s business.

4.132 There is a statutory presumption that where an employee has been dismissed by their employer, the employee has been dismissed by reason of redundancy. The employer bears the burden of proving the contrary.

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172 Section 41AA, EO (Cap 57). The daily rate of annual leave pay is set out in s 41C, of the EO. See Chapter 2, Section 7.II. for the text of the law.
173 Section 41B, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
174 Section 41D, EO (Cap 57). See A Concise Guide to the Employment Ordinance for more detailed information on the calculation of annual leave pay on termination (n 170 above).
175 A ‘leave year’ refers to any period of 12 months commencing on the day on which the employment commenced and the anniversary of such day. See Section 41A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
176 Section 41E, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
177 Section 31B(1), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
178 Section 31B(2), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
179 Section 31B(3), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
180 Section 31Q, EO (Cap 57). For case law applying this provision, please refer to Lam Yau Kuen v Easy (Hang Fung) Transportation Co Ltd & Another [2006] HKEC 2218 English Judgment. See Chapter 2, Section 7.II. for a brief summary of the case.
4.133 In another context\textsuperscript{182} [Cheng Kwok Wah v Li Hing Environmental Services Co Ltd,\textsuperscript{183} the] a court held that where a contract for cleaning services for a fixed term had expired and was not renewed, the employees were dismissed by reason of redundancy. Thus, the court found the employers were liable for severance pay. Applying this analysis to the MDW context, an MDW may have a claim for severance pay, where the MDW’s employment contract is for a fixed term and upon the expiry of that fixed term, the contract is not renewed by the MDW’s employer.

4.134 Should the employer fail to agree upon and pay severance pay, an employee will have to reserve their right to payment by serving a notice in writing to the employer, unless the Commissioner for Labour has agreed to extend the relevant notice period.\textsuperscript{184} A right to severance pay can also be preserved where this payment is an issue in front of the Minor Employment Claims Adjudication Board or the Labour Tribunal.\textsuperscript{185} The employer is liable to pay severance not later than two months upon receipt of the notice.\textsuperscript{186}

4.135 In cases of non-payment of sums owed for work on rest days, holiday pay, annual leave pay, and/or severance pay, the employee may file a claim to the Labour Tribunal to recover such payment as they are entitled to receive under the EO.\textsuperscript{187}

(F) Maternity protection\textsuperscript{188}

4.136 An employee who serves notice of their pregnancy to their employer is entitled to 10 weeks’ maternity leave pay if the employee has:

\begin{itemize}
  \item been employed under a continuous contract for not less than 40 weeks immediately before the commencement of scheduled maternity leave;
  \item given notice of pregnancy and her intention to take maternity leave to her employer by a medical certificate confirming her pregnancy; and
  \item produced a medical certificate specifying the expected date of confinement if her employer so requires.
\end{itemize}

4.137 Those who fulfil the above requirements cannot be dismissed from the date on which the employee’s pregnancy is confirmed by a medical certificate until the date on which they are due to return to work following maternity leave. The only exception is for summary dismissal.\textsuperscript{190}

\begin{itemize}
\item \textsuperscript{182} Cheng Kwok Wah v Li Hing Cleaning Services Co Ltd [2015] 1 HKLRD A2
\item \textsuperscript{183} Cheng Kwok Wah v Li Hing Environmental Services Co Ltd [2013] 5 HKLRD 298 English Judgment. [2013] 5 HKLRD 298 English Judgment.
\item \textsuperscript{184} Section 31N(c), EO (Cap 57). See Chapter 3, Section 3.II.(B) for bringing claims to the Labour Tribunal.
\item \textsuperscript{185} Section 31O, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\item \textsuperscript{186} Section 31O, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\item \textsuperscript{187} For details regarding the remedies available to an employee who has not been paid the sums due by the employer, please refer to “Part VIA Employment Protection” of the EO. In particular, s 32A specifies the circumstances in which the employee may have a right to remedies against his employer and s 32O specifies the terminal payments which the Labour Tribunal may award the employee claiming remedies against his employer. See Chapter 2, Section 7.II. for the text of the law.
\item \textsuperscript{188} Under the EO, an employee is entitled to paternity leave pay of up to 3 days. Relevant legislation is found in Part IIIA Paternity Leave of the EO.
\item \textsuperscript{189} Section 14(2), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\item \textsuperscript{190} Section 15, EO (Cap 57); For details regarding what misconduct may warrant summary dismissal of an employee, see Section 9, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law and case examples.
\end{itemize}
4.138 An employer who dismisses a pregnant employee for reasons other than summary dismissal for grievous misconduct is required to pay the following sums:\textsuperscript{191}

- payment in lieu of notice;\textsuperscript{192}
- a further sum equivalent to one month’s wages as compensation;\textsuperscript{193} and

10 weeks’ maternity leave pay if, but for the dismissal, the employee would have been entitled to such payment.

4.139 An employer is required to provide maternity leave pay on the same day as when the employee was normally paid when not on leave.\textsuperscript{194} Note that maternity leave pay is calculated on a daily rate, based on 80\% of the employee’s average wages over the previous 12 months before maternity leave.\textsuperscript{195}

4.140 For underpayment, non-payment, and late payment of maternity leave pay, the employee may file a claim with the Labour Tribunal to recover such payment as the employee is entitled to under the EO.

(G) Dismissal

4.141 Unfair dismissal refers to the wrongful termination of an employment contract before the end of the agreed, fixed term.

4.142 Depending on the reasons for termination, dismissal can be divided into three types, which each give rise to different remedies, namely:

- summary dismissal;
- constructive dismissal; and
- wrongful dismissal.

(i) Summary dismissal

4.143 Summary dismissal is where an MDW makes a fundamental breach of the employment contract, entitling the employer to dismiss the MDW. There are common law and legislative provisions governing the justifiable circumstances.

(a) Summary dismissal under common law

\textsuperscript{191} Ibid.
\textsuperscript{192} For details regarding termination by payment in lieu of notice, See Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{193} For details regarding the method for calculating the one month’s wages payable on termination of the contract in contravention of the prohibition against termination of employment for pregnancy, see Section 15, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{194} Section 14(4), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{195} Section 14(3A), EO (Cap 57). If the employee has been employed by the employer for a period less than 12 months immediately before the commencement of her maternity leave, the daily average will be calculated based on the shorter period. See Chapter 2, Section 7.II. for the text of the law.
4.144 If an MDW commits a grave breach of contract, the MDW’s employer is entitled to dismiss the MDW summarily, i.e. without notice and with immediate effect.

4.145 Summary dismissal is valid where the MDW’s actions go to the root of the contract, indicating their unwillingness to be bound by the original terms of the contract. This can be labelled as gross misconduct.

4.146 Gross misconduct on the MDW’s part includes:

- serious dishonesty (e.g. deliberate fabrication of documents);
- breach of duty of good faith and fidelity (e.g. unauthorised access to employer’s computer in violation of privacy); and
- negligent performance of duties and negative workplace behaviour (e.g. abusive language and non-consensual body contact).

4.147 Note however that summary dismissal will not usually affect an employee’s right to be paid accrued benefits, such as outstanding wages, accrued annual leave pay, and accrued holiday pay.

4.148 However, such employees are not entitled to any long service payment, severance payment, unaccrued pro rata annual leave pay or unaccrued pro rata end of year payment.

(b) Summary dismissal under the Employment Ordinance

4.149 The EO also provides four specific grounds on which an employer may terminate a contract without notice, or payment in lieu of notice. These include where the MDW:

- wilfully disobeys a lawful and reasonable order;
- misconducts herself in a manner in which the conduct is inconsistent with the due and faithful discharge of her duties;
- is guilty of fraud or dishonesty; or
- is habitually neglectful in her duties.

See Chapter 2, Section 7.II. for an illustration of the range of dismissal allowed under section 9 of the Employment Ordinance with case law.

4.150 The EO sets a high threshold to prove that the employer was entitled to summarily dismiss the employee. It is regarded as a strong measure justified only

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196 Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 W.L.R. 698. Note that a single act of disobedience may not justify summary disposal of an employee where it was not an act that showed a wilful disregard of the employment contract.


198 Sinclair v Neighbour [1967] 2 Q.B. 279.

199 Employees’ duty of good faith and fidelity includes avoiding conflict of interest, not to compete with employer’s business, and not to misuse or disclose confidential information obtained in the course of employment (Dunamis International Co Ltd v Chan Hong Kit [2010] HKEC 1596 English Judgment); Richardv Ltd v Victor Fung[1980] HKLR 797.


201 Section 32O, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

202 Section 9, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
in exceptional circumstances. This is due to the fact that summary dismissal deprives an employee of all protections provided by the EO. The burden of proof that summary dismissal was justified is on the employer.

(c) Payments accruing from summary dismissal

4.151 If the conduct the employer points to as grounds for summary dismissal does not clear the bar set by the EO, the dismissal will be considered wrongful. An MDW can claim various awards of statutory compensation for wrongful dismissal. See Chapter 2, Section 4.IV.(G)(iii), for wrongful dismissal.

(ii) Constructive dismissal

4.152 Constructive dismissal involves an employer making a fundamental breach of the employment contract, entitling the MDW to terminate the contract without notice. There are common law and legislative provisions governing constructive dismissal.

(a) General definition and dismissal under common law

4.153 If the employer’s conduct constituted a fundamental breach or repudiation of the employment contract, the MDW is entitled to terminate the contract without notice. Although it is the MDW who terminates the contract, case authorities have shown that the employee may be compensated in common law damages and/or receive statutory compensation for the employer’s breach of contract.

4.154 Common law damages are calculated on the basis of the expectation measure, i.e. what the employee would have received had the employer not breached the employment contract. See Chapter 2, Section 4.V.(B)(ii), for details on the expectation measure of damages.

4.155 Whether the employer committed a fundamental breach of contract in the first place depends upon the circumstances of each case.

4.156 An employee’s right to claim constructive dismissal arises in the event of the employer’s serious misconduct and/or breach of contract. Employer conduct which has been found sufficiently serious to warrant constructive dismissal include:

- failure to provide a reasonable amount of work;
- failure to pay wages and other benefits; and

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205 Section 8A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
207 Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor [1987] HKLY 475. See Chapter 2, Section 7.II. for brief summary of the case.
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- a unilateral change or variation in the terms and conditions of employment.\(^{211}\)

4.157 See Chapter 2, Section 7.II. under Section 10, EO (Cap. 57), for summaries of cases on circumstances and conduct by the employer which justify termination by an employee.

(b) Constructive dismissal under the Employment Ordinance

4.158 The EO also provides three specific grounds on which an MDW may terminate a contract without notice or payment in lieu of notice, namely where the MDW:\(^{212}\)

- reasonably fears physical danger by violence or disease;
- is subjected to ill-treatment by the employer;
- has been employed for not less than 5 years and they are certified by a registered medical practitioner as being permanently unfit for the type of work they are engaged; or
- would be entitled to terminate the contract without notice at common law.

4.159 With regards to statutory compensation under the EO, an employee terminating the contract for constructive dismissal is treated as dismissal by the employer.\(^{213}\) This would entitle the employee to all the remedies available under the EO.\(^{214}\) See Chapter 2, Section 4.V.(A), for details on statutory remedies.

4.160 Late payment of salary of more than one month from the day on which payment was due will constitute termination by the employer.\(^{215}\) The employer is also deemed to have agreed to pay the employee what they would have been due under termination and payment in lieu of notice.\(^{216}\)

4.161 An employee who lawfully terminates their contract of employment by reason of the employers’ constructive dismissal retains all contractual and statutory entitlements, including:\(^{217}\)

- outstanding wages;
- long service payment;
- severance payment;
- annual leave pay; proportional annual leave pay;
- holiday pay;

\(^{211}\) *Ng Chung Man Joe v Rever Expression Salon Limited*, District Court, Civil Action No, 600 of 2004.

\(^{212}\) *Section 10, EO (Cap 57)*. See Chapter 2, Section 7.II. for the text of the law.

\(^{213}\) *Section 32B, EO (Cap 57)*. See Chapter 2, Section 7.II. for the text of the law.

\(^{214}\) *Section 32A & Section 32O, EO (Cap 57)*. See Chapter 2, Section 7.II. for the text of the law.

\(^{215}\) In *Huen Fook Nam v Pentalpha Enterprises Ltd* [2006] HKEC 1069 English Judgment, the court held that an employer’s failure to pay an employee within one month from the day on which the wages became due entitled the employee to regard himself as being constructively dismissed, in accordance with *Section 10A*; *Section 10A, EO (Cap 57)*. See Chapter 2, Section 7.II. for the text of the law.

\(^{216}\) *Section 10A, EO (Cap 57)*. See Chapter 2, Section 7.II. for the text of the law.

• maternity leave pay; and
• sickness allowance.\textsuperscript{218}

See Chapter 2, Section 7.XVI. for termination payments and severance or long service payments.

4.162 Note that an MDW who attempts to terminate their employment for constructive dismissal but actually has insufficient grounds to do so will be considered to have terminated the contract wrongfully. In such circumstances compensation will be payable to the employer in accordance with EO provisions.\textsuperscript{219}

(c) Remedies in legislation and common law for constructive dismissal

4.163 An MDW who has been constructively dismissed may bring an EO claim for the same remedies available to an employee dismissed without a valid reason.\textsuperscript{220} Courts frequently award statutory damages as though the employment had been wrongfully terminated.\textsuperscript{221}

4.164 In addition, an MDW may be able to bring a common law claim for damages for any loss suffered as a result of the constructive dismissal. The MDW must be able to prove actual loss, and any common law claim would also be subject to the employee’s duty to mitigate their loss.\textsuperscript{222} (i.e. if claiming loss of income, they must show that they attempted to find new employment) If the MDW’s loss as a result of the constructive dismissal could be avoided by taking reasonable steps, the loss cannot be recovered.\textsuperscript{223}

(iii) Wrongful dismissal

4.165 In practice, wrongful dismissal is likely to spell the end of the employment relationship. However, a brief explanation of the law here is important for practitioners.

4.166 Wrongful dismissal means wrongful repudiation or wrongful purported termination of an employment contract, when there has not been an actual breach of the conditions of employment to justify termination.\textsuperscript{224} It occurs when an MDW or an employer terminates an employment contract without serving the requisite notice or payment in lieu of notice in circumstances where summary dismissal is not justified.

4.167 Therefore, it is important to note that any purported dismissal by the employer which is not justified becomes a wrongful dismissal.\textsuperscript{225}

\textsuperscript{218} Section 33(4B), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{219} Section 8A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{220} Section 32A & Section 32B, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{221} See: Ng Wai Yu & Ors v Chong Hou Yue (formerly t/a Ever Rich Knitting Factory) High Court, Labour Tribunal Appeal No 58/89. See also Precieux Garment Factory Ltd v Lam Kin Chung & Ors, Labour Tribunal Appeal No 5/97.
\textsuperscript{222} ICAP (Hong Kong) Ltd v Elaine Chan [2010] HKEC 2012 English Judgment.
\textsuperscript{223} Darbishire v Warran [1963] 1 W.L.R. 1067, 1075.
\textsuperscript{224} Heyman v Darwins Ltd [1942] AC 356.
\textsuperscript{225} Section 8A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
V. Remedies

4.168 Remedies exist under both common law and the EO against employers who have committed a fundamental breach of contract. Such a fundamental breach may be, for example, wrongful dismissal or the commission of an act (or acts) entitling the MDW to claim constructive dismissal.

(A) Legislative provisions under the EO

4.169 During the contract of employment, the employer is required by statute to make several payments to the employee. This may include, for example, holiday pay, annual leave pay, and severance pay. Once a contract has been terminated, the employer must make terminal (i.e. final) payments to the employee.\textsuperscript{226}

4.170 Where an employer fails to make the required payments to the employee, the employee may make a claim for remedies against their employer under the EO. The Labour Tribunal established under the Labour Tribunal Ordinance (Cap 25) shall have jurisdiction to inquire into, hear and determine a claim for remedies made by the employee.\textsuperscript{227} See Chapter 3, Section 3.II.(B) for bringing a claim to the Labour Tribunal.

4.171 In making a claim for remedies under the EO against the employer, the employee must fulfil the following requirements:\textsuperscript{228}

- within 3 months from the date of contract termination, the employee must make a claim for remedies by notice in writing to the employer. This date may be extended for a further period of up to 6 months if approved by the Commissioner for Labour; and
- for claim(s) for remedies filed to the Labour Tribunal, the claim must be filed before the end of the period of 9 months from the date of contract termination.

4.172 Where the employee has made a claim for remedies against their employer to the Labour Tribunal, the Labour Tribunal may make an order for reinstatement and re-engagement, or an award of terminal payments.\textsuperscript{229}

4.173 An award of terminal payments refers to the following:\textsuperscript{230}

- payment in lieu of notice or damages for wrongful termination of the contract;
- payment on termination;
- payment of sums owed for work on rest days, holiday pay, and/or annual leave pay;
- long service payment or severance payment if appropriate; and
- other payments under the employment contract, such as, gratuity, provident fund, etc.

\textsuperscript{226} Section 32O, EO (Cap 57). \textit{See} Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{227} Section 32J, EO (Cap 57). \textit{See} Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{228} Section 32I, EO (Cap 57). \textit{See} Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{229} Section 32M, EO (Cap 57). \textit{See} Chapter 2, Section 7.II. for the text of the law.
\textsuperscript{230} Section 32O, EO (Cap 57). \textit{See} Chapter 2, Section 7.II. for the text of the law.
(i) **Payment in lieu of notice or damages for wrongful termination of contract**

4.174 Where an employer terminates the contract by payment in lieu of notice, the payment is calculated by multiplying the number of days for which wages would normally be payable to the employee by the daily or monthly average of the wages earned during the employee’s contract of employment.\(^{231}\)

4.175 Where an employer wrongfully terminates the employment contract either without giving sufficient notice or without giving payment in lieu of notice, the employee is entitled to damages for wrongful termination of contract.\(^{232}\)

4.176 Damages for wrongful termination of contract shall be payable by the party terminating the contract. That is, a sum equal to the amount of wages that would have been payable had the contract been terminated by payment in lieu of notice.\(^{233}\)

4.177 No duty to mitigate or to prove actual loss exists.\(^{234}\) An employee is entitled to the above compensation even if the employee does not search for or secure another job offer immediately upon dismissal.

(ii) **Payment on termination**

4.178 When an employer terminates their contract with the employee, they must pay any remaining pro rata salary due to the employee. (i.e. if termination happens exactly halfway between pay periods, the employer must pay one half of a month’s salary) If insufficient notice of termination is given, payment in lieu of notice is also required.\(^{235}\)

4.179 The EO further provides that any sum due to the employee shall be paid no later than 7 days after the day of termination.\(^{236}\)

4.180 Where the employer fails to make the statutory-required payments within 7 days from the day on which they become due, the employer is liable to pay interest on the outstanding amount of wages or sum from the date on which the wages or sum becomes due until the date of actual payment.\(^{237}\)

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\(^{231}\) Section 7(1A) & Section 7(1B), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{232}\) Section 8A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{233}\) Section 8A(1), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.


\(^{235}\) Section 25(2), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{236}\) Section 25(1), EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.

\(^{237}\) Section 25A, EO (Cap 57). See Chapter 2, Section 7.II. for the text of the law.
(B) Common law

4.181 Although disputes concerning employment contracts are primarily resolved according to the EO, there are instances where the employee may be able to claim common law damages in addition to statutory damages under the EO. Common law expectation damages are particularly beneficial to employees, as expectation damages entitle employees to all the wages they would have been entitled to had the employer not breached the contract. (i.e. all the wages from the date of termination up to the end of the fixed period of the contract) Expectation damages are subject to any duty to mitigate the losses that the employee has.

4.182 Moreover, an MDW may wish to refer to common law damages as certain time limitations contained in the EO do not apply to common law actions. Common law actions are often longer, generally with a limit of 6 years.

4.183 The following subsections discuss actions for an agreed sum, which concerns unpaid sums, as well as expectation damages.

   (i) An action for the agreed sum

4.184 Employees who have actually rendered services for a period of employment for which their contract entitles them to be paid a fixed amount, the employee has a claim for payment of an agreed sum.

4.185 An MDW faced with non-payment of wages can recover any outstanding wages by a contract action for an agreed sum. Such a claim is not for expectation damages but instead a claim in debt.

Practical points:
To claim for the outstanding wages, useful supporting evidence includes:

- receipt of wage payments clearly stating smaller amounts of wages than that agreed upon; or
- evidence of the employer’s refusal to pay wages.

Note: the employee has the burden of proving non-payment or underpayment of wages.

(ii) Expectation damages

4.186 Where the employer has breached the employment contract, expectation damages aim to put the employee in the position they would have been in, had the contract been properly performed. Therefore, where the contract is terminated before the end of the agreed duration, the employee may claim loss of wages from the time of termination up to the expiry of that agreed duration.

238 An example of time limitations contained in the EO is Section 32I, EO (Cap 57). Section 32I provides that remedies under the EO shall not be available to the employee unless the employee has made a claim for such remedies by notice in writing to the employer within 3 months from the date of termination, or the employee has filed a claim for such remedies with the Registrar of the Labour Tribunal within 9 months from the date of termination.

239 Section 5 LO (Cap 347). See Chapter 2, Section 7.VI. for the text of the law.


4.187 However, the employee’s claim for loss of wages is subject to mitigation. This requires the employee to take reasonable steps to minimize the loss caused by their employers' breach of contract. Thus, the law expects an employee to find new work immediately upon the termination of their employment contract and take reasonable steps to market herself as an employee to prospective employers. Failure to do so would prevent them from claiming such loss of wages as expectation damages.

4.188 The only situations where the employee would wish to claim expectation damages would therefore be situations where the employee fails to obtain suitable alternative employment, despite taking reasonable steps to do so, and/or situations where the employee cannot engage in searching for work.

4.189 For example, where the employer’s breach of contract involves violating Hong Kong immigration laws and both the employer and employee are under investigation, an employee may be prevented from working by the Immigration Department. In such a situation, it may be possible for the employee to claim expectation damages, as they would be unable to find new work.

(C) Signing a settlement agreement to accept fewer benefits

4.190 Despite protection in terms of available remedies upon breach of the employment contract by the employer, in practice the employee’s rights may still be substantially altered by any settlement agreement purporting to stipulate the employee's entitlements upon the termination of their employment.

(i) General definition

4.191 It is commonplace that when an MDW leaves their employment contract, the employment agency would draft a settlement agreement that stipulates the benefits the MDW is entitled to upon termination of their contract. The agreement shows final satisfaction of their employer's compensation to the MDW. This happens regardless of whether it is the employer or the MDW who terminates the contract.

(ii) Are such settlement agreements legally enforceable?

4.192 If an employer opts for early termination of the employment contract with the MDW, the employer must provide fresh consideration in order to render the settlement agreement legally enforceable. Promising something other than what is stipulated in the Standard Contract, such as an earlier discharge of contract, could amount to good consideration if it is more beneficial to the MDW who is agreeing to the lower settlement sum. In this case, the settlement agreement would be legally enforceable.

4.193 Even without fresh consideration from the employer, the settlement agreement may still be legally enforceable to a certain extent under the equitable doctrine of

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243 Bank of Credit and Commerce International SA (in liquidation) v Ali and others (No 3) [1999] All ER (D) 677.
244 Ibid.
245 For a more detailed explanation of fresh consideration, see Chapter 2, Section 4.III.(A)(i) above.
promissory estoppel. Promissory estoppel allows enforcement of a settlement agreement for the MDW to accept less in the absence of consideration where:

- the MDW has unequivocally represented that they will not insist on their legal rights to termination entitlements;
- the employer has relied on such representation, such as by paying the MDW the agreed benefits as stated in the settlement agreement; and
- that it is inequitable for the MDW to renege on their promise.

Nevertheless, MDWs may challenge the validity of the settlement agreements on grounds such as duress, undue influence, or unconscionable bargain if the circumstances amount to such.

For example, in one case, the MDW was misled to believe that she would be seen to have unilaterally left her job if she did not sign a settlement agreement. The agreement included a smaller amount of settlement fee than the one she had asked for. The court held that the settlement agreement was void for unconscionable bargain, ruling that the employer took advantage of the special disadvantages of the MDW, namely her inferior social and economic status and lack of legal representation when agreeing to the settlement.

VI. Over-charging agency fees

MDWs may also encounter contractual issues with employment agencies. Over-charging of fees is one of the most common problems MDWs encounter with agents.

Employment agencies may charge no more than 10% of an MDW’s first month’s salary. In practice, however, many MDWs are charged much higher fees than the allowable limit, which, according to caseworkers, are usually not documented in the contract.

Agencies may attempt to require MDWs to pay fees in excess of the statutory limit in at least the following ways:

- by oral variation of the contract between the MDW and the agency to require a higher sum to be paid;
- by adding a collateral term stipulating a higher sum to be paid that prevails over the existing terms; and/or
- by duress, undue influence, and/or unconscionable conduct.

Although agencies may contractually require MDWs to pay in excess of the statutory amount, contract terms are not enforceable for illegality. (i.e. they contravene statute) This thus gives rise to cause(s) of action for the MDW and

remedies against their agency in cases where the MDW has paid in excess of the statutory amount.

4.200 Remedies for excessive agency fees are:
- challenging the validity of the terms of contract with the employment agency on the basis of illegality, so that the term requiring payment in excess of the statutory limit is void; and
- bringing claims under the tort of breach of statutory duty. \(^{250}\)

4.201 The maximum statutory compensation for contravention of this requirement with regards to over-charging agency fees is, as of publication, HK$50,000. \(^{251}\)

VII. Invalidating loan agency loans

4.202 Agents may take MDWs directly to loan agencies and force them to obtain loans, in order to immediately pay agency fees. These usually come with high interest rates. \(^{252}\)

4.203 There are statutory remedies for entering into loan contracts with substantially high interest rates, though there appears to have been no cases filed against loan agencies by MDWs on this basis to date. The following sub-sections discuss these remedies.

(A) Statutory remedies for entering into loan contracts with a substantially high interest rate

4.204 For loan agreements with annual interest rates exceeding 60%, MDWs may claim that the agreements are unenforceable. Charging excessive interest rates may also be treated as a criminal offence under the Money Lenders Ordinance, which regulates money-lending transactions. \(^{253}\)

4.205 For loan agreements with annual interest rates over 48% but not exceeding 60%, there is a rebuttable presumption that the agreements are extortionate and unenforceable. \(^{254}\) In other words, the defendant has the burden of proving that the agreements are neither of these.

4.206 However, having regard to all the circumstances relating to the agreement, the court may find that such rates are not unreasonable or unfair, rendering the agreements enforceable.

4.207 Factors for considering whether the interest rate is extortionate include:
- the prevailing interest rate at the time the loan was made; \(^{255}\)

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\(^{250}\) Ibid.


\(^{253}\) Section 24(1), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.

\(^{254}\) Section 25(3), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.

\(^{255}\) Section 25(4)(a), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.
• the debtor’s age, experience, business capacity and state of health;\(^\text{256}\)
• the degree to which the debtor was under financial pressure at the time the loan was made;\(^\text{257}\)
• the degree of risk accepted by the creditor;\(^\text{258}\) and
• the creditor’s relationship to the debtor.\(^\text{259}\)

(B) Common law remedies for entering into loan contracts

4.208 Interest rates below 48\% may entitle MDWs to certain common law remedies, provided they can show that the interest rate is substantially higher than the one that can be obtained by salaried residents in Hong Kong.\(^\text{260}\)

4.209 Such remedies include setting aside the loan for unconscionable bargain. The claimant will have the burden of proving the loan constituted an unconscionable bargain. Nevertheless, if the MDW entered into the loan contract with exceptionally high interest rates in a position of vulnerability, the burden of proof to discharge the contract may not be so heavy, although no cases filed against loan agencies by MDWs were found by date of publication. See Chapter 2, Section 4(I)(c), for unconscionable bargain.

VIII. Non-monetary employment disputes

4.210 Non-monetary employment disputes are those not directly related to pecuniary payments. Examples include unsafe living conditions and insufficient food provision. MDWs may bring claims against employers for breaching the Standard Contract and/or the implied terms.

(A) Actions that breach the Standard Contract

4.211 Aside from salary issues, MDWs may face situations that breach the minimum provisions of the Standard Contract. Some of the most common issues are being assigned work duties outside those stipulated in the Standard Contract, and not be provided with food or food allowance. See Chapter 2, Appendix A, for a sample of Standard Contract.

4.212 Employers who breach the Standard Contract may not only be liable for damages, as discussed in Chapter 2, Section 4(IV), breach of standard contract for monetary employment disputes, but may also be refused future applications to employ MDWs.\(^\text{261}\)

\(^{256}\)Section 25(5)(a), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.
\(^{257}\)Section 25(5)(b), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.
\(^{258}\)Section 25(6)(a), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.
\(^{259}\)Section 25(6)(b), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.
\(^{260}\)Section 25(2), MLO (Cap 163). See Chapter 2, Section 7.VIII. for the text of the law.
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(i) Breach of contractual provisions regarding work duties

4.213 The Standard Contract provides that MDWs only perform domestic duties listed in the Schedule of Accommodation and Domestic Duties, namely:

- household chores;
- cooking;
- looking after elderly persons in the household;
- babysitting;
- child-minding; and
- others (to be specified).

4.214 Without prior consent from the Commission of Labour, any requirements for the MDW to perform non-domestic work duties amounts to a breach of contract. On grounds of breach, MDWs can claim expectation damages, with MDWs bearing the burden of proof.

(ii) Breach of contractual provisions regarding food provision

4.215 The Standard Contract provides that the employer is obligated to provide the MDW with food free of charge, or a food allowance of no less than HK$964 per month.262

4.216 Refusal to provide either food or food allowance constitutes a breach of contract. Employers will be liable for the cost of the food, and for any other relevant damages that the MDW incurs.

(B) Breach of implied terms

4.217 Implied terms that may be breached include poor or unsafe living conditions, provided either by employers or employment agencies.

(i) Poor/unsafe living conditions

4.218 MDWs may face poor or unsafe living conditions provided by employment agencies and/or employers, depending on particular situations explained below. This gives rise to remedies on grounds of personal injury or employment compensation, tort of negligence, or the breach of Occupiers’ Liability Ordinance.

(a) What happens when employment agencies provide poor or unsafe living conditions?

4.219 In cases where poor or unsafe living conditions are provided by employment agencies, the problems and remedies are explained below.

262 Ibid, at 5.
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Problems

4.220 Some common issues faced by MDWs include employment agencies providing poor or unsafe living conditions, either upon the MDW’s arrival in Hong Kong, or during the MDW's stay with the employment agency in the two-week period of job hunting upon termination of contracts. Conditions can include living in warehouses, balconies, or cramped spaces without amenities.

4.221 In some cases, these environments can pose a mortal risk. A 2015 incident involved an MDW being killed by a huge falling concrete slab while she was sleeping in the balcony of a guesthouse run by her employment agency.\(^{263}\)

Remedies

4.222 Possible remedies available to MDWs in circumstances where poor or unsafe living conditions are provided include:

- if the MDW suffered injury or illness as a result of the poor conditions of the boarding house provided by the agency, damages may be recovered on grounds of personal injury or employment compensation claims. See Chapter 2, 5.I.(D), for Employees' Compensation Ordinance;

- if it can be shown that the employment agency lowers the quality of boarding house conditions for MDWs for the purpose of saving costs to make profits, punitive damages may be awarded against the agency, see Chapter 2, Section 7.XIII.(A)(i)(b), for punitive damages;

- an action under the tort of negligence where personal injury occurs, see Chapter 2, Section 5.II.(B)(i); and

- a claim against the employment agency for failing to ensure that visitors, MDWs in this context, are reasonably safe, pursuant to Occupiers’ Liability Ordinance (Cap. 314), see Chapter 2, Section 5(II)(C)(i), for Occupiers’ Liability Ordinance.

4.223 As there is no express term in the employment agency contracts requiring the agencies to provide for the safety of MDWs, breach of contract seems not to be a direct claim for MDWs.

(b) What happens when employers provide poor or unsafe living conditions?

4.224 The problems and associated remedies for poor or unsafe living conditions provided by employers is explained below.

Problems

4.225 Employers may provide MDWs with poor or unsafe living conditions, due to the commonly small size of residential flats in Hong Kong. It is not uncommon for an

MDW to share a room with family members of their employers, live in small storerooms or even sleep in the toilet, kitchen or corridor. 264

**Remedies**

4.226 Possible claims include an action for damages, on the grounds of breach of an implied term in the employment contract to provide a safe living environment to employees. 265

4.227 MDWs may be entitled to ‘reliance damages’, which refer to the expenses or losses incurred by the innocent party for the employer’s breach of implied terms, given that expectation damages may be difficult to calculate. For example, the MDW may claim for expenses or losses incurred upon living in an unsafe environment provided by the employer.

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5. Injuries

5.1 This section discusses injuries that MDWs may suffer on or off the job. As proving the injury occurred, as well as who caused the injury is often fact specific, this section will discuss potential remedies in terms of the elements of the remedy that must be proven, and who bears the initial burden of proof. Case examples are provided to illustrate the claims discussed. The section includes discussions on the tort of deceit, unintentional harms and intentional harms.

I. The Tort of Deceit

5.2 This sub-section covers a tort that does not involve physical injury, but rather deceptive practices that have been covered in previous sections. For other tort claims, see section 5 below.

5.3 In the context of MDWs, an employer may promise to pay an MDW a higher wage after completing certain additional duties, but fail to do so after the duties are performed. This is only one of the situations in which an MDW may bring an action for deceit.

5.4 The tort of deceit arises when the plaintiff relies on a false statement made by the defendant, and subsequently suffers a loss, usually monetary in nature. Unlike a claim of misrepresentation under contract law, the tort of deceit does not require the plaintiff and defendant to have a formal contractual relationship. However, where there is a contractual relationship, the plaintiff may bring claims under both contract law and tort.

(A) Considerations for bringing a claim under the tort of deceit

5.5 The advantages of bringing a claim under the tort of deceit include the fact that:

- there is no need to demonstrate a contractual relationship or even a duty of care owed to the plaintiff;
- contributory negligence is inapplicable,
- and the time limit for bringing a claim only starts after the fraud is discovered with reasonable diligence.

5.6 Point to Note: as in most tort cases, the plaintiff bears the burden of proving deceit on the balance of probabilities. (i.e. that something was more likely than not to have happened.

(B) What is a false representation?

5.7 False representation: there are two kinds of false representation – those relating to facts, and those relating to opinions of the law. The former refers to untrue claims about factual statements, whilst the latter refers to untrue statements

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266 Standard Chartered Bank v Pakistan National Shipping Corporation (Nos. 2 & 4) [2003] 1 AC 959, [11], where the court dealt with S1(1) and S4 of the Law Reform (Contributory Negligence) Act 1945, the relevant provisions of which are the same as sections 21(1) and (10) of the LARCO (Cap. 23).

267 See Section 26, LO (Cap 347). The claimant must establish that they could not have discovered the fraud without exceptional measures. See Chapter 2, Section 7.VI. for the text of the law.
made about the law or the statement-makers’ opinions of the law. A defendant may be held liable for ambiguous misrepresentation as well.

5.8 Misrepresentation of fact: a misrepresentation of fact can be oral or written, and it is not necessary that an entire representation be false. A partial statement of fact made whilst withholding critical information that renders the statement false is also a misrepresentation for purposes of a claim under deceit. Furthermore, a misrepresentation of fact can also be implied from another party’s conduct.

5.9 An action will only succeed if an employer makes a representation without the intention of fulfilling it. If at the time of making a statement, the employer genuinely meant what they said but then subsequently changed their mind, there is no false representation. In this situation, an MDW may be able to bring a claim for breach of contract instead.

Example case:
If an employer promises – either orally or in writing – to pay an MDW more if the MDW works longer hours, and the employer then fails to follow through, the MDW may bring a claim in contract (provided the agreement between the employer and the MDW can be proven), as well as in tort of deceit. This is because the MDW has relied on the representation of fact by the employer to the MDW’s detriment (working longer hours for no additional pay).

5.10 Misrepresentation of opinion of law: misstatements of law can also lead to an action under the tort of deceit. The plaintiff has to show that the maker of the statement did not honestly hold the opinion of law that he or she represented.

Example case:
An employer makes a misrepresentation about the minimum wage for MDWs under Hong Kong law, and the MDW relies on such information and accepts a lower wage for a certain time period until the MDW discovers the deceit. The MDW may then pursue a claim of deceit on the basis of a misrepresentation of the law.

5.11 Ambiguous misrepresentation: when the truth of a statement is ambiguous, the burden is on the plaintiff to prove that the defendant deliberately misled them, or otherwise made the statement with the intent of leading them to an erroneous meaning. The court will not assign a meaning to the statement.

(C) Establishing the tort of deceit

5.12 Elements: there are four elements that must be present for a deceit claim to succeed:

- the defendant must have made a false representation to the plaintiff;

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269 Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 204, 211 (HL).
270 William Peek v J H Gurney, (1873) LR 6 HL 377, 403.
272 Jorden v Money (1854) 5 HL Cas 185.
274 Ibid.
275 Derry v Peek (1889) LR 14 App Cas 337.
• the defendant must have known the representation was false, or was reckless as to whether it was true or false;\textsuperscript{276}

• the defendant intended that the plaintiff would rely upon the representation in carrying out some action;\textsuperscript{277} and

• the plaintiff acted in reliance upon the representation and consequently suffered loss.\textsuperscript{278}

5.13 **Knowledge of false representation:** a defendant must lack a belief in the truth of a representation. Even if the defendant has no subjective knowledge of its falsehood, the defendant will still be responsible if they made the representation recklessly as to whether or not it was true.

**Example case for the knowledge of false representation (see Chapter 2, Section 7.IV.(D)):**

A third party related to a loan agency persuades an MDW to take a loan from the agency by lying about some features of the loan (e.g., the interest rate and the consequences of taking out the loan). The MDW may then sue the third party under the tort of deceit if the MDW can prove that the third party knew that the representation was false, or had been reckless as to the truth of the representation.

5.14 **Representation acted upon by the plaintiff:** a plaintiff must show that the defendant intended them to act on the representation, thereby causing some sort of loss. Such an intention can be found in instances when the defendant gains a benefit from the plaintiff’s action.\textsuperscript{279} For example, an employer does not pay the prescribed wages after falsely telling an MDW that the minimum wage is lower than it actually is.

5.15 Furthermore, the representation needs not be made directly by the defendant to the plaintiff. Communication, either by the defendant or a third person, to the plaintiff is sufficient so long as the plaintiff acts upon the representation. The plaintiff also need not be the only person to whom the representation is communicated; the plaintiff can be one of a class or group of persons to whom the representation is made.\textsuperscript{280}

5.16 However, if the plaintiff knew of the deceit at the time the representation was made, they have no cause of action.\textsuperscript{281} This is because it cannot be said that the plaintiff actually relied on the representation.

5.17 **Loss recoverable by monetary damages:** the plaintiff must establish that the deceit has actually caused damage.\textsuperscript{282} However, it need not be the only cause of damage. It is sufficient if the representation substantially influenced the action of the plaintiff leading to the damage, and it does not matter if the plaintiff was partly influenced by a mistake of their own.\textsuperscript{283}

\textsuperscript{276} Ibid.
\textsuperscript{277} *Peek v Gurney* [1873] LR 6 HL 377.
\textsuperscript{278} *Attwood v Small* [1838] 6 Cl & F 232; 7 ER 684.
\textsuperscript{279} *Glory Link Investments Ltd v Young Pui York* [2013] HKEC 1962.
\textsuperscript{280} *Swift v Winterbotham* (1872–73) LR 8 QB 244, 253.
\textsuperscript{281} Greatland Property Consultants Ltd v Charis Patria Ltd [2015] HKEC 541.
\textsuperscript{282} *Pasley v. Freeman*, (1789) 3 TR 51.
\textsuperscript{283} *St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96, 107–108 (Evans LJ).
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5.18 If a representation has more than one interpretation and one of the interpretations is true, the plaintiff needs to establish that they were in fact deceived into understanding the representation in a false sense.

5.19 Damages for deceit are intended to restore the plaintiff to the position the plaintiff would have occupied if no false statement had been made or relied upon. Although the damages would usually be monetary losses, they could take other forms, such as compensation for any personal injuries resulting from the representation.

(D) Can the defendant reduce or escape liability?

5.20 Contributory negligence: this cannot be raised as a defence to an action in the tort of deceit. Where a person has been deceived by fraudulent misrepresentation, or wilful concealment of facts, it is no defence that the victim might have discovered the truth by independently making proper enquiries.

5.21 Therefore, in a scenario of underpayment of wages, it is not a defence for an employer, under an action for deceit, to argue that an MDW could have figured out the statutory wages applicable to them on their own.

5.22 Illegality: the claim between the plaintiff and the defendant must not involve unlawful conduct. Due to public policy reasons, courts have refused to provide relief for claims based on illegality.

(E) Remedies for the Tort of Deceit

5.23 Consequential losses: a plaintiff can be compensated for losses suffered, provided that the damage is not too remote. Subject to the obligation to mitigate damage, the plaintiff may recover, for example, lost profits, loss of pay and earnings, damages for injured feelings or inconvenience, or even damages for loss of a chance.

5.24 Aggravated damages: these may be awarded to compensate for any injury to the plaintiff’s feelings by reason of the deceit.

5.25 Exemplary damages: these are awarded when compensatory damages are deemed an inadequate remedy. In the context of deceit claims, they will often be awarded in circumstances where the defendant’s conduct was calculated to make a profit, which may exceed the compensation payable to the plaintiff. Exemplary damages are described as a last resort and are typically only awarded where other available remedies are inadequate to punish and deter the defendant for their conduct.

285 The Directors of the Central Railway Co of Venezuela v Joseph Kisch (1867) LR 2 HL 99.
289 East v Maurer [1991] 1 WLR 461 (CA).
290 Burrows v Rhodes [1899] 1 QB 816.
292 Chaplin v Hicks [1911] 2 KB 786 (CA).
5.26 Currently, the law is not settled with respect to whether exemplary damages can be awarded in an action for deceit. Exemplary damages have been awarded in deceit cases by the Australian, Canadian and British courts, yet, Hong Kong courts prefer not to award them, especially where a sentence has already been handed down in criminal court.

II. Unintentional harms / accidents

(A) Introduction

5.27 In addition to salary and contractual issues, MDWs may suffer harm as a result of accidents in the workplace or elsewhere. Where injury is suffered in the workplace, an MDW may bring a claim against their employer. However, where injury is suffered in another setting, the MDW may bring a claim against the relevant or responsible party. Intentional harms and abuse are covered in Chapter 2, Section 5(II).

5.28 In Hong Kong, there are two ways an MDW can bring a claim against a wrongdoer for unintentional harm:

- via the common law tort of negligence; and
- using Occupier’s Liability under the Occupier’s Liability Ordinance.

5.29 An MDW may be able to claim compensation where they can establish that the MDW suffered actual physical harm or loss as a result of negligence. Whether there is any actual harm or loss suffered is a factual issue for the court to establish.

5.30 Damages are divided into three categories, explained in ascending order of difficulty to the claim:

- **damages for physical injury**: courts will set compensation based on evidence of the damage suffered (such as medical bills), and will also consider amounts set in similar cases in the past.
- **damages for psychiatric injury**: courts are more willing to award compensation for nervous shock that results in medically recognisable physical / mental illnesses, and less willing to award compensation for other emotional trauma that is unaccompanied by physical injury;
- **damages for pure economic loss**: courts traditionally have awarded very limited compensation for pure economic loss.

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296 Such an award was refused in Archer v Brown [1985] QB 401, as the defendant had already been given a sentence by the criminal court. In Hong Kong, Reyes J declined to award exemplary damages in Lau King Ting v Cheng Miu Har (unrep., HCA 1049/2007, [2009] HKEC 505).
297 Occupiers Liability Ordinance (No 36 of 1959) (hereinafter “OLO”).
298 See Chapter 2, Section 5.III.(B) below.
299 See Chapter 2, Section 5.III.(A) below.
300 The courts will seek to restore the plaintiff, as far as compensation can do, to the position he was in before the tort occurred.
301 See Chapter 2, Section 5.II.(B)(i)(d) below.
means a purely financial loss, independent from and in no way consequent on damage to the plaintiff or the plaintiff’s property.\textsuperscript{302}

\textsuperscript{302} An example of pure economic loss is when a worker’s tools are damaged by a defect in the working environment (perhaps caused by the employer’s negligence), making him unable to earn his wages for a duration until the tools are replaced. See Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27.
(B) Claims under the Tort of Negligence at common law

Chart 2-12: An overview of the Tort of Negligence

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<th>ELEMENTS</th>
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**REMEDIES (subject to defences)**

- Compensation
  - Employees’ Compensation Ordinance
  - Damages

- Defences
  - Contributory negligence
  - Voluntariness
  - Illegality

(i) The Tort of Negligence

5.31 Negligence arises when the defendant carelessly causes harm to the plaintiff by either failing to do what a “reasonably prudent person” would do, or otherwise doing what a reasonably prudent person would not do in the circumstances. The “reasonably prudent person” standard is an objective test, so it is irrelevant whether a defendant genuinely believed their actions were prudent.

5.32 Claims of negligence can be brought against anyone, not just someone with a contractual relationship with the plaintiff.

5.33 Burden of Proof: The plaintiff generally bears the responsibility of proving their claim on the balance of probabilities.

5.34 Elements: For a negligence claim to be successful, four elements must be present:

- a legal duty of care must have been owed to the plaintiff (moral and ethical duties will not suffice);
- there must have been a breach of that duty of care;
- the breach of that duty of care must have directly caused the plaintiff to suffer physical or psychological injury or damage; and
- the relationship between the defendant’s actions and the plaintiff’s injury must not be too remote from each other.

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303 Glasgow Corp v Muir [1943] AC 448.
5.35 Without a legal duty of care, no basis exists for a potential negligence claim. A duty of care will arise in the context of particular relationships, including employment relationships. Whether a duty of care does arise between an employer and employee will depend on the circumstances of each relationship. The factors of proximity, foreseeability, fairness and policy have to be taken into account when assessing whether a duty of care arises between two parties.

(b) Omissions

5.36 Omissions, in the context of tort law, refer to situations where a person does not act positively to confer a benefit on another person. One example is when a pedestrian does not warn a blind man that he is about to walk into an excavation site.\textsuperscript{304}

5.37 In general, there is no liability for an omission under the tort of negligence, but liability can be imposed under special circumstances. In particular, an employer has a duty to take reasonable care to ensure that their workplace is safe for employees.\textsuperscript{305}

Example case for Omission (see Chapter 2, Section 7.IX.(D)):

If an employer provides an MDW with a stool or ladder to retrieve household items (such as cups, bowls and plates) from a high kitchen shelf, and the MDW then falls and is injured because they stand on that apparatus on tiptoes, it is unlikely that the employer will be liable.

As MDWs are required to exercise their own judgment in safely executing “everyday acts,” standing on a stool or ladder on one foot, on tiptoes, or otherwise using it in a dangerous manner, would undercut the MDW’s claim.

However, employers should give adequate instructions and proper equipment for MDWs to carry out their tasks. If the employer fails to provide the proper equipment and a “safe environment,” the employer might be liable as the employer has a duty to act in such circumstances.

As with any negligence case, the exact facts surrounding an accident in the workplace will largely determine whether an employer had a duty to act.

(c) Unknown cause of the accident

5.38 For MDWs, many injuries occur inside the home, where witnesses and evidence may be difficult to secure. However, when the precise cause of an injury cannot be found or explained, but is more likely than not the result of a defendant’s act or omission, the doctrine of \textit{res ipsa loquitur} (meaning, “the facts speak for themselves”) applies, and the defendant’s negligence may be implied.\textsuperscript{306}

5.39 A plaintiff may assert that their injury is a result of the defendant’s act or omission on the basis of \textit{res ipsa loquitur} if the following three conditions are satisfied:

\textsuperscript{304} Glofcheski, Rick. \textit{Tort Law in Hong Kong 3rd Ed.} Sweet & Maxwell, 2012, p 251.

\textsuperscript{305} Tam Kam Fai v Michael J design Ltd & ors [2006] HKEC 1820 English Judgment.

\textsuperscript{306} Fong Yuet Ha v Success Employment Services Ltd [2012] HKEC 540 English Judgment at 24. See Chapter 2, Section 7.IX.(D) for a brief summary of the case.
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- the accident happened in such a way that it is not possible for the plaintiff to prove what act or omission caused the accident;
- in the ordinary course of events, such an accident would not happen unless there was negligence; and
- the circumstances surrounding the accident "point to the defendant and the defendant only" as its cause.

5.40 A plaintiff who establishes these elements has made out a case that, at least on its face, shows the defendant was negligent. The defendant then has the burden of proving they were not negligent.

Example case for unknown cause of accident (see Chapter 2, Section 7.IX.(F)):
If a spray gun is applied by the employer to the employee, and the gun is blocked, injuring the employee when he attempts to unblock the nozzle with a pin in order to work, the employee can put forth the argument of *res ipsa loquitur* to hold the employer liable for negligence.

(d) Duty of care in the context of psychiatric Injury

5.41 Where an MDW is clinically diagnosed as suffering a recognized mental injury – whether or not in connection with a physical injury (e.g., battery)– they may be able to claim damages for psychiatric injuries. Generally, signs of depression, grief or anxiety that result from traumatic events, such as the death of a loved one, are usually not sufficient to claim compensation.

Primary Psychiatric Victim

5.42 Primary psychiatric victims include persons who:
- suffer psychiatric injury together with physical injury;
- have a fear of being physically injured despite no accompanying physical injury, or
- are subject to undue stress and humiliation as a result of the defendant’s negligence.

5.43 A primary victim may be able to claim damages as long as the physical injury they suffered or feared was reasonably foreseeable.

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307 Ng Chun-pui v Lee Chuen-tat & Another [1988] 2 HKLR 425. The Privy Council affirmed that under *res ipsa loquitur*, the legal burden is not shifted onto the defendant.

308 Individuals suffering from psychiatric injury are generally classified as either primary victims or secondary victims. However, the discussion below only focuses on primary victims as it is exceedingly unlikely that an MDW would ever become a secondary psychiatric victim (i.e., a person who suffers Post Traumatic Stress Disorder after witnessing a sudden, traumatic event involving death or injury to others without accompanying physical injury to themselves). To date, there has been only one successful claim by secondary psychiatric victim in the courts in Hong Kong – see Lee Wah v Lok Wai Wah [2015] HKEC 1323 English Judgment.

309 In Page v Smith [1996] AC 155, the plaintiff suffered psychiatric harm as a result of being exposed to, but escaping, instant physical harm. Despite avoiding any physical injury, the court still found a duty of care. The House of Lords also stated that the test for duty of care for psychiatric injury was whether there was reasonable foreseeability of any injury. See also Rothwell v Chemical & Insulating Co Ltd [2008] AC 281.

310 In T v Kan Ki Leung [2002] 1 HKLRD 29 English Judgment, the plaintiff student was subjected to overly zealous forms of discipline, such as public humiliation by the teacher, and developed schizophrenia. The defendant teacher was liable for the plaintiff's psychiatric injury.
Primary psychiatric injury resulting from work

5.44 In the context of MDWs, primary victims are most commonly those who suffer occupational stress as a result of overworking, or harassment from their employer, employer's family or colleagues.\textsuperscript{312}

5.45 An MDW may pursue a negligence claim against their employer in circumstances where the MDW suffers a nervous breakdown as a result of the stress caused by working excessively long hours. This is currently the position under UK law,\textsuperscript{313} and although it is believed that Hong Kong might assume the same position, this has yet to be formally tested.

Example case of primary psychiatric injury (see Chapter 2, Section 7.IX. (E) for a brief summary of the case):

If an MDW suffers a nervous breakdown after working 18 hours per day under demanding and harsh conditions, and the MDW has previously made a complaint to her employer who did nothing to improve her situation, the MDW may be able to establish a claim in negligence against the employer for failing to take steps to alleviate her stress.

(e) When is a duty of care breached?

5.46 Moving on to the second element of negligence, after establishing a duty of care, a plaintiff must prove that the defendant breached that duty by failing to meet an objectively reasonable standard of care. Courts will take into account all relevant circumstances of a case in making this determination.\textsuperscript{314}

Example case when a duty of care is breached (adapted from Chapter 2, Section 7.IX.(A) for a brief summary of the case):

An employer’s dog bites an MDW, causing serious injury. If the dog had attacked others before and the employer knew or should have known about these incidents, the employer will be held liable, as the employer has failed to take proper measures to protect the MDW (and others) from the dog.

\textsuperscript{311} Page v Smith [1996] AC 155 (n 298 above).


\textsuperscript{313} See Mark Hone v Six Continents Retail Ltd [2005] EWCA Civ 922.

\textsuperscript{314} Relevant circumstances include the likelihood that someone may be injured, the seriousness of the injury which may occur, the social value of the activity which gave rise to the risk, and the cost of preventative measures. See Tomlinson v Congleton Borough Council [2004] 1 AC 46 at 34.
A plaintiff must prove that the defendant's breach of duty effectively caused or substantially contributed to their injuries. In considering this issue, the court will generally determine whether the plaintiff's injuries would have occurred without the defendant's breach of duty.

Can the defendant escape or reduce their liability?

Contributory Negligence: a defendant may claim that despite any negligence on their part, the plaintiff contributed to the cause of their injuries. Contributory negligence is a partial defence and the defendant has the burden of proving that "the plaintiff did not take reasonable care of himself and was negligent, thus contributing to his own injuries." In the event that such a defence is successful, the damages the plaintiff can recover will be reduced by an amount the court deems just, in light of the role that the plaintiff’s own actions had in contributing to the harm.

Voluntariness: a defendant may raise a defence of voluntariness (volenti non fit injuria) in circumstances where the plaintiff voluntarily consented to the risk of harm, with full knowledge of the nature and extent of the risks. Voluntariness is a complete defense against liability. However, it is exceedingly difficult to substantiate, no cases showing a successful plea of voluntary assumption of risk were found in Hong Kong.

Illegality: a defendant may seek to avoid liability by claiming that the plaintiff was engaged in illegal activities at the time they were injured. Illegality (ex turpi causa) is a complete defence against liability, but there must be sufficient connection between the illegality and the accident, and the illegal conduct must be sufficiently grave. In determining this, the court will examine all the circumstances, including the nature of the illegality, the level of moral and criminal culpability, the plaintiff’s conduct, and any relevant legislation.

In the context of MDWs, the illegality defence may be particularly relevant in circumstances where an MDW (as a plaintiff) is injured in the course of an illegal
employment arrangement (for instance, undertaking part-time work outside their regular place of employment).

Example case for illegality defence (see Chapter 2, Section 7.IX. (B) for a brief summary of the case):

Where an MDW has been injured in the course of conducting work beyond the scope of their employment contract (for instance, by helping out at their employer’s shop), the MDW may still be awarded compensation if the court is of the view that their illegal conduct is not sufficiently grave to deprive them of damages. Additionally, if an MDW was pressured to work illegally at the employer’s shop by the employer, the MDW may be able to claim duress and thus the employer may not be able to escape liability.

(h) Limitation Period for Making Claims:

5.53 The time limit for claiming personal injury is three years from the date on which the injury occurred, or three years from the date when the plaintiff came to know of the injury, whichever is later.

5.54 In determining when a plaintiff first came to know of the injury, the court will take into account the date on which the plaintiff first had knowledge of the following factors:

- that the injury in question is significant;
- that the injury is attributable in whole or in part to the allegedly negligent act;
- the identity of the defendant; and
- where it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting an action against the defendant.

5.55 The plaintiff’s knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

5.56 Burden of proof: the preliminary burden of establishing that the date of knowledge of injury falls within the limitation period rests upon the plaintiff. Defendants will sometimes seek to show that the plaintiff should have known of the injury earlier (i.e. constructive knowledge), and thus the limitations period should also have started earlier. Defendants seeking to do so bear the burden of proof.

5.57 If the injured person dies before the expiration of the three year limitation period described above, the limitation period will then be three years from the date of death.

322 See for example Yim Tat Fai v Attorney-General [1986] HKLR 873, where the court focused on a moral assessment of the plaintiff’s conduct in deciding whether or not to accept the defence of illegality.

323 The test for knowledge is an objective, reasonable standard. See A v Hoare [2008] 2 All ER 1. The word “knowledge” does not mean “know for certain beyond possibility of contradiction,” but rather “know with sufficient confidence to justify embarking on the preliminaries of [issuing a claim].” See Gallagher v Ministry of Defence [1998] 4 IR 457.

324 Section 27(1), LO (Cap 347). See Chapter 2, Section 7.VI. for the text of the law.

325 Section 26(6), LO (Cap 347). See Chapter 2, Section 7.VI. for the text of the law.

death, or the date of the personal representative's knowledge, whichever is later.\textsuperscript{327}

(C) Claims in Occupier's Liability under the Occupiers' Liability Ordinance

5.58 When an MDW is injured within certain premises, the MDW may bring a claim based on Occupier's Liability, in addition to claims grounded in the tort of negligence. Occupiers' Liability is governed by the Occupier's Liability Ordinance (No 36 of 1959) ("OLO")\textsuperscript{328} and is important to MDWs who may be injured on the premises where they both work and live.

5.59 Unlike the tort of negligence, Occupier's liability is wide enough to hold an occupier liable for injuries caused by his failure to take affirmative action to ensure safety of persons at risk of injury.\textsuperscript{329}

5.60 It is important to note that the court may view an MDW working in a home as visitor and an occupier with control of the premises in certain circumstances, for instance, when the employer is on vacation.\textsuperscript{330} It is thus important to consider whether an MDW may actually be considered an occupier prior to pursuing a claim under the OLO.

(i) Occupiers' liability

5.61 Burden of proof: the plaintiff has the burden of proving their claim on the balance of probabilities.

5.62 Elements: five elements are crucial to a claim under Occupier's Liability:

- the defendant is an occupier;
- the plaintiff is a visitor;
- the venue where the injury occurred is a premises;\textsuperscript{331}
- the occupier has breached the common law duty of care;\textsuperscript{332} and
- the plaintiff suffered an injury as a result.

(a) Who are the occupiers?

\textsuperscript{327} Section 27(5), LO (Cap 347). “Personal representative” is a general term for the person who has the right and responsibility to manage a deceased’s person’s estate. If there is more than one personal representative, and their dates of knowledge are different, the earliest date is the relevant one (Section 27(10), LO (Cap 347)). See Chapter 2, Section 7.VI. for the text of the law.
\textsuperscript{328} See n 310 above.
\textsuperscript{329} Glofcheski, Rick. Tort Law in Hong Kong 3rd Ed. Sweet & Maxwell, 2012, p 342
\textsuperscript{330} The difference between a visitor and an occupier lies in whether the person has control of the premises, which will depend on the circumstances of each case. If the person has control of the premises, it is more likely that he is an occupier, as opposed to a visitor.
\textsuperscript{331} The rules enacted in relation to an occupier and his visitors extend, under the OLO, to “any fixed or moveable structure, including any vessel, vehicle or aircraft” (Section 2(3)(a), OLO (Cap 314)). In addition to a building, its entranceway, lobby, podium, awnings, scaffolding and so on will also count as part of the premises. Past cases have held that elevators, escalators, digging machines, trains, motor coaches, ladders and stools are all considered to be premises under the OLO (Section 2 (3)(a), OLO (Cap 314)).
\textsuperscript{332} Chapter 2, Section 5.II.(C)(i)(c) below.
5.63 The OLO does not define an “occupier”, but common law considers an occupier to be a person or persons with control over the premises in which the injury occurred, regardless of whether they were the owner(s) of the premises. 333

Example case for identifying a defendant occupier (see Chapter 2, Section 7.X.(B) for the brief summary of the case):

A dog owned by an employer's brother bites an MDW in a house where the MDW, the employer, the dog and the employer's brother live. The house is registered under the name of the employer's brother, but he often travels outside Hong Kong and spends minimal time at the house. The MDW will likely not be able to pursue the brother as the defendant occupier, because his frequent and lengthy absences are likely to mean that he does not have sufficient control of the premises. In such a case, the employer is likely to be the occupier with sufficient control of the premises.

(b) Who are the visitors?

5.64 The OLO does not define a “visitor”, but common law considers a visitor to be a person who is treated as an invitee or licensee. This means that a visitor must have permission to enter the premises either expressly (orally or in writing), or impliedly from custom. For instance, customers have implied permission to enter a shop.

5.65 Other factors that may be considered when determining whether a person had permission to enter certain premises, are the duration and purpose of their visit.

Example case for identifying plaintiff visitor (see Chapter 2, Section 7.X.(C)):

While enjoying a meal at a restaurant with the employer’s family, a ceiling light falls and hits an MDW. The MDW suffers head injuries as a result. In such circumstances, the MDW is likely to be a legal visitor to whom the occupier of the restaurant (probably the owner and/or the manager) owes a duty of care.

(c) When is the common law duty of care breached?

5.66 An occupier of premises owes a common duty of care to all lawful visitors. It is an affirmative duty, which means that the occupier has to take active precautions against any foreseeable harm within the premises, and ensure that visitors are reasonably safe (for instance, by permanently affixing warning signs near hazard areas etc.).

5.67 It is important to note that occupiers may restrict or exclude their liability if there is mutual agreement. In addition, there is no duty if the visitor willingly accepts the risks. 334 However, the courts will likely be reluctant to find that MDWs voluntarily or willingly accepted the risks associated with working in their employers’ homes, as MDWs are acting under the compulsion of a duty and not in a position to choose freely. 335

334 Section 3(5), OLO (Cap 34).
(d) Necessary causal link between the breach of duty and the injury suffered

5.68 As with common law negligence, causation is also necessary for a successful claim under Occupier’s Liability. Accordingly, an MDW must be able to prove that, but for the defendant occupier’s breach of duty of care, the injury would not have occurred.

(e) Can the defendant escape or reduce his liability?

5.69 Contributory negligence, voluntariness, and illegality defences are all available for an action involving occupiers’ liability.\(^{336}\)

(D) Employees’ Compensation Ordinance (ECO)

(i) Overview of Employees’ Compensation Ordinance

5.70 The Hong Kong’s Employees’ Compensation Ordinance (“ECO”)\(^{337}\) provides for payment of compensation to employees who are injured in the course of their employment. It also sets out the rights and obligations of employers and employees in relation to injuries or death caused by accidents occurring in the course of employment.

5.71 An employee is any person who has entered into or works under a contract of service or apprenticeship.\(^{338}\) Accordingly, MDWs are categorized as employees and covered by the ECO.

5.72 All employers are required to take out an insurance policy for every employee for an amount set out in the ECO.\(^{339}\) MDWs are thus also protected by insurance if they suffer any work-related injuries.\(^{340}\)

(ii) Employer’s liability for compensation

5.73 If an MDW sustains an injury in the course of employment that results in partial, serious, or permanent incapacity, or death,\(^{341}\) their employer is likely to be liable to pay compensation under the ECO.

5.74 An employee’s own negligence or fault in causing the accident does not prevent the employee from obtaining compensation, but the damages recoverable will be reduced according to the degree in which the employee contributed to the accident.\(^{342}\) (emphasis added)

5.75 Elements: there are three elements that plaintiffs must demonstrate to successfully make a claim:

\(^{336}\) See Chapter 2, Section 5.III.(E) below.

\(^{337}\) ECO (Cap 282).

\(^{338}\) Section 2(1), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

\(^{339}\) An employer who fails to take out employee’s compensation insurance commits a criminal offence and shall be liable to a fine up to HK$100,000 and to imprisonment up to 2 years (Section 40, ECO (Cap 282)).

\(^{340}\) Note also the Standard Employment Contract (ID 407) Clause 9 (see Appendix A) stipulates that the employer should provide free medical treatment for the MDW who is ill or suffering from personal injury not attributable to his/her employment, which is not normally covered by insurance policy for the purposes of the ECO.

\(^{341}\) Section 5, ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

\(^{342}\) Section 21(1), LARCO (Cap 23). See Chapter 2, Section 7.V. for the text of the law.
• The injury was suffered as the result of an accident;\textsuperscript{343}
• the accident \textit{arose out of the plaintiff's employment},\textsuperscript{344} and
• the accident \textit{arose in the course of the plaintiff's employment}.\textsuperscript{345}

(\textit{emphasis added})

5.76 “Arose in the course of the plaintiff’s employment” means that the accident must have occurred “\textit{in the course of the work which the employee is employed to do and what is incident to it}.”\textsuperscript{346}

5.77 For example, an MDW falls from a ladder and sustains injury to her arms and back while cleaning windows. Since the act of cleaning windows is customary in the duties of a typical MDW, the accident is likely to be regarded as occurring in the course of employment. So long as the task undertaken by the MDW at the time of the injury is one which the employer expects the MDW to do, the injury will have arisen in the course of employment.

5.78 Section 5(4) of the ECO includes provisions that may assist employees in establishing that injuries arose out of, and were sustained in the course of, their employment. Accidents will be deemed to have arisen out of and in the course of employment if the accidents happened:

• when the employee was carrying out work for the purposes of and in connection with the employer’s trade or business, even if the employee lacked specific instructions from the employer;\textsuperscript{347} or

• while the employee was travelling to or from their place of work, by a means of transport operated or arranged by their employer.\textsuperscript{348}

5.79 However, under the ECO an employer is not liable to pay compensation in circumstances where:\textsuperscript{349}

• the injury does not result in permanent incapacity and prevent the employee from earning full wages at their normal work;\textsuperscript{350}

• the injury is a deliberate self-injury by the employee;\textsuperscript{351}

• the employee has misrepresented to the employer that he was not suffering, or had previously suffered, from a similar injury,\textsuperscript{352} and

\textsuperscript{343} This is the basic requirement of causation.
\textsuperscript{344} Section 5(1), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
\textsuperscript{345} Section 5(1), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
\textsuperscript{346} \textit{Charles R Davidson \& Co v McRobb} [1918] AC 304 at 314. There must be causation (\textit{Dover Navigation Co Ltd v Craig} [1940] AC 190, per Lord Wright), and so the court will generally consider whether the accident giving rise to the injury arose from a risk inherent in, or incidental to, the performance of the work (\textit{Dennis v AJ White \& Co} [1917] AC 479) ((Rick Glofcheski, Farzana Aslam, \textit{Employment Law and Practice in Hong Kong}, Sweet \& Maxwell Hong Kong, 2011) Paragraph 11.042). If an MDW can show that their accident “\textit{arose in the course of employment}”, the accident will also be deemed to “\textit{arise out of their employment}”, unless there is evidence to the contrary (Section 5(4)(a), ECO (Cap 282)). See Chapter 2, Section 7.I. for the text of the law).
\textsuperscript{347} Section 5(4)(b), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
\textsuperscript{349} Section 5(2), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
\textsuperscript{350} Section 5(2)(a), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
\textsuperscript{351} Section 5(2)(b), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
\textsuperscript{352} Section 5(2)(c), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.
• the accident causing the employee’s injury is (i) directly attributable to their own drug addiction, or (ii) sustained when the employee was under the influence of alcohol and the injury suffered does not result in death or serious and permanent incapacity.

(iii) Making a claim for employees’ compensation

5.80 Before claiming compensation it is important that an MDW employee first inform their employer of any injuries suffered in the course of their work. The MDW should also promptly seek medical treatment once they become aware of any injuries.

5.81 It is an employer’s duty to report any accidents causing death or injury to their employees to the Commissioner for Labour within 14 days after the accident has come to the employer's knowledge, regardless of whether the accident gives rise to any liability to pay compensation.

5.82 If there is no private settlement concerning employees’ compensation liabilities between an MDW and their employer, the parties can seek assistance from the Employees’ Compensation Division (“ECD”) of the Labour Department, which will provide advice and assist in any required investigation. However, the ECD has no legal authority to adjudicate employee compensation claims, so where a settlement cannot be reached with the ECD’s help, the MDW should lodge a compensation claim with the District Court within 24 months from the date of the accident.

Practical points:

It is highly advisable for an MDW to immediately notify their employer of any work injury (regardless of its seriousness) and to provide medical reports and receipts for medical treatment. MDWs should keep a copy of all documents for their own records, including the originals if possible. MDWs can also provide the medical information to the Labour Department for follow up / investigation where their employer is uncooperative.

(iv) Types of compensation and maximum amount claimable

<table>
<thead>
<tr>
<th>Type of Compensation</th>
<th>Amount Claimable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical expenses and cost of medicines</td>
<td>• A maximum of $200 or $280 per day See Table 2-14 below</td>
</tr>
<tr>
<td>Permanent partial incapacity</td>
<td>• [Amount of compensation due to permanent total incapacity] x [% of permanent loss of</td>
</tr>
</tbody>
</table>

354 Section 15, ECO (Cap 282). Note also that Form 2 is to be used for work injury resulting in temporary incapacity for more than 3 days, while Form 2B is to be used for work injury resulting in temporary incapacity for not more than 3 days – see http://www.labour.gov.hk/eng/form/ecd/pdf/NA.pdf For Form 2, see http://www.labour.gov.hk/eng/form/ecd/pdf/f2.pdf?formref=LAB-F008 For Form 2B, see http://www.edb.gov.hk/attachment/en/sch-admin/admin/about-sch/sch-safety/15EC%20Form%202B_E.pdf.
355 The District Court has exclusive jurisdiction over claims brought under the ECO, see Section 21, ECO (Cap 282). See Chapter 3, Section 3.III.(B).
### Type of Compensation | Amount Claimable
--- | ---
Permanent total incapacity | • 48 – 96 months’ of earnings depending on the MDW’s age; OR
| • $386,110 (for injuries that occurred between 21/7/2012 and 4/3/2015) or $426,880 (for injuries that occurred on or after 5/3/2015), whichever is higher.

Injury resulting in death | • 36 – 84 months’ of earnings depending on the MDW’s age; OR
| • $340,040 (for injuries that occurred between 21/7/2012 and 4/3/2015) or $375,950 (for injuries that occurred on or after 5/3/2015), whichever is higher.

#### 5.83 Payment of medical expenses and cost of medicines:

An employer is liable to pay medical expenses (subject to the daily maximum amount of medical expenses payable stipulated in the ECO), with respect to any period during which the employee receives medical treatment from a registered medical practitioner, a registered Chinese medicine practitioner, or a registered dentist, until they certify that no further treatment is required.

**Table 2-14: Daily maximum medical expenses payable by an employer**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>The medical expenses for each day an employee stays in the hospital and is given medical treatment as an in-patient.</td>
<td>$200</td>
</tr>
<tr>
<td>The medical expenses for each day an employee is given medical treatment other than as an in-patient in a hospital.</td>
<td>$200</td>
</tr>
<tr>
<td>The medical expenses for each day an employee is given medical treatment both as an in-patient in a hospital, and other than as an in-</td>
<td>$280</td>
</tr>
</tbody>
</table>

---

356 Sections 10A(5); (5A); (5B) and section 10AB(2), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

357 The medical expenses payable include but are not limited to, fees for consultation, any surgical or therapeutic treatment, cost of nursing attendance, hospital accommodation as an in-patient, medicine, curative materials and medical dressings. See Section 3, ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

358 An employer is only liable for the cost of medicine prescribed for the direct treatment of an injury, not for the cost of medicine simply geared towards the maintenance of general health. See Section 10AB(2), ECO (Cap 282).

5.84 **Compensation for temporary incapacity:** during a period of temporary incapacity, an employer shall make periodic payments to the employee. These payments must be 80% of the difference between the monthly wages that the employee was earning at the time of their accident, and the monthly earnings which they are earning (or are capable of earning), in some suitable employment during the period of their temporary incapacity after the accident. However, given that an MDW is only entitled to work for one employer, this is likely to be the full amount.

5.85 The periodic payment shall be payable on the same days as wages would have been payable.

5.86 The ECO prohibits an employer from terminating the employment contract of any employee who is entitled to employees’ compensation when such a claim is pending.

5.87 **Compensation for permanent partial incapacity:** in cases where an employee experiences permanent partial incapacity, the compensation is determined in accordance with the table below.

<table>
<thead>
<tr>
<th>Amount of compensation due to permanent total incapacity</th>
<th>% of permanent loss of earning capacity</th>
</tr>
</thead>
</table>

5.88 Compensation is payable if the injured employee suffers from permanent incapacity and is unable to perform the essential actions of life without the assistance of another person. The Court may award:

- an amount up to HK$511,700 that it considers necessary;
- an amount up to HK$511,770 as specified by the ECO and set down in an agreement entered into by the employer and the injured MDW, and approved by the Commissioner for Labour.

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362 Standard Employment Contract (ID 407) Clause 4(b); see Chapter 2, Section 7.XV.
364 Section 48(1), ECO (Cap 282).
365 Section 9, ECO (Cap 282); A Concise Guide to the Employees’ Compensation Ordinance, Labour Department, p. 11 (n. 183, above).
366 An example of a person unable to perform the essential actions of life is where assistance is needed for care in his hygiene, exercise, and feeding etc – see Kong Hoi Lam v Cheung Yuk Kwan [2013] HKEC 1630 English Judgment.
367 Section 8(1)(a), ECO(Cap 282). However, for work injuries caused by accidents, or prescribed occupational diseases contracted between 21 July 2012 and 4 March 2015, the maximum amount of compensation for employees requiring attention is $462,890, see A Concise Guide to the Employees’ Compensation Ordinance (n. 183 above) p 16.
368 Section 8(1)(b), ECO (Cap 282). However, for work injuries caused by accidents, or prescribed occupational diseases contracted between 21 July 2012 and 4 March 2015, the maximum amount of compensation for employees requiring attention is $462,890; see A Concise Guide to the Employees’ Compensation Ordinance (n. 183 above) p 16.
5.89 **Compensation for cases of permanent total incapacity:** where an employee suffers permanent total incapacity, the amount of compensation will be determined as per the table below.\(^{369}\)

\(^{369}\) Section 7, ECO (Cap 282); see A Concise Guide to the Employees’ Compensation Ordinance (n. 183 above) p 10.
Table 2-16: Calculation of compensation for permanent total incapacity

<table>
<thead>
<tr>
<th>Age of Injured Employee</th>
<th>Amount of Compensation</th>
<th>Or minimum amount of compensation, whichever is higher</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 40</td>
<td>96 months’ earnings</td>
<td>- For injuries suffered or prescribed occupational diseases contracted on or after 5/3/2015: $426,880</td>
</tr>
<tr>
<td>40 to under 56</td>
<td>72 months’ earnings</td>
<td>- For injuries that occurred between 21/7/2012 and 4/3/2015: $386,110</td>
</tr>
<tr>
<td>56 or above</td>
<td>48 months’ earnings</td>
<td></td>
</tr>
</tbody>
</table>

5.90 **Compensation in fatal cases:** if the death of an MDW results from injury, the MDW’s family can claim compensation in accordance with the following table.

Table 2-17: Calculation of compensation for injury resulting in death

<table>
<thead>
<tr>
<th>Age of Deceased Employee</th>
<th>Amount of Compensation</th>
<th>Minimum amount of compensation, whichever is higher</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 40</td>
<td>84 months’ earnings, OR</td>
<td>- For injuries suffered or prescribed occupational diseases contracted on or after 5/3/2015: $375,950</td>
</tr>
<tr>
<td>40 to under 56</td>
<td>60 months’ earnings, OR</td>
<td>- For injuries occurring between 21/7/2012 and 4/3/2015: $340,040</td>
</tr>
<tr>
<td>56 or above</td>
<td>36 months’ earnings, OR</td>
<td></td>
</tr>
</tbody>
</table>

5.91 Besides compensation for death, the employer is also liable for reimbursement of any funeral and medical attendance expenses, up to a maximum amount of HK$76,220.

III. **Intentional harms**

5.92 Aside from workplace accidents, MDWs may also face physical abuse in the course of their employment. This kind of “intentional harm” is anecdotally prevalent amongst MDWs. The mandatory “live in” policy forces MDWs to live and work in close proximity to their employers, making them even more vulnerable to physical abuse. At the same time, the hidden nature of violence

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370 Section 6 (1)&(2), ECO (Cap 282); Labour Department, *A Concise Guide to the Employees’ Compensation Ordinance* (n. 191 above) p.16.
371 Section 6 (5) & Sch 6, ECO (Cap 282).
in the home may make such claims difficult to bring, as providing sufficient evidence of who harmed the victim may be difficult. According to a survey conducted in 2014 by Mission for Migrant Workers and Asian Migrants’ Coordinating Body, 110 out of 1000 MDWs alleged that they had experienced direct physical violence from their employers or the employer’s family.\footnote{Mission for Migrant Workers, Migrants Review, Researches and Essays on Migrant Domestic Workers in Hong Kong (November 2014), p.52.}

5.93 When intentional physical or psychological harm occurs, an MDW may bring a claim under the tort of ‘trespass to the person.’

5.94 This tort is also addressed under various criminal law offences. An MDW may wish to report any abuse to the police in order to pursue criminal action. In addition to holding abusive employers accountable, pursuing both criminal and civil action can lead to a greater chance of compensation for the victim, as the underlying facts can support both claims.

5.95 Note however that the court may pause the civil proceedings, pending the outcome of a criminal proceeding.\footnote{Secretary for Justice v Brian Alfred Hall [2009] HKCU 1978 ruled that civil and criminal proceedings can occur in parallel, and civil action may be interfered for the determination of criminal proceedings, the test is whether it is just to interfere with the plaintiff's right to civil claims.}

5.96 A claim for trespass to the person is relatively straightforward, as the claimant does not need to prove that the defendant breached their duty of care, as would be required for a negligence claim. An MDW thus faces fewer hurdles than in other tort actions.

\textbf{(A) Damages}

5.97 Nominal damages: for torts that are actionable per se (i.e. torts that can support a claim even in the absence of actual harm), a plaintiff can be awarded nominal damages. Nominal damages are awarded to recognise that a person’s rights have been infringed and are generally smaller in size.

\textbf{Table 2-18: Summary of intentional harms}

\begin{center}
\begin{tabular}{|l|c|c|}
\hline
Action & Actionable \textit{per se} & Limitation Period \\
\hline
Assault & Yes & 6 years \\
Battery & Yes & 6 years \\
False Imprisonment & Yes & 6 years \\
Intimidation & No, whether physical or psychological (can only be brought alongside other actions) & 6 years \\
Sexual Harassment & Yes & No limit \\
\hline
\end{tabular}
\end{center}

5.98 Compensatory damages: these seek to restore the actual out-of-pocket expenses incurred by a plaintiff due to their injuries (e.g., medical expenses). In addition,
the plaintiff can claim damages for pain and suffering, loss of future income, etc.

5.99 Aggravated damages: these are generally awarded if the circumstances under which the tort was committed caused injury to the plaintiff’s dignity and pride.

5.100 Exemplary (punitive) damages: these aim to punish a defendant’s behaviour. They will often be awarded in circumstances where a plaintiff suffered harm by the arbitrary or unconstitutional action of a government servant, or the defendant’s conduct was calculated to make a profit, which may exceed the compensation payable to the plaintiff. Exemplary damages are described as a last resort and are typically only awarded where other available remedies are inadequate to punish and deter the defendant for their conduct.

5.101 The following subsections discuss claims for intentional physical harm, claims that include intentional wrongful detention and harassment and intimidation, defences to tort claims, remedies available, and claims for deceptive promises.

(B) Claims for intentional physical harm

5.102 A plaintiff may claim assault or battery against a defendant who has intentionally caused them to suffer or to apprehend physical harm.

5.103 An assault is an act which causes the plaintiff to apprehend the infliction of immediate, unlawful force on their person. It does not involve the actual use of physical force, but the plaintiff has to be aware of the defendant’s intention to use such force.

5.104 Assault is often accompanied by acts of battery, which is defined as the intentional, direct and immediate infliction of harmful or offensive bodily contract with the plaintiff which he/she did not consent to.

5.105 Burden of Proof: in both assault and battery cases, the plaintiff bears the burden of proving their claim on a balance of probabilities. (i.e. that it was more likely than not to have happened as alleged)

(i) Assault

5.106 Elements: three elements must be present for assault:

- the plaintiff must be aware of the threat of the use of force;
• there must be a reasonable apprehension of contact,\textsuperscript{383} for example reinforced by bodily movement (subjective fear for one’s safety is not required); and

• the threat must be of immediate force, so the attack must seemingly be possible.\textsuperscript{384} For example, if the plaintiff is driving away in a car, he or she cannot reasonably consider the defendant running alongside the car to constitute a credible attack.

5.107 In some circumstances, words alone may constitute an assault; however assault is more likely to be established if accompanied by threatening conduct.

Example case for mere words as assault (see Chapter 2, Appendix G, for case example 1):
A loan agency constantly phones an MDW, making death threats if she does not repay her loan. Note if the loan agency visits the employer’s house to threaten the MDW, or stops the MDW on the street, the case has gone beyond mere oral threats, and an action in assault would be more likely to succeed.

(ii) Battery

5.108 Any intentional infliction of physical injury may constitute battery. An MDW who is subject to a battery should seek help from the police and undergo a related medical check as soon as possible. The police statement and medical report outlining the injuries suffered will be extremely useful pieces of evidence in establishing the claim.

5.109 Elements: the following four elements must be present for a battery:

• there must be intention to make physical contact (physical harm is not required);\textsuperscript{385}

• bodily contact must have occurred;\textsuperscript{386}

• the contact must have been harmful or offensive; and

• the contact must have been directly and immediately inflicted.\textsuperscript{387}

5.110 In the context of MDWs, cases of battery may arise with hitting, scalding with a hot iron and/or pouring bleach or hot water on MDWs.\textsuperscript{388} It is important to note that acts that constitute a lesser degree of harm will still qualify as battery. It would be a misunderstanding to suggest an MDW can only have a right to bring a case if the MDW suffers from extreme acts of maltreatment and/or violence.

\textsuperscript{383} Thomas v National Union of Mineworkers (South Wales Area) [1986] Ch 20.
\textsuperscript{384} Home Office v Wainwright [2000] QB 1334.
\textsuperscript{385} Livingston v Commonwealth (1857) 14 Gratt (55 Va.) 592.
\textsuperscript{386} Collins v Wilcock [1984] 3 All ER 374.
\textsuperscript{387} Collins v Wilcock [1984] 3 All ER 374.
(iii) Claiming damages for psychiatric harm in an assault and/or battery claim

5.111 Psychiatric harm refers to a medically proven psychological injury. Depending on the context, psychiatric harm can be grave enough that it is possible to recover damages when suing for an intentional tort. An example is fear or depression suffered as a consequence of the defendant's actions or words, which are intended to harm the plaintiff.

Example case for psychiatric harm (see Chapter 2, Appendix G, for case example 2):

If an MDW experiences extreme emotions of fear and depression from threats of violence and acts of disturbance by their employer, the MDW may be able to make a claim for the psychiatric harm inflicted, provided that the harm constitutes medically recognisable illnesses.

(C) Claims for intentional wrongful detention (false imprisonment)

5.112 An MDW may bring a claim for false imprisonment in circumstances where the defendant fully restrained their freedom of movement in an unlawful way without justification or consent.

5.113 While it is not necessary to prove that a plaintiff was under a direct threat from the defendant, the defendant must have conducted the act directly and intentionally against the plaintiff's will, without any legal justification. Even in the absence of direct physical interference, psychological restraint may be sufficient to constitute an action of false imprisonment.

5.114 Elements: the following three elements must be present for a claim of false imprisonment to succeed:

- the defendant intentionally restricted the plaintiff's freedom of movement or disregarded the possibility that the plaintiff would be subject to such restraint and continued to take that risk;
- there was a complete or total restraint on the plaintiff's freedom of movement; and
- the freedom of movement was limited without any lawful justification or authorization.

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389 See Wilkinson v Downton [1897] EWHC 1 QB which is the first English Tort Law decision to recognize the tort of Intentional infliction of emotional distress (IIED) and in Wong Kwai Fun v Li Fung [1994] 1 HKC 549, psychiatric injuries including suicide attempts are sufficient to recover damages.

390 See Wong Kwai Fun v Li Fung [1994] 1 HKC 549 which states that all injuries including psychiatric ones can be recoverable as long as they are damages flowing from the trespass.

391 Chaytor v London, New York and Paris Association of Fashion Ltd and Price [1961] 30 DLR (2d) 527 in which psychological imprisonment means there is no physical restraint but the plaintiff has no practice choice but to obey to the confinement of movement.

392 Bird v Jones (1845) 7 QB 742.

393 See Herd v Meadowdale Steel, Coal and Coke Co Ltd [1915] AV 67 which ruled that restraint will be regarded as total if there is no reasonable means of escape available.

394 Bird v Jones (1845) 7 QB 742.
5.115 **Intentional restraint of freedom of movement:** the defendant must conduct the act that caused the plaintiff’s imprisonment, with the intention of restraining the plaintiff’s movement.

**Example case for intentional restraint of freedom of movement (see Chapter 2, Section 7.IV.(C)(A)):**

If an MDW is locked up at home and not provided with house keys for a prolonged period of time, the MDW may bring a claim of false imprisonment against their employer.

5.116 **Reasonable means of escape:** false imprisonment can be established even if the confinement is in an unbounded area, so long as there is no reasonable means of escape available.\(^{395}\) For example, there would be no practical choice for an MDW who has been confined at their employer’s home to leave if the only option is to jump out a fourth floor window. Such confinement has been called "psychological imprisonment"\(^{396}\) by the court.

**Example case:**\(^{397}\)

An employer cannot find his wallet and then accuses an MDW of stealing his property. The employer prevents the MDW from trying to leave the employer’s home and locks the MDW in a closet for three days, only letting the MDW out to use the bathroom and eat but keeping close watch. In this case, the MDW would be able to sue the employer for false imprisonment, as a reasonable person would believe that the MDW has no reasonable means of escape despite not actually being under arrest.

5.117 **Lack of physical restraint:** physical restraint is not necessary for an act of false imprisonment. It is sufficient if the defendant had total control over the plaintiff and that the act was against the plaintiff’s will. For example, if an employer confiscates an MDW’s passport, phone and other documents or personal effects, it could constitute false imprisonment.

**Example case for the lack of physical restraint needed (see Chapter 2, Section 7.IV. (C)(B) for a brief summary of the case)**\(^{398}\)

If an MDW defaults on a loan, and a loan agent impersonates an immigration officer and follows the MDW around, threatening to send her back to her home country until the MDW is frightened into paying back the loan, the agent’s actions would constitute false imprisonment.

(D) **Claims for harassment and intimidation**

5.118 MDWs may be subjected to intimidation, or sexual and racial harassment in the course of their employment. Given that MDWs live with their employers and risk deportation if they are fired, they may be particularly vulnerable to this kind of mistreatment.\(^{399}\)

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\(^{396}\) See n 404 above, p. 89.


\(^{398}\) Note that the example case based on *Chan Wing Kuen and Another v R* [1995] 1 HKC 470 is a criminal case. *See* Chapter 2, Section 7.IV.(C)(B) for a brief summary of the case.

\(^{399}\) Petersen, *Sexual Harassment in the Workplace* (University of Hong Kong Faculty of Law: Centre of Comparative and Public Law, Occasional Paper No.4, June 2002), p.3.
If the MDW has been subjected to intimidation or harassment, Hong Kong offers three possible remedies: the tort of intimidation at common law, statutory remedies under the Sex Discrimination Ordinance and the Race Discrimination Ordinance for sexual and racial harassment, and remedies for non-trespassory tort under *Wilkinson v Downton*.\(^{401}\)

Note, however, that Hong Kong law is still unsettled as to whether harassment as a tort claim exists.\(^ {402}\) Lawyers may wish to consider whether attempting a claim may be an appropriate strategy for their case.

The Sex Discrimination Ordinance ("SDO") provides protection for employees generally and MDWs in particular areas.\(^ {403}\)

Employees are protected from harassment by employers and by their co-workers (section 23(2)-(3)). Applicants for jobs (section 23(1)) are also protected.\(^ {404}\)

An MDW is protected from sexual harassment from all who dwell within their employer's residence. It is unlawful for "any person who resides on the premises" to harass a domestic helper who works there.\(^ {405}\)

Victims of harassment may claim remedies under the tort of intimidation at common law and/or through legislation such as the SDO and the Race Discrimination Ordinance (RDO). See paragraphs 5.129 and 5.141 below.

(i) Claims for intimidation at common law

The tort of intimidation can be invoked when a defendant uses an unlawful threat to compel an MDW to act or refrain from acting in a particular manner that will cause harm to the MDW.

The following three elements must be present for intimidation:

- the defendant made an unlawful threat;\(^ {406}\)
- there was an intention to cause harm to the plaintiff with the threat;\(^ {407}\)
  and
- damage was suffered by the plaintiff.\(^ {408}\)

Examples of threats could include malicious emails, nuisance telephone calls, surveillance and intrusions of privacy. More serious examples could include filing...
false police reports, and putting up derogatory posters. Note that the latter cases may also amount to intimidation. Practitioners will want to weigh the relative advantages of bringing each claim.

5.128 **Whether threatening to breach an employment contract constitute an unlawful act:** the threat to breach a contract cannot be considered as the “unlawful act” element in establishing this tort. One key reason is the availability of other remedies to the plaintiff, such as anticipatory breach of contract and economic duress, among others, which allow recovery in the same circumstances.

Example case:
If an MDW is disturbed by a loan agent intruding into the MDW’s privacy through surveillance at their employer’s home, as well as receiving malicious calls from the loan agency demanding repayment, the MDW may be able to sue under the tort of intimidation.

(ii) **Claims for sexual harassment under the Sex Discrimination Ordinance**

5.129 Sexual harassment in the course of employment is prohibited by the SDO. Job applicants and employees are protected from sexual harassment from both their employers and their co-workers.

5.130 For MDWs who work in the home, apart from an MDW’s direct employer, it is also unlawful for “any person who resides on the premises”, such as the husband or son of the employer, to sexually harass the MDW.

5.131 Section 2(5) of the SDO provides three definitions of sexual harassment. It states that an individual will be liable for sexual harassment if the individual does any of the following:

- makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the victim;
- engages in other unwelcome conduct of a sexual nature in relation to the victim; or
- alone or together with other persons, engages in conduct of a sexual nature which creates a sexually hostile or intimidating work environment for the target.

An MDW may bring a claim once any of these three definitions is satisfied.

5.132 “Conduct of a sexual nature” includes making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing.

5.133 The actions must be such that a reasonable person would have anticipated that the target would be offended, humiliated or intimidated.

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409 Section 23, SDO (Cap. 480). See Chapter 2, Section 7.XIV. for the text of the law.
410 Ibid.
411 Section 23(12), SDO (Cap 480). See Chapter 2, Section 7.XIV. for the text of the law.
412 Section 2(5)(a) & (b), SDO (Cap 480). See Chapter 2, Section 7.XIV. for the text of the law.
413 Section 2(7), SDO (Cap 480). See Chapter 2, Section 7.XIV. for the text of the law.
5.134 In order to bring a claim for sexual harassment, an MDW would make a complaint (either to the police, the MDW's agency, or a NGO) immediately after the relevant incident. Any delay may undermine the MDW's credibility, while such agencies could be very helpful in establishing a successful claim.\(^\text{415}\)

5.135 The Sex Discrimination Ordinance covers acts of harassment that take place in relation to employment, education, and the provision of goods and services. The first two are the most relevant in the context of MDWs.

(a) What constitutes sexual harassment?

5.136 In determining whether a sexual advance or request for sexual favours was ‘unwelcome’, courts will look to the plaintiff's own subjective experience of the event.\(^\text{416}\) In other words, if the plaintiff felt the action was unwelcome, the court will typically find it was too.

5.137 If the action was unwelcome, the court will test whether a reasonable person would have anticipated that the plaintiff would be offended, humiliated or intimidated as a consequence of the unwelcome advances, given all the circumstances surroun\(^\text{417}\) ding the act.

5.138 In determining whether the unwelcome conduct was of a sexual nature, the conduct itself rather than the motive is important.\(^\text{418}\) In fact, sexual harassment often does not arise out of sexual desire, but rather out of a desire to hurt, humiliate, or intimidate the victim.\(^\text{419}\)

5.139 As examples, the act of sending or displaying unwelcome pornography, asking a woman explicit questions about her sexual life or her method of birth control, making insulting sexual comments about a woman's body, or engaging in acts of voyeurism may be considered "sexual conduct," regardless of the defendant's intent in performing these acts.

(iii) Claims for racial harassment under Race Discrimination Ordinance

5.140 Racial harassment at work is prohibited under the RDO.\(^\text{420}\) It applies to all employers, including employers of MDWs. Although it allows MDWs to be selected based on their race, other provisions in the RDO become applicable once the employment contract takes effect.\(^\text{421}\)

\(^{414}\) Section 2(5)(a), SDO (Cap 480). See Chapter 2, Section 7.XIV. for the text of the law.


\(^{416}\) See Chen v. Tamara Rus and Another [2001] 3 HKLRD 541 where the Court of Appeal confirmed that the test is a mix of subjective and objective elements, but that plaintiff must first establish that the conduct was subjectively unwelcome to that plaintiff. However, see also Aldridge v Booth [1988] 80 ALR 1, which found that when the plaintiff behaved in a way that "solicited or invited" the conduct then it may not be considered unwelcomed objectively.

\(^{417}\) Ibid.

\(^{418}\) Strathclyde Regional Council v Porcelli [1986] IRLR 134 CS.

\(^{419}\) Petersen, *Sexual Harassment in the Workplace* (University of Hong Kong Faculty of Law: Centre of Comparative and Public Law, Occasional Paper No.4, June 2002), p.10.

\(^{420}\) Section 7, RDO (Cap 602). See Chapter 2, Section 7.XI. for the text of the law.

(b) What constitutes racial harassment?

5.141 Racial harassment is any unwelcome conduct towards another person on the grounds of the person’s race. Subjective intent is not required for racial harassment and as such, if an MDW feels offended by race-related conduct in circumstances where a reasonable person would have felt such, then the relevant act will constitute racial harassment.

5.142 There are two types of racial harassment, both of which are prohibited by the RDO:
- unwelcome conduct harassment (e.g., racial jokes, banter, derogatory remarks, insults, or even using an offensive tone when communicating with people of a certain racial background); and
- hostile environment harassment (e.g., putting up posters or newspaper clippings in a workplace when they contain racially derogatory remarks).

(E) Defences for Various Tort Claims

5.143 A limited number of defences exist to intentional tort. The most common is the victim's consent to the act. However, this consent must be willing, and acts of intimidation, threats or other forms of coercion negate the victim’s consent. Self-defence is applicable only in assault and battery cases, with the defendant bearing the burden of proving that they were protecting themselves or others from attack. The following chart outlines the available defences to each tort.

Table 2-19: Defences for tort claims

<table>
<thead>
<tr>
<th>Defence/ Action</th>
<th>Assault</th>
<th>Battery</th>
<th>False imprisonment</th>
<th>Intimidation</th>
<th>Sexual Harassment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self-defence / defence of others</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consent of victim</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Lawful justification</td>
<td></td>
<td></td>
<td>✓</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

(F) Remedies for the tort of trespass to the person

5.144 Victims of assault, battery, false imprisonment, and intimidation may claim a variety of damages for the injuries they suffered. This section describes the types of damages, but does not provide the amount of compensation available, as the exact amount of compensation will always be case-dependent (i.e., dependent on the facts of a specific claim and the injury suffered by a plaintiff). For an estimate of compensation, a consultation with a licensed Hong Kong lawyer is necessary.

5.145 Statutory compensation frameworks also exist. Where these do not provide full compensation, a plaintiff may move forward with a tort claim to recover the remainder.

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422 Section 24(12), RDO (Cap 602). See Chapter 2, Section 7.XI. for the text of the law.
The types of damages available include pain, suffering and loss of amenities; aggravated damages, exemplary damages, pre-trial loss of earnings, loss of earning capacity, future medical expenses, and miscellaneous special damages.

**Pain, suffering and loss of amenities ("PSLA"):** these are general compensatory damages that are not capable of exact calculation. A good estimate as to the amount recoverable would depend on the severity of the disablement (e.g., serious injury, substantial injury, gross disability, or disaster) which could then be compared with the amounts awarded in similar cases. Nonetheless, these are only guidelines which are intended to be flexibly applied. "Loss of amenities" awards compensation for the loss or reduction of a plaintiff’s mental or physical capacity to do things the plaintiff could do prior to the injury.

**Aggravated damages:** in addition to PSLA, a court may award aggravated damages where a plaintiff has faced humiliation and hostility, or additional mental stress, as a result of a defendant’s malicious acts. Additionally, these may be awarded where a defendant is found to be defiant of the charges, unrepentant and vindictive.

**Exemplary damages:** these are awarded when compensatory damages are deemed inadequate. Exemplary damages will often be awarded where a plaintiff suffered harm by the arbitrary or unconstitutional action of a government servant, or the defendant’s conduct was calculated to make a profit, which may exceed the compensation payable to the plaintiff. Exemplary damages are described as a last resort and are typically only awarded where other available remedies are inadequate to punish and deter the defendant.

**Pre-trial loss of earnings:** these are special damages assessed with full particulars of the plaintiff’s pre-accident employment income prior to the accident.

**Loss of earning capacity:** the court will consider the entirety of circumstances in the case, including the degree of handicap to future earnings, as assessed by an expert.

**Future medical expenses:** this award includes medical expenses for both physical and psychological treatments. The court will typically allow for recommendations by doctors for treatment more expensive than that provided publicly. For instance, in a case where an MDW’s doctor recommended treatment at a private hospital, the court ordered that the related expenses be covered, even though they were more costly than treatment in a public hospital.

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431 Tangarorang Jessamie Mendrez v Chan Chau Wing DCPI 433/2010, unrep. See Chapter 2, Section 7.IV.(B) for a brief summary of the case.
5.153 Miscellaneous special damages: all other expenses incurred by a plaintiff in connection with the litigation can be claimed under this heading. This includes, but is not limited to, visa extension expenses, alternative accommodation, food, personal hygiene items, transportation fees incurred when travelling to legal appointments, medical expert fees, and court fees. Additionally, unemployment expenses that a plaintiff incurs whilst waiting for the litigation to be completed can also be claimed.

6. Conclusion

6.1 This chapter summarises the common legal issues encountered by MDWs and the potential routes of redress in relation to:

- contract validity and variation;
- underpayment, non-payment or late payment of sums owed;
- unfair dismissal;
- over-charging agency fees;
- invalidation of loan agency contracts;
- non-salary employment agreements;
- discrimination on the basis of sex or race;
- unintentional harms / accidents; and
- intentional harms.

6.2 Legal practitioners should note the differences between bringing a claim under legislation and at common law. What needs to be proven can vary depending on the law used, and remedies are not always clearly available under legislation. Note however, the latter can provide longer limitation periods with respect to bringing claims. As some of the remedies discussed in the chapter have yet to be tested in court, practitioners are advised to evaluate each case based on the facts to determine which type of action is the most feasible, given the circumstances.

6.3 The substantive areas of law in the MDW context have been discussed in Chapter 2. Chapter 3 deals with the court procedures MDWs may need to navigate when bringing a claim.

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433 Ibid.
7. **Black letter law and case analysis**

7.1 This section is a simplified reference for legal practitioners and others who wish to delve further into the law discussed throughout this chapter. Arranged in alphabetical order by statute and by topic in the case of common law, this section compiles the relevant portions of statutes cited, as well as the most relevant case law. Legal practitioners may find reviewing the relevant laws below a useful first step in preparing a client's case.

I. **Employees' Compensation Ordinance (Cap. 282)**

**Section 2: Meaning of "employee"**

(1) In this Ordinance, unless the context otherwise requires, the expression "employee" (僱員), subject to section 4 and the proviso to this subsection, means any person who has, either before or after the commencement of this Ordinance, entered into or works under a contract of service or apprenticeship with an employer in any employment, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing: (Amended 11 of 1958 s. 2) Provided that the following persons are excepted from the definition of "employee" (僱員) -

(Repealed 44 of 1980 s. 3)

(b) any person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club and not being a part-time domestic helper; or (Amended 63 of 1992 s. 2)
(c) an outworker; or
(d) a member of the employer's family employed by such employer and who resides with the employer. (Amended 55 of 1969 s. 2)

**Section 3: Interpretation**

"medical expenses" (醫療費)-

(a) in relation to medical treatment given in Hong Kong, means all or any of the following expenses incurred in respect of the medical treatment of an employee-
(i) the fees of a registered medical practitioner, registered Chinese medicine practitioner, registered dentist, registered chiropractor, registered physiotherapist or registered occupational therapist; (Replaced 16 of 2006 s. 12)
(ii) the fees for any surgical or therapeutic treatment;
(iii) the cost of nursing attendance;
(iv) the cost of hospital accommodation as an in-patient;
(v) subject to section 10AB, the cost of medicines, curative materials and medical dressings; (Amended 16 of 2006 s. 12)

(b) in relation to medical treatment given outside Hong Kong, means such expenses incurred in respect of the medical treatment of an employee as the Commissioner, by certificate in writing issued under section 10B(1)(b), determines to be medical expenses; (Replaced 1 of 1995 s. 2)
Section 5: Employer's liability for compensation for death or incapacity resulting from accident

(1) Subject to subsections (2) and (3), if in any employment, personal injury by accident arising out of and in the course of the employment is caused to an employee, his employer shall be liable to pay compensation in accordance with this Ordinance.

(2) No compensation shall be payable under this Ordinance in respect of:
   (a) any injury, other than an injury which results in partial incapacity of a permanent nature, which does not incapacitate the employee from earning full wages at work at which he was employed; (Amended 67 of 1996 s. 2)
   (b) any incapacity or death resulting from a deliberate self-injury;
   (c) any incapacity or death resulting from personal injury if the employee has at any time represented to the employer that he was not suffering or had not previously suffered from that or a similar injury, knowing that the representation was false; or
   (d) any injury, not resulting in death or serious and permanent incapacity, caused by an accident which is directly attributable to the employee's addiction to drugs or his having been at the time of the accident under the influence of alcohol.

(4) For the purposes of this Ordinance:
   (a) an accident arising in the course of an employee's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment;
   (b) an accident to an employee shall be deemed to arise out of and in the course of his employment, notwithstanding that the employee was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the employee for the purposes of and in connection with his employer's trade or business;
   (c) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens-
      (i) while, with the consent of his employer, the employee is being trained in first aid, ambulance or rescue work or engaged in any competition or exercise in connection therewith;
      (ii) in, at or about any premises other than his employer's while, with the consent of his employer, the employee is engaged in any first aid, ambulance or rescue work or in any competition or exercise in connection therewith; or
      (iii) in, at or about his employer's premises while the employee is engaged in any first aid, ambulance or rescue work, notwithstanding that in the case of rescue work the employee was acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if when such act was done the employee reasonably acted in order to rescue, succour or protect any other person who had suffered, or who was reasonably believed to be in danger of, injury, or to avert or minimize serious damage to property of the employer;
   (d) an accident to an employee shall be deemed to arise out of and in the course of his employment if it happens to the employee while he is, with the express or implied permission of his employer, travelling as a passenger by any means of transport to or from his place of work and at the time of the accident, the means of transport is being operated-
      (i) by or on behalf of his employer or by some other person pursuant to arrangements made with his employer; and
(ii) other than as part of a public transport service

Section 10: Compensation in case of temporary incapacity

(1) Where temporary incapacity whether total or partial results from the injury, the compensation shall be the periodical payments hereinafter mentioned, or a lump sum calculated accordingly, having regard to the probable duration, and probable changes in the degree, of the incapacity. Such periodical payments shall be, or shall be at the rate proportionate to, a monthly payment of four-fifths of the difference between the monthly earnings which the employee was earning at the time of the accident and the monthly earnings which he is earning, or is capable of earning, in some suitable employment or business during the period of the temporary incapacity after the accident.

(3) Periodical payments under this section shall be payable on the same days as wages would have been payable to the employee if he had continued to be employed under the contract of service or apprenticeship under which he was employed at the time of the accident: Provided that-
   (a) by agreement or by order of the Court, the periodical payments may be made at shorter intervals; and
   (b) the interval between periodical payments shall not exceed 1 month.

Section 10A: Payment of medical expenses

(5A) Subsection (4) does not relieve an employer of the liability to pay medical expenses in respect of medical treatment of any description received by an employee unless the free medical treatment provided or agreed to be provided by the employer covers medical treatment of the same description.

(5B) In subsections (5) and (5A), a reference to a description of medical treatment is a reference to any of the following-
   (a) medical treatment given by, or under the supervision of, a registered medical practitioner;
   (b) medical treatment given by, or under the supervision of, a registered Chinese medicine practitioner;
   (c) medical treatment given by, or under the supervision of, a registered dentist;
   (d) physiotherapy given by, or under the supervision of, a registered physiotherapist or registered medical practitioner;
   (e) occupational therapy given by, or under the supervision of, a registered occupational therapist or registered medical practitioner;
   (f) medical treatment given by, or under the supervision of, a registered chiropractor.

Section 10AB: Cost of medicines

(2) Subject to the other provisions of this section, the medical expenses that an employer is liable to pay in respect of an employee’s personal injury—
   (a) include the cost of medicines to the extent that the medicines are prescribed medicines for the direct treatment of the injury; but
   (b) do not include the cost of any tonic or substance that is prescribed for the purpose of the maintenance of general health only.
II. Employment Ordinance (Cap. 57)

Section 6: Termination of contract by notice

(1) Subject to subsections (2), (2A), (2B), (3) and (3A) and sections 15 and 33, either party to a contract of employment may at any time terminate the contract by giving to the other party notice, orally or in writing, of his intention to do so.

(2) The length of notice required to terminate a contract of employment shall be-
   (a) in the case of a contract which is deemed by virtue of the provisions of section 5 to be a contract for 1 month renewable from month to month and which does not make provision for the length of notice required to terminate the contract, not less than 1 month;
   (b) in the case of a contract which is deemed by virtue of the provisions of section 5 to be a contract for 1 month renewable from month to month and which makes provision for the length of notice required to terminate the contract, the agreed period, but not less than 7 days;
   (c) in every other case, the agreed period, but not less than 7 days in the case of a continuous contract.

(2A) Without prejudice to section 41D, annual leave to which an employee is entitled under section 41AA shall not be included under subsection (2) in the length of notice required to terminate a contract of employment.

(2B) The period of maternity leave to which a female employee is entitled under section 12 shall not be included under subsection

(2) in the length of notice required to terminate a contract of employment.

(3) Where in any contract of employment, whether in writing or oral, it has been expressly agreed that the employment is on probation and the contract does not make provision for the length of notice required for its termination such contract may be terminated-
   (a) by either party at any time during the first month of such employment without notice or payment in lieu;
   (b) by either party at any time after the first month of such employment by giving to the other party notice of not less than 7 days.

(3A) Where in any contract of employment, whether in writing or oral, it has been expressly agreed that the employment is on probation and the contract makes provision for the length of notice required for its termination such contract may be terminated-
   (a) notwithstanding the length of notice provided for in the contract, by either party at any time during the first month of such employment without notice or payment in lieu;
   (b) by either party at any time after the first month of such employment by giving to the other party notice of the agreed period, but not less than 7 days.

(4) For the purposes of this section the expression "month" (月) means a period of time commencing on the day when notice of termination of a contract of employment is given or when employment begins, as the case may be, and ending at the end of the day before the corresponding date in the following month or, where there is no corresponding date in the following month or where the commencing day is the last day of a month, at the end of the last day of the following month.
Section 7: Termination of contract by payment in lieu of notice.

(1) For the purposes of subsections (1A), (1B) and (1C), "wages" (工資) includes any sum paid by an employer in respect of—
(a) a day of maternity leave, a day of paternity leave, a rest day, a sickness day, a holiday or a day of annual leave taken by the employee;
(b) a day of leave taken by the employee with the agreement of his employer;
(c) a normal working day on which the employee is not provided with work;
(d) a day of absence from work of the employee due to temporary incapacity for which compensation is payable under section 10 of the Employees’ Compensation Ordinance (Cap 282).

(1A) Subject to sections 15 and 33, either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party—
(a) where the length of notice required to terminate the contract under section 6 is a period expressed in days or weeks, a sum calculated by multiplying the number of days in the period for which wages would normally be payable to the employee by the daily average of the wages earned by the employee during—
(i) the period of 12 months immediately before the date on which the party terminating the contract gives notice of the termination to the other party ("date of notification"); or
(ii) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of notification, the shorter period; or
(b) where the length of notice required to terminate the contract under section 6 is a period expressed in months, a sum calculated by multiplying the number of months required by the monthly average of the wages earned by the employee during—
(i) the period of 12 months immediately before the date of notification; or
(ii) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of notification, the shorter period.

(1B) In calculating the daily average or monthly average of the wages earned by an employee during the period of 12 months or the shorter period—
(a) any period therein for which the employee was not paid his wages or full wages by reason of:-
(i) any maternity leave, paternity leave, rest day, sickness day, holiday or annual leave taken by the employee;
(ii) any leave taken by the employee with the agreement of his employer;
(iii) his not being provided by his employer with work on any normal working day; or
(iv) his absence from work due to temporary incapacity for which compensation is payable under section 10 of the Employees’ Compensation Ordinance (Cap 282); and
(b) any wages paid to him for the period referred to in paragraph (a), are to be disregarded.

(1C) For the avoidance of doubt, if the amount of the wages paid to an employee in respect of a day specified in subsection (1) is only a fraction of the amount earned by the employee on a normal working day, the wages and the day are to be disregarded in accordance with subsection (1B).
(1D) Despite subsection (1A), if for any reason it is impracticable to calculate the daily average or monthly average of the wages earned by an employee in the manner provided in that subsection, the amount may be calculated by reference to the wages earned by a person who was employed at the same work by the same employer during the period of 12 months immediately before the date of notification, or, if there is no such person, by a person who was employed in the same trade or occupation and at the same work in the same district during the period of 12 months immediately before the date of notification.

(2) Either party to a contract of employment, having given proper notice in accordance with section 6, may at any time thereafter terminate the contract by agreeing to pay to the other party such proportion of the sum referred to in subsection (1) as is proportionate to the period between the termination of the contract and the time when the notice given would have expired.

(3) (Repealed)

(4) For the purposes of this section, and notwithstanding any other provision of this Ordinance, the term "wages" (工資)—
   (a) includes overtime pay of a constant character or the monthly average of which over a period of 12 months (or if not applicable, such shorter period of employment) immediately preceding the date on which the termination takes effect is equivalent to or exceeds 20% of his monthly average wages during the same period;
   (b) except as provided in paragraph (a), shall be deemed not to include overtime pay.

Section 8A: Damages for wrongful termination of contract.

(1) Without prejudice to section 9, 10 or 11(2), where a contract of employment is terminated otherwise than in accordance with section 6 or 7, a sum equal to the amount of wages that would have been payable had the contract been terminated in accordance with section 7 shall be payable by the party terminating the contract to the other party.

(2) Without prejudice to section 9, 10 or 11(2), where a party to a contract of employment, having given proper notice in accordance with section 6 thereafter terminates the contract before the expiry of the period of notice otherwise than in accordance with section 7, such proportion of the sum referred to in subsection (1) as is proportionate to the period between the termination of the contract and the time when the notice given would have expired shall be payable by the party terminating the contract to the other party.

(3) For the purpose of calculating the sum referred to in subsection (1), where the party terminating the contract has not given notice of the termination to the other party, in calculating the daily average or monthly average of the wages earned by the employee in accordance with section 7, the reference in that section to the date on which the party terminating the contract gives notice of the termination to the other party or to the date of notification is to be construed as a reference to the date of termination of the contract.

Section 9: Termination of contract without notice by employer

(1) An employer may terminate a contract of employment without notice or payment in lieu—
   (Amended 51 of 2000 s. 2)
   (a) if an employee, in relation to his employment—
      (i) wilfully disobeys a lawful and reasonable order;
      (ii) misconducts himself, such conduct being inconsistent with the due and faithful discharge of his duties;
(iii) is guilty of fraud or dishonesty; or
(iv) is habitually neglectful in his duties; or
(b) on any other ground on which he would be entitled to terminate the contract without notice at common law.

(2) The fact that an employee takes part in a strike does not entitle his employer to terminate under subsection (1) the employee’s contract of employment. (Added 51 of 2000 s. 2)

<table>
<thead>
<tr>
<th>Willful disobedience of a lawful and reasonable order (s9(a)(i))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases where summary dismissal justified</td>
</tr>
<tr>
<td><strong>Primotex Button Hong Kong Ltd v Chu Mui Ying</strong>[^34]</td>
</tr>
<tr>
<td>- <strong>Rule:</strong> The disobedience must be willful and not negligent (<em>Law Ying Chung v Lo Chun Kie</em>).^[^435]</td>
</tr>
<tr>
<td>- <strong>Facts:</strong> The defendant employee, an administration manager of the plaintiff, executed and signed a cheque without getting proper authorization, which she knew she needed to seek</td>
</tr>
<tr>
<td>- <strong>Held:</strong> The defendant exceeded her authority and her act would be in conflict with the plaintiff’s interest. Willful disobedience of a lawful and reasonable order was found and summary dismissal was justified.</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th>Misconduct, being inconsistent with the due and faithful discharge of his duties (s9(a)(ii))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases where summary dismissal justified</td>
</tr>
<tr>
<td><strong>Li Heung Sang v Compuware Asia Pacific Ltd</strong>[^39]</td>
</tr>
</tbody>
</table>

[^34]: Primotex Button Hong Kong Ltd v Chu Mui Ying [2013] HKEC 963.
[^437]: Glofcheski, RA & Aslam, FA. Employment law and practice in Hong Kong (Hong Kong: Sweet & Maxwell/Thomson Reuters. 2010), para 6.117.
[^438]: Ibid.
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

- **Rule:** The misconduct alleged must ‘go to the root of the contract so as to indicate an unwillingness to continue to be bound upon the original terms’.  

- **Facts:** P was employed as a sales director for the North Asia area by D. An internal audit revealed that a manager in D’s Beijing office, for which P was responsible, had embezzled monies and had entered fictitious sales figures in the business books.

- **Held:** P committed misconduct by failing to supervise the manager of the Beijing office. “His conduct was inconsistent with the due and faithful discharge of his duties and the summary dismissal was justified.”

- **Rule:** Immediate dismissal of an employee for a single act of misconduct could only be justified in very exceptional circumstances. It might also be necessary to balance the impact of the summary dismissal on the employee with the effect of the employee’s misconduct on the employer, to decide if summary dismissal was justified.

- **Facts:** X, a director of a company, E, was summarily dismissed on the ground that X had committed misconduct by selling machines at a low price without E’s consent.

- **Held:** Summary dismissal not justified. There was no allegation of previous misconduct or dishonesty.

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### Fraud or dishonesty (s9(a)(iii))

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<tr>
<th>Cases where summary dismissal justified</th>
<th>Cases where summary dismissal not justified</th>
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<tbody>
<tr>
<td><strong>Yau Luen Transportation Co Ltd v Kwok Fu and Others</strong>¹⁴⁴</td>
<td><strong>Chong Hau Sai v Mok Kuen Shing and Others</strong>¹⁴⁷</td>
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- **Rule:** “Where the conduct complained of is such that the confidential relationship between employer and employee is ruptured, or where it causes

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¹⁴² Tsang Tak Chi v China Wall Ltd [1999] HKLRD (Yrbk) 400.
¹⁴⁴ Li Heung Sang v Compuware Asia Pacific Ltd [2004] 2 HKLRD 732, para. 75.
¹⁴⁳ Tsang Tak Chi v China Wall Ltd [1999] HKLRD (Yrbk) 400.
¹⁴³ Ibid.
loss, or even it seems probable, loss of reputation by the employer, summary dismissal is justified.\(^{445}\)

- **Facts:** The employees had been dismissed after the discovery of their attempt to conceal the accidental loss of 10 bags of sugar, which had fallen overboard.

*Ng Ai Kheng Jasmine v The Open University of Hong Kong*\(^{446}\)

- **Rule:** The employer was entitled to rely on the following grounds to justify dismissing an employee summarily: 
  1) Dishonesty arising as a result of the employee claiming to have undertaken work that was not in fact undertaken;
  2) Dishonesty as a result of recycling student assignments; or
  3) Poor attitude and work performance.

- **Facts:** The employee, an assistant professor employed on superannuation terms, had been dismissed after her employer had become very dissatisfied with her performance.

<table>
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<tr>
<th>Habitually neglectful in performance of duties (s9(a)(iv))</th>
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<tr>
<td><strong>Ying Kee Safes and Furniture Limited v Wong Yam-tak</strong>(^{449})</td>
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<tr>
<td><strong>Rule:</strong> Persistent lateness may be regarded as unauthorised</td>
</tr>
</tbody>
</table>

\(^{447}\) Chong Hau Sai v Mok Kuen Shing and Others [1995] HKCFI 456.

\(^{448}\) Ibid, para. 7.

\(^{445}\) Ibid., para 15.

\(^{446}\) Ng Ai Kheng Jasmine v The Open University of Hong Kong [2005] HKEC 1165.

\(^{449}\) Ying Kee Safes and Furniture Limited v Wong Yam-tak [1995] HKCFI 460.
absence and constitute misconduct. 450

- **Facts:** The employee was summarily dismissed after being persistently late for work and having disobeyed a lawful and reasonable order to arrive punctually for work.

  Keung Man-lan and Others v Oceanic Universal Garment Manufacturers Co. Ltd 451

  - **Rule:** The persistent lateness which employees had been warned against was a sufficient ground for summary dismissal by reason of disobeying a lawful and reasonable order.

  - **Facts:** The employees were summarily dismissed after they continued to be late for work despite notices to desist.

serious to justify a summary dismissal is a question of fact and degree, depending on the circumstances of the particular contract.

- **Facts:** The claimant was summarily dismissed for having absented himself without permission on a day he knew would be particularly busy for the establishment.

- **Held:** The facts were borderline and the Tribunal decided that the misconduct of the employee was insufficiently grave to justify summary dismissal.

Chow Yin Chun v Fang Brothers Knitting Ltd 453

- **Rule:** To justify summary dismissal, neglect in the performance of duties must be substantial and habitual. Cases of actual negligence in performing duties and cases where duties were neglected, i.e. absence from or lateness for work should be distinguished. 454

- **Facts:** The claimant had been an ironing worker for 10 years and her work standards had dropped so that she had been asked frequently to redo her work before the dismissal.

### Section 10: Termination of contract without notice by employee

An employee may terminate his contract of employment without notice or payment in lieu-

(a) if he reasonably fears physical danger by violence or disease such as was not contemplated by his contract of employment expressly or by necessary implication;

(aa) if-

(i) he has been employed under the contract for not less than 5 years; and

   (Amended 41 of 1990 s. 4; 62 of 1992 s. 3)

(ii) by a certificate in the form specified by the Commissioner under section 49

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452 Borrallón, Alfonso Pacheco v Ellis Entreprise Ltd, District Court, Labour Tribunal Appeal No 1/75.
453 Ibid, para. 6.
455 Chow Yin Chun v Fang Brothers Knitting Ltd [1988] HKCFI 46.
456 Ribeiro (see n 472 above), p 57-58.
and issued by a registered medical practitioner or registered Chinese medicine practitioner, he is certified as being permanently unfit for a particular type of work specified in the certificate for a reason or reasons stated therein; and (Amended 68 of 1990 s. 24; 61 of 1993 s. 3; 16 of 2006 s. 3)

(iii) he is engaged in that type of work under the contract; (Added 52 of 1988 s. 4)

(b) if he is subjected to ill-treatment by the employer; or

(c) on any other ground on which he would be entitled to terminate the contract without notice at common law.

Circumstances justifying termination by an employee under EO s.10

<table>
<thead>
<tr>
<th>(a) Employee’s reasonable apprehension of physical danger by violence or disease</th>
<th>There must be a reasonable apprehension of physical danger to life or personal injury by violence as a result of continuing the work. The danger to life or health must, however, be of such a nature that was not envisaged, whether explicitly or implicitly, under the terms of employment. The statutory right extends to where the employee has been misled into anticipating the provision of the precautionary measures rendered reasonably necessary by the nature of the work.(^{455})</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b) Employee being subjected to ill-treatment by the employer</td>
<td>An employee is also permitted to terminate without notice where an employer subjects the employee to severe ill-treatment, or the employer fails to carry out the employer’s contractual obligations.</td>
</tr>
</tbody>
</table>
| (c) Other grounds at common law constituting constructive dismissal | • Non-payment of wages and other benefits.\(^{456}\)  
• A lay-off, which occurs in the absence of an express or implied term of the employment contract.\(^{457}\)  
• A unilateral material change of the terms of employment by the employer.\(^{458}\)  
• A variation of employment terms that went beyond what was permitted in the employment contract.\(^{459}\)  
• A drastic reduction in work.\(^{460}\) |

In *Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor* [1987] HKLY 475, the High Court held that an employer who failed to provide a piece-rated employee with sufficient work was in serious breach of the employment contract, and the employees were entitled to terminate without notice. The court held that because the employees had been constructively dismissed in accordance with s 10(c) of the EO, they had rightfully terminated their contracts in accordance with the provisions of the EO.

In recognising that what amounts to a fundamental breach may

\(^{455}\) *The annotated ordinances of Hong Kong. Employment Ordinance (Cap 57) (Hong Kong: LexisNexis Butterworths. 2010), para 10.9.*  
\(^{456}\) Law Shiu Kai, Andrew v Dynasty International Hotel Corporation and Others, [2006] HKCA 21.  
\(^{457}\) Fan Kam Fung and Others v Sorley Handbags Manufactory [1984] HKCFI 421.  
\(^{459}\) Ying Cheong Shoe Mfy v Yam Yuk Bing & Anor [1987] HKLY 475.  
\(^{460}\) Chow Koon Sing (t/a Lee Cheung Transportation Co) v Fan Kok Choy [1990] 1 HKC 429 HC.
vary with the circumstances of the case, Hong Kong courts have held that, for instance, a drastic reduction in work, working hours or wages, unilateral changes to an employee’s terms of employment, a lay-off for longer than permitted by statute, and compelling staff to transfer, were sufficient grounds for regarding an employee to have been constructively dismissed.

Section 14: Payment for maternity leave

(2) An employer shall pay a female employee maternity leave pay for the period of maternity leave taken by her and to which she is entitled under section 12(2)(a) if she— (Amended 73 of 1997 s. 6)

(a) has been employed by that employer under a continuous contract for a period of not less than 40 weeks immediately before the date of her commencement of maternity leave as determined under section 12AA; (Amended 5 of 1995 s. 4; 73 of 1997 s. 6)

(b) has given notice under section 12(4) or (5);

(c) has complied with any requirement by her employer under section 12(6) or (7); and

(d) (Repealed 73 of 1997 s. 6)

(3A) Maternity leave pay payable under this section is to be calculated at four-fifths of the daily average of the wages earned by the female employee during—

(a) the period of 12 months immediately before the date of commencement of her maternity leave; or

(b) if the employee has been employed by the employer concerned for a period shorter than 12 months immediately before the date of commencement of her maternity leave, the shorter period, but no maternity leave pay is payable in respect of a day on which the female employee would not have worked had she not been on maternity leave and for which no wages would normally be payable by the employer. (Added 7 of 2007 s. 6)

(4) Maternity leave pay under this section shall be paid by an employer on the same day and in the same manner as he would have been required to pay wages to the female employee if she had not taken maternity leave and had continued in his employ.

Section 25: Payment on termination

(1) Subject to section 31O, where a contract of employment is terminated any sum due to the employee shall be paid to him as soon as is practicable and in any case not later than 7 days after the day of termination. (Amended 44 of 1971 s. 4; 67 of 1974 s. 4)

(2) The sum referred to in subsection (1) shall be—

(a) the equivalent of the amount earned by the employee for work done over the period commencing on the expiry of his wage period next preceding the time of termination up to that time;

462 Kam Hung Industries Co Ltd v Lam Ming-sun and Others [1987] HKCFI 36.
466 Wong Yuen-kwong v The Hong-Kong and China Gas Co Ltd [1987] HKCFI 51.
(b) the sum (if any) payable under sections 7, 15(2) and 33(4BA); (Amended 57 of 1983 s. 4; 76 of 1985 s. 3; 103 of 1995 s. 7; 7 of 2001 s. 6)
(ba) any long service payment due to the employee; and (Added 76 of 1985 s. 3. Amended L.N. 34 of 1990)
(c) any other sum due to the employee in respect of his contract of employment.

(3) In addition to any deduction which may be made under section 32, and subject to any order made by a court, an employer may deduct from any sum payable under subsection (1) to an employee who terminates his employment otherwise than under section 6, 7 or 10 such sum as the employee would have been liable to pay if he had terminated his employment under section 7. (Replaced 44 of 1971 s. 4. Amended 14 of 1975 s. 3; 48 of 1984 s. 12)

Section 31B: General provisions as to the right to severance payment

(1) Where an employee who has been employed under a continuous contract for a period of not less than 24 months ending with the relevant date- (Amended 76 of 1985 s. 5)

(a) is dismissed by his employer by reason of redundancy; or
(b) is laid off within the meaning of section 31E, the employer shall, subject to this Part and Part VC, be liable to pay to the employee a severance payment calculated in accordance with section 31G. (Amended 52 of 1988 s. 5)

(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that-

(a) his employer has ceased, or intends to cease, to carry on the business-
   (i) for the purposes of which the employee was employed by him; or
   (ii) in the place where the employee was so employed; or
(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish. (Replaced 62 of 1992 s. 4)

(3) For the purposes of the application of this Part to an employee who is employed as a domestic servant in, or in connection with, a private household, this Part (except section 31J) shall apply as if the household were a business and the maintenance of the household were the carrying on of that business by the employer.

[cf. 1965 c. 62 ss. 1 & 19(1) U.K.]

Section 31E: Lay-off

(1) Where an employee is employed under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind he is employed to do, he shall for the purposes of section 31B(1) be taken to be laid off where the total number of days on each of which such work is not provided for him by the employer exceeds-

(a) half of the total number of normal working days in any period of 4 consecutive weeks; or
(b) one-third of the total number of normal working days in any period of 26 consecutive weeks,

and he is not paid a sum equivalent to the wages which he would have earned if work had been provided on the days on which no work was provided.
(1A) Notwithstanding subsection (1), any period during which an employee is not provided with work because of a lock-out by his employer, or as a result of a rest day, a statutory holiday or a day of annual leave, shall not be taken into account as normal working days in determining whether an employee has been laid off.

(2) The continuity of a contract of employment of an employee shall not be treated as broken by any lay-off as a result of which no severance payment has been made.

(3) For the purposes of this Part the "relevant date" (有關日期) in respect of the right of an employee to a severance payment arising by reason of lay-off means any day on which the period of 4 consecutive weeks or 26 consecutive weeks, as the case may be, referred to in subsection (1) has expired.

<table>
<thead>
<tr>
<th>CONSTRUCTIVE DISMISSAL</th>
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<tr>
<td><strong>Law Shiu Kai v Dynasty International Hotel Corporation and Others [2004] 2 HKLRD 524</strong></td>
</tr>
</tbody>
</table>

**Holding**

- Although the contract was for a fixed three-year period, s.5(2) of the Employment Ordinance (Cap 57) applies, deeming the contract to be for one month renewable from month to month and not a fixed three-year contract.
- S.6 of the Employment Ordinance (Cap 57) applies to limit the period of notice required to terminate the employment contract to not less than one month. Accordingly, **the employee was not entitled to damages more than one month’s wages for constructive dismissal.**

**Facts**

The employee and employer entered into an oral agreement that the employee would be employed for a fixed three-year period.

When the employer failed to pay wages and any arrears of wages, the employee gave one month’s notice and left employment by constructive dismissal. The employee brought an action to recover the arrears of wages and the salary for the unexpired period of the contract (some two-and-a-half years).

**Legal Analysis and Application to the Facts**

[65]: "I have no difficulty in finding that the third defendant was in breach of the employment contract in failing to pay the plaintiff his salary in July….The failure to pay salary was a continuing breach." This justified the plaintiff’s termination of the contract by constructive dismissal.

[72]-[74]: On the facts, there is no evidence in writing signed by each party to indicate that the contract is not for one month renewable from month to month. In these circumstances, the contract is deemed to be a contract for one month renewable from month to month under the Employment Ordinance, rather than a fixed three-year contract.

[75]: The defendant had failed to pay the plaintiff wages from April to August. In those circumstances, the plaintiff is deemed to have been constructively dismissed. Applying s.8A of the Employment Ordinance,
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

the plaintiff is entitled to one month’s wages as damages for the wrongful dismissal.

DURESS

Estinah v Golden Hand Indonesian Employment Agency [2001] 4 HKC 607

**Holding**

[16]: “…the pressure applied does not have to be in the manner of an express threat or coercion … If the victim is left with no practical choice but to submit because of the course of action of the other party, this would suffice.” (emphasis added)

**Facts**

The appellant was an Indonesian MDW who was overcharged by the respondent for agency fees. The respondent told the appellant that the respondent would not process her file until the agency fee was fully paid. The appellant sought to claim for the excessive amount paid.

**Legal Analysis**

The court held that the appellant had no practical alternative not to succumb to the pressure for two reasons: (i) the appellant was told that if she did not pay the agency fee, the respondent would not complete the necessary procedure for her the appellant to be able to work; and (ii) only after full payment was made did the respondent complete the necessary procedure for the appellant to be able to work.

With all other required elements fulfilled, the court held that there was a valid cause of action for economic duress.

ILLEGALITY

Lilik Andayani v Chan Oi Ling [2001] 2 HKLRD 572

**Holding**

Employment contracts with terms below the minimum standard are illegal because they are contrary to public policy.

A valid employment contract can be implied where a *de facto* employment relationship exists.

To create a *de facto* employment relationship,

[16]: “a person works for another, acknowledges him as his employer to whom he owes fiduciary duty and the acknowledgment by that other person of his reciprocal obligation”.

**Facts**

The appellant was an Indonesian MDW who entered into an oral contract stipulating a monthly wage of $2,200 with the respondent. After leaving the employment upon an alleged assault by the respondent, the appellant sought to claim wages in lieu of notice and arrears of wages at the Labour Tribunal.
<table>
<thead>
<tr>
<th>Legal Analysis</th>
<th>After finding the original written contract void due to lack of agreement between the parties, the oral contract was found void for contravening public policy, as its employment terms were below the minimum standard set out in law. Despite lacking an enforceable employment contract in this case, a <em>de facto</em> employment relationship was established to imply a contract of employment, pursuant to section 2 of the EO. The implied employment contract contained terms of the standard contract, as they constituted the lowest standard of terms that could legally allow the appellant to enter and stay in Hong Kong for employment on the outset.</th>
</tr>
</thead>
</table>

**SUMMARY DISMISSAL**

*Lam Yau Kuen v Easy (Hang Fung) Transportation Co Ltd and Another [2006] HKEC 2218 English Judgment*

<table>
<thead>
<tr>
<th>Holding</th>
<th>The employers were unable to discharge their burden of proving that they were entitled to summarily dismiss the employee under s.9 of the Employment Ordinance for insubordination. Applying s.31Q of the Employment Ordinance, the presumption that the employee was dismissed by reason of redundancy applies. Unless the employers could prove that the employee was dismissed for reasons other than redundancy (which they could not), the employers were bound to pay the employee severance payment.</th>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Facts</th>
<th>The Plaintiff (employee) was a lorry driver employed by the Defendants (employers). The Plaintiff had made several requests to the Defendants to make advance payments for him to pay the road and bridge tolls of his trip to the mainland for the purpose of carrying out his employment contract. The Plaintiff had waited to receive the requested payments but on the next day, he was dismissed without notice or payment in lieu of notice by the Defendants. The Plaintiff sued to recover: - Wages owing; - Wages in lieu of notice of termination; - Statutory holiday payment; - Annual holiday payment; - Severance payment; and - Wages unreasonably withheld.</th>
</tr>
</thead>
</table>

| Legal Analysis and Application to the Facts | [16]: The Plaintiff's case was that the Defendants refused to provide him with the expenses that he needed to drive the lorry into the mainland. From the evidence, it appeared that these expenses were usually advanced to the Plaintiff and had to be accounted for when wages were calculated on pay day. Thus, the Plaintiff's refusal to drive the lorry was not a case of insubordination. Accordingly, the |
Defendants had no ground to dismiss the Plaintiff without notice or one month’s wages in lieu of notice in accordance with sections 6 and 7 of the Employment Ordinance.

[18]: The Defendants had the burden of proof to show on a balance of probabilities that the Plaintiff was dismissed for reasons other than redundancy. The Defendants had not discharged this burden at all. By virtue of section 31Q of the Employment Ordinance, Cap. 57, the Plaintiff was presumed to have been dismissed for reason of redundancy.

**UNCONSCIONABILITY**

_Semana Bachicha v Poon Shiu Man [2000] 2 HKLRD 833_

<table>
<thead>
<tr>
<th>Holding</th>
<th>A compromise agreement to settle claims against an employer in full can be void for unconscionability, depending on the facts.</th>
</tr>
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<tbody>
<tr>
<td>Facts</td>
<td>The plaintiff was a Filipino MDW. After being subjected to “an oppressive and exploitative work regime” with a large amount of work and physical abuse by the defendant for six months, the plaintiff left the job. Later, the plaintiff was advised by an officer from the Labour Department that she bore a net liability for walking away from her job, and thus, she signed a compromise agreement to receive $975 in cash as full and final settlement.</td>
</tr>
</tbody>
</table>
| Legal Analysis | The court held that:-  
  - the plaintiff had a “special disadvantage” because she received no legal representation when signing the compromise agreement, suffered economic and social disadvantage, and had unequal bargaining power compared to the defendant;  
  - the defendant knew of the plaintiff’s disadvantage as the defendant knew that she was driven out of her job by “an oppressive and exploitative work regime”; and  
  - the defendant still took advantage of the plaintiff’s ignorance and the officer’s faulty advice to have the plaintiff sign the compromise agreement.  
With all elements established, the compromise agreement was considered an unconscionable bargain. |

**Section 31R: General provisions as to employee’s right to long service payment**

(1) Where an employee who has been employed under a continuous contract-
(a) for not less than 5 years of service at the relevant date- (Amended 74 of 1997 s. 10)  
(i) is dismissed and his employer is not liable to pay him a severance payment by reason thereof; or  
(ii) subject to subsections (3) to (5), terminates his contract in the circumstances specified in section 10(aa); or (Amended 61 of 1993 s. 5)
(b) terminates his contract and, at the relevant date, he is not less than 65 years of age and has been employed under that contract for not less than 5 years, (Amended 65 of 1995 s. 2)

the employer shall, subject to this Part and Part VC, pay to the employee a long service payment calculated in accordance with section 31V(1). (Amended 105 of 1991 s. 2)

Section 31RA: Death of employee

(1) Where an employee dies and he had been at the time of his death employed under a continuous contract for not less than 5 years of service on the date of his death, the employer shall, subject to this Part and Part VC, pay a long service payment calculated in accordance with section 31V(1) to- (Amended 105 of 1991 s. 3; 74 of 1997 s. 11)

(a) the spouse of the employee, if the employee leaves a spouse; or
(b) the issue of the employee, if the employee leaves any issue but no spouse; or
(c) a parent of the employee, if the employee leaves neither a spouse nor issue; or
(d) the personal representative of the employee, if the employee does not leave any spouse, issue or parent.

Section 32O: Award of terminal payments

(1) Subject to section 32M, if no order for reinstatement or re-engagement is made under section 32N, the court or Labour Tribunal may make an award of terminal payments to be payable by the employer to the employee as it considers just and appropriate in the circumstances.

(2) Terminal payments under this section refer to the statutory entitlements under this Ordinance that the employee has not been paid and that the employee is entitled to upon the termination of the contract of employment, or that he might reasonably be expected to be entitled to upon the termination of the contract of employment had he been allowed to continue with his original employment or original terms of the contract of employment to attain the minimum qualifying length of service required for the entitlements under this Ordinance.

(3) Subject to subsection (4), terminal payments include-

(a) any wages and other payments due to the employee under his contract of employment;
(b) any payment in lieu of notice payable under Part II, in the case of a dismissal without due notice;
(c) any end of year payment payable under Part IIA;
(d) any maternity leave pay or sum payable under Part III;
(da) any paternity leave pay payable under Part IIIA; (Added 21 of 2014 s. 7)
(e) any severance payment payable under Part VA or any long service payment payable under Part VB;
(f) any sickness allowance or sum payable under Part VII;
(g) any holiday pay payable under Part VIII;
(h) any annual leave pay payable under Part VIII A; and
(i) any other payments due to the employee under this Ordinance and under his contract of employment.

(4) Notwithstanding that the employee has not attained the qualifying length of service required for the entitlements under this Ordinance, the court or Labour Tribunal may make an award for terminal payments under subsection (1) or (5) which shall be reckoned according to the actual length of time that the employee has been employed under that
contract of employment with the employer.

(5) For the purposes of this section, where no order for reinstatement or re-engagement is made for an unreasonable variation of the terms of the contract of employment, the court or Labour Tribunal may treat the unreasonable variation of the terms of the contract of employment as an unreasonable dismissal by the employer and make an award for terminal payments and such terminal payments should be calculated up to the last date on which the employee renders services to the employer or the date on which an award of terminal payments under this section is made by the court or Labour Tribunal, whichever is the earlier.

(6) The respective provisions governing the calculation of the statutory entitlements shall apply to the calculation of the terminal payments; and, subject to subsection (4), in the case of an employee aged at the relevant date less than 45 years who at that date has less than 5 years service with his employer, any long service payment payable by virtue of subsection (3)(e) shall be calculated in the same manner as any long service payment payable under Part VB to an employee aged at the relevant date less than 45 years who at that date has 5 years service with his employer.

(7) Sections 31I and 31IA shall apply to any severance payment paid under this section.

(8) Sections 31Y, 31YAA and 31YA shall apply to any long service payment paid under this section.
III. Immigration Ordinance (Cap. 115)

Section 42: False statements, forgery of documents and use and possession of forged documents

(1) Any person who makes or causes to be made-
   (a) to an immigration officer, immigration assistant or any other person lawfully acting
      under or in the execution of Part IB, II, III, IV or VIIC of this Ordinance; (Amended
      23 of 2012 s. 9)
   (b) in any document furnished to an immigration officer or immigration assistant
      pursuant to this Ordinance or a requirement made thereunder; or
   (c) for the purpose of obtaining, whether for himself or any other person, any travel
      document, certificate of entitlement, entry permit, re-entry permit, certificate of
      identity, document of identity, APEC business travel card, travel pass or
      Vietnamese refugee card, any statement or representation which he knows to be
      false or does not believe to be true shall be guilty of an offence.

   (Amended 57 of 1972 s. 10)
IV. **Intentional harms**

(A) **Assault**

<table>
<thead>
<tr>
<th>MERE WORDS AS ASSAULT</th>
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</thead>
<tbody>
<tr>
<td><strong>Wong Kwai Fun v Li Fung</strong> [1994] 1 HKC 549</td>
</tr>
</tbody>
</table>

**Holding**

Oral threats of physical violence and intimidation may amount to a tort if the person receiving the threats suffers nervous shock or illness as a consequence.

In this case, the threats were followed by actual assaults and beatings on D and his family. D was awarded aggravated damages to compensate for his suffering, the impact on his dignity and pride, mental discomfort and distress.

**Facts**

P sued D for a land claim, and D lodged a counterclaim alleging that P, acting in the capacity of a debt collector, used threats and intimidation to compel them to repay a loan. D suffered nervous shock after he received death threats over the telephone on a few occasions, and he and his family were physically beaten by P. After the threats and beating took place, D suffered from fear and depression, which caused him to attempt suicide. The threats persisted even after D's suicide attempt.

**Wong Wai Hing and Another v Hui Wei Lee** [2001] HKEC 685

**Holding**

The threats uttered in P’s business premises constituted assault and intimidation, and D was liable for the tortious acts committed by the collections agents.

**Facts**

D, a medical practitioner, believed that P owed her a debt and appointed debt collectors from an agency to recover the debt. The collectors made threats of physical violence over the phone and repeatedly visited P's business premises, as well as vandalizing the area by spraying red paint outside the premises.

(B) **Battery**

<table>
<thead>
<tr>
<th>PSYCHIATRIC HARM IN BATTERY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Tangarorang Jessamie Mendrez v Chan Chau Wing</strong> [2013] HKEC 126</td>
</tr>
</tbody>
</table>

**Holding**

D was found liable for the indecent assaults and criminal intimidation. P was awarded damages totalling HK$367,790 for PSLA, aggravated damages, pre-trial loss of earnings, loss of earning capacity, future medical expenses, and special damages.

**Facts**

P, an MDW, was indecently assaulted by her employer, D, who also...
threatened to kill her or send her back to the Philippines if she resisted or complained to his wife. P suffered PTSD as a result.

(C) False Imprisonment

<table>
<thead>
<tr>
<th><strong>A) INTERNATIONAL RESTRAINT OF FREEDOM OF MOVEMENT</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Faridha Sulistyoningsih v Mak Oi Ling Karen</strong> [2007] HKDC 110</td>
</tr>
<tr>
<td><strong>Holding</strong> D was found liable for false imprisonment in this civil action (although the criminal charge of false imprisonment was not established) as it was established that D intended to totally confine P’s liberty of movement.</td>
</tr>
<tr>
<td><strong>Facts</strong> D, an employer, prevented P, an MDW, from leaving D's flat throughout the entire three months of her employment. The front door of the flat was always locked and no keys were provided to P.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>B) PHYSICAL RESTRAINT NOT NEEDED</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chan Wing Kuen and Another v R</strong> [1995] 1 HKC 470</td>
</tr>
<tr>
<td><strong>Holding</strong> Although this was a criminal case in false imprisonment, neither the use of force nor the threat of force is a requirement for establishing false imprisonment. D was found guilty of criminal false imprisonment because the debtor had accompanied the debt collector against his will.</td>
</tr>
<tr>
<td><strong>Facts</strong> D, a debt collector, guarded P, a debtor, for hours and made phone calls to try to obtain money during the period. Afterwards, P sued for false imprisonment.</td>
</tr>
</tbody>
</table>

(D) Tort of deceit

<table>
<thead>
<tr>
<th><strong>A) KNOWLEDGE OF FALSE REPRESENTATION</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>Tso Kuk Wan v Lam Yuk Wah</strong> [2009] HKEC 2050</td>
</tr>
<tr>
<td><strong>Holding</strong> P succeeded in her claim against D, her insurance agent, who would frequently inquire into a client’s health condition. Therefore, D must have known that the representation he made was untrue. Even if D had not known it was false, he would still be responsible because he made the representation regardless of its truth.</td>
</tr>
<tr>
<td><strong>Facts</strong> P claimed that D, an insurance agent, made a false representation to her, telling her that since her medical problem had been resolved, there was no need for her to disclose it in her application for medical insurance. P suffered loss and damage as her insurance refused to reimburse her medical expenses on the ground of non-disclosure.</td>
</tr>
</tbody>
</table>
V. Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)

Section 21: Apportionment of liability in case of contributory negligence

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: (Amended L.N. 337 of 1989)

Provided that-

(a) this subsection shall not operate to defeat any defence arising under a contract;
(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

(10) In this section- "court" (法院) means, in relation to any claim, the court or arbitrator by or before whom the claim falls to be determined; "damage" (損害) includes loss of life and personal injury; "dependant" (受養人) means any person for whose benefit an action could be brought under the Fatal Accidents Ordinance (Cap 22); "fault" (過失) means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this section, give rise to the defence of contributory negligence.
VI. Limitation Ordinance (Cap. 347)

Section 5: Limitation in case of successive conversions and extinction of title of owner of converted goods

(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of 6 years from the accrual of the cause of action in respect of the original conversion or detention.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.

Section 26: Postponement of limitation period in case of fraud, concealment or mistake

Fraud, concealment and mistake

(1) Subject to subsection (4), where in the case of any action for which a period of limitation is prescribed by this Ordinance, either-
   (a) the action is based upon the fraud of the defendant;
   (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

(2) References in subsection (1) to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(3) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(4) Nothing in this section shall enable any action- (a) to recover, or recover the value of, any property; or (b) to enforce any charge against, or set aside any transaction affecting, and property, to be brought against the purchaser of the property or any person claiming through him in any case where the property has been purchased for valuable consideration by an innocent third party since the fraud or concealment or (as the case may be) the transaction in which the mistake was made took place.

(5) A purchaser is an innocent third party for the purposes of this section-
   (a) in the case of fraud or concealment of any fact relevant to the plaintiff's right of action, if he was not a party to the fraud or (as the case may be) to the concealment of that fact and did not at the time of the purchase know or have reason to believe that the fraud or concealment had taken place; and
   (b) in the case of mistake, if he did not at the time of the purchase know or have reason to believe that the mistake had been made.
(6) Sections 31 and 32 shall not apply to any action to which subsection (1)(b) applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 4(1)).

Section 27: Time limit for personal injuries

Special provisions applicable to certain actions in respect of personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an Ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(5) If the person injured dies before the expiration of the period in subsection (4), the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 20 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) shall be 3 years from - (a) the date of death; or (b) the date of the personal representative's knowledge, whichever is the later.

(10) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) shall be read as referring to the earliest of those dates.

VII. Misrepresentation Ordinance (Cap. 284)

Section 2: Removal of certain bars to rescission for innocent misrepresentation

Where a person has entered into a contract after a misrepresentation has been made to him, and-

(a) the misrepresentation has become a term of the contract; or
(b) the contract has been performed,
or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Ordinance, notwithstanding the matters mentioned in paragraphs (a) and (b).

[cf. 1967 c. 7 s. 1 U.K.]

Section 3: Damages for misrepresentation

(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion
that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

Section 4: Avoidance of provision excluding liability for misrepresentation

If a contract contains a term which would exclude or restrict-

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 3(1) of the Control of Exemption Clauses Ordinance (Cap 71); and it is for the person claiming that the term satisfies that requirement to show that it does.

(Replaced 59 of 1989 s. 20)

VIII. Money Lenders Ordinance (Cap. 163)

Section 24: Prohibition on excessive interest rates

(1) Any person (whether a money lender or not) who lends or offers to lend money at an effective rate of interest which exceeds 60 per cent per annum commits an offence.

Section 25: Reopening of certain transactions

(3) Any agreement for the repayment of a loan or for the payment of interest on a loan in respect of which the effective rate of interest exceeds 48 per cent per annum shall, having regard to that fact alone, be presumed for the purposes of this section to be a transaction which is extortionate; but except where such rate exceeds the rate specified in section 24(1), the court may declare that any such agreement is not extortionate for the purposes of this section if, having regard to all the circumstances relating to the agreement, the court is satisfied that such rate is not unreasonable or unfair.

(4) In determining whether a transaction is extortionate for the purposes of this section, regard shall be had to such evidence as is adduced concerning-

(a) interest rate prevailing at the time it was made;
(b) the factors mentioned in subsections (5) and (6); and
(c) any other relevant considerations.

(5) Factors applicable under subsection (4)(b) in relation to the debtor include-

(a) his age, experience, business capacity and state of health; and
(b) the degree to which, at the time of entering into the transaction, he was under financial pressure, and the nature of that pressure.

(6) Factors applicable under subsection (4)(b) in relation to the lender or other person by whom the proceedings are taken include-
(a) the degree of risk accepted by the lender, having regard to the nature and value of any security provided;
(b) his relationship to the debtor;
(c) whether or not a spurious cash price was quoted for any goods or services included in the transaction; and
(d) where one or more other transactions are to be taken into account, the question how far any such other transaction was reasonably required for the protection of the debtor or the lender, or was in the interest of the debtor.
IX. Negligence

(A) Breach of Duty

**BREACH OF DUTY**

*Mujiati v Chong Wai Kwan* [2005] 1 HKLRD C10

<table>
<thead>
<tr>
<th>Holding</th>
<th>D breached his duty of care and was liable to P, because he knew that his dog had bitten other people previously. When an owner of an animal knows of the animal's propensity to cause injuries to humans, and can foresee such injury to others, the owner may be held liable for damages.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facts</td>
<td>P, a domestic helper employed by D, sustained injuries after being bitten by D's dogs on the forearms and right flank when walking them and taking care of them at D's home. D's dogs had bitten other people before, and on one such previous occasion, the incident was reported to the police and the dog was detained at an animal management centre.</td>
</tr>
</tbody>
</table>

(B) Illegality Defence

**ILLEGALITY DEFENCE**

*Tsang Siu Hong v Kong Hoi For and Another* [2003] 1 HKLRD D22

<table>
<thead>
<tr>
<th>Holding</th>
<th>The overall question for the court was whether, after considering all the circumstances, it would be an affront to the public conscience or an offence to an ordinary citizen if compensation was awarded for the injury. In this case, although both P and D were aware of the unlawful nature of the employment, it would be unfair to deprive P of compensation, but only to the extent that he may not profit in excess of what he would have made in China by it. Therefore, compensation was calculated in accordance with what the plaintiff would have earned in his lawful Mainland employment during the equivalent period, for that was his real loss.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facts</td>
<td>P was from Mainland China and working without a valid visa in a garage for D in Hong Kong. While working, P suffered a blow on the head by a falling iron rod, which resulted in a fractured skull and internal bleeding. Although P was making good progress in recovering after the surgery, he complained of residual headaches, irritability, and impaired memory.</td>
</tr>
</tbody>
</table>
(C) Negligence

**NEGLIGENCE**

*Rivera, Sally De Guzman v Chan Hoi Sing T/A Sing Kee Vegetable Wholesale* [2011] HKEC 30

<table>
<thead>
<tr>
<th>Holding</th>
<th>D, being the owner of the shop, failed to keep the entrance of the shop dry which rendered the ramp was unsafe. D did not submit any evidence to the contrary and did not attend the trial.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facts</td>
<td>P sued D for damages for injuries and losses sustained as a result of an accident at D’s vegetable shop. P walked up the ramp to D’s shop to look for a particular vegetable, but slipped and fell at the entrance as there was a puddle. P used her left hand to support herself as she fell, and fractured her wrist.</td>
</tr>
</tbody>
</table>

(D) Omission of a Safe System of Work

**OMISSION OF A SAFE SYSTEM OF WORK**

*Fong Yuet Ha v Success Employment Services Ltd* [2012] HKEC 540

| Holding | As the act of taking the food from the upper shelf is an everyday act and not an inherently dangerous act, there was no need for the employer to prescribe a safe system of work or to give specific advice for such an act. The judge stated that "an adult employee, particularly, one of [the employee]'s maturity, experience, position and job responsibilities, could certainly be trusted to have sufficient common sense to decide how she could perform this task safely".\(^{467}\) The extent of the duty to prescribe a safe system of work is a question of fact depending on the nature of the work, such as whether the work requires careful organisation and supervision, whether it is in the interests of safety of all those persons carrying it out, and whether a prudent employer can confidently entrust the particular employee to do it reasonably safely.

In any case, there would be no failure to provide a safe system if an employee was dealing with a “one-off” task requiring the exercise of common sense, and it was difficult to see what relevant instruction could have been given. That said, if it is necessary in the interests of safety, the employer is under a duty to prescribe a system of work, even where the work is one-off. |
| Facts | P was an employee of a domestic helper agency. She fell from a plastic stool when she stood on it on tiptoe to take some canned food down from an upper cabinet shelf. P then sued the agency for failing to provide a safe system of work. |

\(^{467}\) *Fong Yuet Ha v Success Employment Services Ltd* [2012] HKEC 540, para 38.
(E) Primary Psychiatric Injury

<table>
<thead>
<tr>
<th>PRIMARY PSYCHIATRIC INJURY</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Barber v Somerset County Council</em> [2004] 1 WLR 1089</td>
</tr>
</tbody>
</table>

**Holding**

An employer is entitled to assume that their employees can withstand the normal pressures of their job.

However, a reasonable and prudent employer ought to take positive steps to ensure the safety of their employees if they know of some particular problem or vulnerability in the employee or due to the job nature. Such knowledge need not be from a specific inquiry but only what the employer is told by or on behalf of the employee at face value.

In this case, as D had knowledge of P’s condition, D ought to have taken the initiative in inquiring about P’s problems and attempting to ease the stress. The House of Lords reversed the appeal and awarded to P damages of £72,547.02. (damages reduced from lower court ruling)

**Facts**

P, a schoolteacher, worked long hours in meeting new responsibilities due to a restructure at his school, and he began to suffer stress and depression as a result. P took three weeks off work after consulting his doctor, and spoke to the Ds, his employers, about his problems upon returning. However, nothing was done to help P and he suffered a mental breakdown. As a consequence, P was unable to work again as a teacher so he brought an action against the Ds for damages for personal injuries caused by their negligence.
(F) **Unknown Cause of Accident**

### UNKNOWN CAUSE OF ACCIDENT

*Chan Kwok Ping v Hop Yick Engineering Co (a firm) and Another* [1997] HKLRD 1390

**Holding**

Although a spray gun was supplied by the employer and spray from the spray gun seemed to have caused the employee's injuries, the actual cause of the accident was unknown. In this circumstance, the tribunal could draw inferences from the available facts, on the assumption that such accidents would not happen but for some defect of the spray gun, without having to prove the negligence of the employee (the 'res ipsa loquitur' principle). P was found to have contributed to his injury by negligence to the extent of 40%. The High Court dismissed P's appeal.\(^{468}\)

**Facts**

P was working on a construction site with a spray gun which became blocked. P tried to unblock the nozzle with a pin. Whilst attempting to do this, paint sprayed out from the gun striking him in the eye and causing injury. P sued D1, his employer, and D2, the principal contractor for negligence and breach of statutory duty.

---

X. Occupier’s Liability Ordinance (Cap. 314)

(A) Breach of Common Duty of Care in Occupiers’ Liability

<table>
<thead>
<tr>
<th>BREACH OF COMMON DUTY OF CARE IN OCCUPIERS’ LIABILITY</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Chan Nga Yin formerly known as Chan Mei Yi Sicely v MTR Corporation Ltd [2014]</em></td>
</tr>
<tr>
<td>HKEC 1061</td>
</tr>
</tbody>
</table>

**Holding**
The CCTV footage showed that the cleaning lady was habitually more concerned with the constant cleanliness of the floor than with the safety of passers-by. Therefore, fault was found on D as the company, for failing to sufficiently instruct the cleaner to provide for the reasonable safety of the visitors.

**Facts**
P was walking inside a mall and fell on a slippery floor after it had been mopped. There was no warning sign put up near the area where she slipped and fell, although the CCTV footage of the mall showed that a yellow warning sign had been erected earlier, during the initial stages of cleaning. Even after P slipped, the yellow warning sign had not been put up near the place where P fell. P fractured her wrist as a result and sued the company of the mall under both negligence and occupier’s liability.

(B) Identifying Defendant Occupier

<table>
<thead>
<tr>
<th>IDENTIFYING DEFENDANT OCCUPIER</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Lo Ka Yue v Leung Chun Kit and Another [2015] HKEC 1320</em></td>
</tr>
</tbody>
</table>

**Holding**
Although D2 was the registered owner of the house, he frequently travelled to Mainland China for work and rarely stayed in the house. In fact, D2 only spent 123 days in Hong Kong over the prior two years, and most of the stays only lasted for two days. The court therefore held that only D1 qualified as an occupier, as there was no way D2 would have sufficient control of the premises owing to his frequent absence.

**Facts**
D1 and D2 were brothers. P was invited to visit a house registered in D2’s name but where D1 resided, and was bitten by D1’s dog. P sued both Ds in occupier’s liability. D2 sought to defend himself by stating that he neither resided at the house, nor knew P.
(C) Identifying Plaintiff Visitor

<table>
<thead>
<tr>
<th>IDENTIFYING PLAINTIFF VISITOR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yang Yee Man, the Administratrix of the Estate of Lam Lok Kin, Deceased v Leung Hing Hung</strong> [2014] 3 HKLRD 194</td>
</tr>
</tbody>
</table>

**Holding**

Once a person enters a public space such as a park, he or she becomes a “visitor”. Therefore, P became a visitor of the car park the moment he set foot in it.

The claim against the Commissioner was successful for 20% of damages and interest awarded to P against D. The Commissioner was “liable for breach of the common duty of care to see that his visitor, the deceased, would be reasonably safe in using the parking space which he was invited by the Commissioner, or permitted, to use” [45]. The claim against the contractor was dismissed.

**Facts**

D was driving into a public car park when he reversed his car in a small space, accidentally knocking a parking sign post onto X’s head (who was feeding a parking meter at the time). X died as a result of his injuries, and his estate P instituted proceedings against D. D pleaded that the design of the park was negligent and instituted third party proceedings against the Secretary for Justice, for and on behalf of the Commissioner for Transport, as well as HKPL, the contractor responsible for the “management, operation and maintenance of the parking meter system” of the car park and “all ancillary facilities”, seeking an indemnity against, or contribution towards his liability to P.
XI. Race Discrimination Ordinance (Cap. 602)

Section 7: Racial Harassment

(1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person harasses another person if, on the ground of the race of that other person or a near relative of that other person, the first-mentioned person engages in unwelcome conduct (which may include an oral or a written statement), in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated by that conduct.

(2) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (“the first-mentioned person”) harasses another person (“the second-mentioned person”) if, on the ground of the race of the second-mentioned person or his or her near relative, the first-mentioned person, alone or together with other persons, engages in conduct (which may include an oral or a written statement) that creates a hostile or intimidating environment for the second-mentioned person.

Section 24: Employees, etc.

(12) It is unlawful for a person residing in any premises to harass another person who is—

(a) employed by a third person at an establishment in Hong Kong (whether or not the third person also resides in those premises and whether or not those premises are that establishment); and

(b) carrying out in those premises all or part of his or her work in relation to the employment (whether or not he or she resides in those premises).
XII. Remedies for Trespass to the Person

Case example 1

**Achacoso, Warly Cabaneros v. Liu Man Kuen [2004] HKCFI 461**

**Holding**
Although the MDW did not suffer permanent incapacity, her scars were permanent and the court awarded her aggravated damages on the basis that the manner in which the wrong was committed not only injured P’s feelings of pride and dignity, but also caused her humiliation, distress, insult and pain.

**Facts**
An Indonesian MDW was abused by her employer, who forcefully burned her fingers with an iron. Her hands became red, swollen and painful when she carried heavy objects, and they also reacted adversely to detergent. The MDW was deeply ashamed by the scars left on her hands, and whenever she saw them, she was reminded of this incident and regarded that as a lifetime embarrassment.

(A) Summary of damages claimed and awarded:

<table>
<thead>
<tr>
<th>Heads of damages claimed</th>
<th>Amount of damages claimed</th>
<th>Actual damages allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>PSLA</td>
<td>HK$ 480,000</td>
<td>HK$ 280,000</td>
</tr>
<tr>
<td>Aggravated damages</td>
<td>HK$ 50,000</td>
<td>HK$50,000</td>
</tr>
<tr>
<td>Pre-trial loss of earnings</td>
<td>HK$ 98,157.5</td>
<td>HK$ 98,157.5</td>
</tr>
<tr>
<td>Loss of earning capacity</td>
<td>Unsure</td>
<td>Nil</td>
</tr>
<tr>
<td>Future medical expenses</td>
<td>HK$ 2,028</td>
<td>HK$ 2,028</td>
</tr>
<tr>
<td>Special damages (travelling expenses,</td>
<td>HK$ 4,117</td>
<td>HK$ 4,117</td>
</tr>
<tr>
<td>medical expenses and visa extension expenses)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total: HK$ 434,302.50

Case example 2

**Faridha Sulistyoningsih v Mak Oi Ling Karen [2007] HKLRD (Yrbk) 418**

**Holding**
The four months of false imprisonment entitled P to an additional sum for compensatory and aggravated damages, on top of ordinary damages. However, the court declined to award the HK$2,844 sum requested by the MDW for labour expended in taking care of an infant of D’s colleague, as it was unclear whether this was a duty carried out.
by the MDW in addition to, or as part of, her existing domestic duties.

Facts

A Filipino domestic helper was indecently assaulted on three occasions by her employer, who also threatened to kill her or send her back to the Philippines if she resisted or complained to his wife.

Each time the employer sexually harassed the MDW against her will, she reported it to her employment agency and asked for help. After the third incident, the employment agency called her to check her safety, and later police officers and representatives of the employment agency arrived and escorted her to a shelter. As a result of the sexual harassment, the MDW was diagnosed with PTSD, and requested six months sick leave.

This was a case of physical assault and false imprisonment. The MDW was subject to physical abuse in the form of hitting, pinching, scratching, being beaten with a wooden ruler, and being assaulted with umbrellas, chair legs, mops, hangers, and even teapots. In addition, the MDW was subjected to horrendous working conditions, such as 22.5-hour working days, no proper food, and no rest days for four months.

As a result of the assaults, the MDW sustained injuries all over her body, including on her face, chest and limbs. Psychologically, she also suffered from adjustment disorder and displayed depressive symptoms, including lack of sleep and crying spells.

(B) Summary of damages claimed and awarded:

<table>
<thead>
<tr>
<th>Heads of damages claimed</th>
<th>Amount of damages claimed</th>
<th>Actual damages allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>PSLA</td>
<td>HK$ 320,000</td>
<td>HK$ 280,000</td>
</tr>
<tr>
<td>Past loss of earnings</td>
<td>HK$ 129,220</td>
<td>HK$ 129,220</td>
</tr>
<tr>
<td>Compensatory and aggravated damages for false imprisonment</td>
<td>HK$ 100,000</td>
<td>HK$ 60,000</td>
</tr>
<tr>
<td>Exemplary damages for false imprisonment</td>
<td>HK$ 50,000</td>
<td>Nil</td>
</tr>
<tr>
<td>Aggravated damages for the assaults</td>
<td>HK$ 100,000</td>
<td>HK$ 50,000</td>
</tr>
<tr>
<td>Special damages</td>
<td>a) Unpaid wages and other statutory and contractual entitlements under Employment</td>
<td>a) HK$ 22,754</td>
</tr>
</tbody>
</table>

469 Faridha Sulistyoningsih, para 15: The plaintiff refers to Hoi Wai Yee v Yip Chuen, Yip Wing Choi, HCPI 291 of 1996, unrep. In this previous case, the plaintiff suffered more serious injuries, as her scars were assessed as "permanent and unsightly" with "cosmetic disability of 8%".
470 Ibid. In Faridha Sulistyoningsih, the plaintiff's scars appeared to be slight and small. Her cosmetic disability would only be 3%.
471 Ibid, para 16: $4,970 (monthly salary) x 26 (months when she was out of employment) = $129,220.
### Case example 3

*Tangarorang Jessamie Mendrez v Chan Chau Wing [2013] HKDC 68*

<table>
<thead>
<tr>
<th>Ordinary: HK$22,754</th>
<th>HK$ 9,390</th>
</tr>
</thead>
<tbody>
<tr>
<td>b) Hospital fees, dental treatment fees and damaged clothing and others: HK$ 9,390</td>
<td></td>
</tr>
<tr>
<td>c) Actual labour expended in taking care of the infant of a colleague of the defendant: HK$ 2,844</td>
<td>Nil; for being too remote</td>
</tr>
<tr>
<td><strong>Future medical expenses</strong></td>
<td>HK$ 65,635 (medical expert’s opinion that future surgeries needed for treating the scars)</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>HK$616,998</strong></td>
</tr>
</tbody>
</table>

#### Facts

P, an MDW, was indecently assaulted by her employer, D, who also threatened to kill her or send her back to the Philippines if she resisted or complained to his wife. P suffered PTSD as a result.

#### Holding

The employer was charged with three counts of indecent assault and three counts of criminal intimidation. He was convicted after trial of all counts and sentenced to five months imprisonment. Nine months later, the MDW received a phone call from him and he threatened to take her life in revenge. She reported the matter to the police and he was arrested again and charged with criminal intimidation and sentenced to a further 3 months imprisonment.

The doctor’s opinion was that sick leave for six months on psychological grounds would be reasonable. When the employer reached back out to the MDW and threatened the MDW again, this caused a further deterioration in her wellbeing, which required another three months' sick leave.
(C) Summary of Damages Claimed and Awarded:

<table>
<thead>
<tr>
<th>Heads of damages claimed</th>
<th>Amount of damages claimed</th>
<th>Actual damages awarded</th>
</tr>
</thead>
<tbody>
<tr>
<td>PSLA</td>
<td>HK$ 170,000</td>
<td>HK$ 140,000</td>
</tr>
<tr>
<td>Aggravated damages</td>
<td>HK$ 50,000</td>
<td>HK $ 30,000</td>
</tr>
<tr>
<td>Pre-trial loss of earnings</td>
<td>HK $ 83,520</td>
<td>HK $74,560</td>
</tr>
<tr>
<td>Loss of earning capacity</td>
<td>HK $ 150,000</td>
<td>HK $ 30,000</td>
</tr>
<tr>
<td>Future medical expenses</td>
<td>HK $ 45,000 (based on medical opinion)</td>
<td>HK $ 45,000</td>
</tr>
<tr>
<td>Miscellaneous special damages</td>
<td>Visa extension: HK$160 x 22 = HK$3,520</td>
<td>HK$ 3,520</td>
</tr>
<tr>
<td></td>
<td>Alternative accommodation: 1) HK$10 x 30 days x 13 months = HK$3,900. 2) HK$400 x 10 months = HK$4,000.</td>
<td>HK$ 7,900</td>
</tr>
<tr>
<td></td>
<td>Food and others: HK$(40 x 30 days + HK$200) x 24 months + = HK$33,600.</td>
<td>HK$ 34,800.</td>
</tr>
<tr>
<td></td>
<td>Mobile phone expenses: HK$1,200</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Transportation: HK$2,010</td>
<td>HK$ 2,010</td>
</tr>
<tr>
<td></td>
<td>Total: HK$367,790</td>
<td></td>
</tr>
</tbody>
</table>

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472 Tangarorang Jessamie Mendrez v Chan Chau Wing [2013] HKDC 68 para 47: The claimant left Hong Kong to visit her parents in the Philippines for two months. During those two months, she could not have worked in Hong Kong and was therefore unable to claim the loss of earnings for these 2 months. There was also a HK$2000 pretrial settlement that was deducted from the damages.

473 Ibid, para 63: As damages.
XIII. Remedies under contract law

(A) Remedies under contract law

7.2 A breach of contract gives rise to a right of action for damages. In cases where damages would be an inadequate remedy, a plaintiff can apply for a decree of specific performance. In cases of negative obligations, a plaintiff may apply for an injunction to restrain a breach of contract.\footnote{Stephen D. Mau, \textit{Hong-Kong Legal Principles: Important Topics for Students and Professionals} (Hong Kong: Hong-Kong University Press 2006) p 88 (hereinafter "Hong Kong Legal Principles"); \textit{See also, Halsbury’s Laws of Hong-Kong} Vol 7 (Hong Kong: Lexis Nexis, 2007), para 115.369.}

    (i) Damages

7.3 Damages are intended as compensation for the loss suffered by the party in question and place the party in a position as if the contract has been fully performed. An innocent party cannot make a profit from an action for damages.\footnote{\textit{See Hong Kong Legal Principles, p 89; \textit{See also Attorney General v Blake} [2001] 1 AC 268 where the Court decided that damages for breach of contract could be assessed by reference to the benefits gained by the wrongdoer rather than the loss suffered by the innocent party.}
\textit{See Hong Kong Legal Principles, p 89; \textit{See also Hadley v Baxendale} [1854] 9 Ex 341 which first stated the remoteness of damage principle.}}

    (a) Principles of Damages

7.4 Damages are generally assessed by courts according to the principle of remoteness of damages and the principle of mitigation of loss.\footnote{\textit{See Hong Kong Legal Principles, p 89; \textit{See also Chui & Roebuck, Hong-Kong Contracts} (Hong-Kong: Hong Kong University Press, 1994), para. 7.3.3. “The defendant does not have to pay damages for loss which was not caused by the breach.”}} The principle of remoteness of damages provides that the plaintiff can recover losses:

    - which arise naturally from the breach of the contract by the defendant; and/or

    - which are a probable result of a breach of the contract by the defendant (as could be reasonably predicted by the parties at the time the contract was made).\footnote{\textit{See Hong Kong Legal Principles, p 89-90; \textit{See also Chui & Roebuck, Hong-Kong Contracts} (Hong-Kong: Hong Kong University Press, 1994), para. 7.3.3.}}

7.5 The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties.\footnote{\textit{See Hong Kong Legal Principles, p. 90; \textit{See also Chui & Roebuck (see n 499 above), para. 7.3.3.}} Further, the plaintiff may recover damages only for a loss where the breach of the contract was the “effective” or “dominant” cause of that loss.\footnote{\textit{See Hong Kong Legal Principles, p. 90; \textit{Chitty, The Law of Contracts} Vol 1 (Hong-Kong: Sweet & Maxwell 2004), paras 26-077 (hereinafter “Chitty”).}}

7.6 The principle of mitigation of loss requires the injured party to take all reasonable steps to minimize the loss suffered on account of the breach prior to making a claim for remedy.\footnote{\textit{See Hong Kong Legal Principles, p. 90.}} Though this principle may apply in few claims by MDWs, it should be considered on a case-by-case basis.\footnote{\textit{For example, if a worker claims for lost wages, he or she may need to show an effort to find alternative employment.}}
(b) Types of Damages

7.7 The court may award the plaintiff in a successful claim for breach of contract the following types of damages:

- **Expectation damages**\(^{482}\) which place the injured party in a position as if the contract had been performed:
  - The courts determine the profits that would have been made if the contract had been fully performed;
  - Damages are normally determined at the time of the breach for the loss of value to the injured party;
  - The courts would consider the value that the injured party should have received under the terms of the contract; and
  - The courts would consider any incidental and foreseeable consequential damages; or

- **Reliance damages**\(^{483}\) which restore the injured party to a position as if the contract had never been made:
  - These are awarded in circumstances where determination or assessment of expectation damages is difficult;
  - It seeks to compensate the injured party for expenses incurred in performing the contract and does not include lost profits; and
  - It may be awarded in cases where a party has suffered detrimental reliance from an unenforceable agreement; or

- **Restitution damages**\(^{484}\) which seek to prevent an unfair benefit to the defaulting party by forcing the defaulting party to compensate the injured party for the value of service received:
  - they are awarded for partially performed contracts;
  - the benefit conferred on the defendant by the performance, in part, of the plaintiff, is recoverable;
  - the measure of damages is normally based on the market value of the services performed;
  - the measure of damages could alternatively be measured by the extent the value of the defendant’s property was increased by the service performed; or

- **Nominal damage**\(^{485}\) which constitute a small amount fixed as damages for breach of contract without regard to the amount of harm; or

- **Punitive damages**\(^{486}\) which punish the defendant and acts as a deterrent for future acts):
  - they are normally not awarded for a breach of contract;
  - they may be awarded in circumstances where the conduct of the defendant is so “morally repugnant” as to warrant such damages; or

- **Liquidated Damages**\(^{487}\) where parties agree on the sums in the contract:


\(^{483}\) Ibid p 81.

\(^{484}\) Ibid p 81.

\(^{485}\) Also termed ‘contemptuous damages’. See Black’s Law Dictionary (9th ed 2009) available at Westlaw Black.

\(^{486}\) Ibid., p 81. See also Black’s Law Dictionary (9th ed 2009) available at Westlaw Black.

\(^{487}\) See Hong Kong Legal Principles, p. 91.
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

- These are pre-agreed sums to be awarded in case of a breach; and
- Such a provision is likely to be very rare in MDW employment contracts.

(ii) Equitable remedies

(a) Specific Performance

7.8 If monetary damages are considered to be inadequate, equitable remedies,\(^{488}\) such as specific performance of a contract, may be available to an injured party.\(^{489}\) However, specific performance is typical in cases where the subject matter of the contract is considered to be unique – for example, land or irreplaceable items – such that no amount of damages would compensate for the loss of it.\(^ {490}\) Specific performance is not granted for contracts of personal service.\(^ {491}\) Therefore, it may not be relevant in the majority of claims brought by MDWs.

(iii) Restrictions on Remedies

7.9 As the rules and law governing a contractual relationship are made by the parties, only the parties are bound by the responsibilities and receive the benefit of the contract. Consequently, only the parties to a contract may sue on it. However, it is important to note that restrictions on potentially available remedies may be imposed by the parties\(^ {492}\) or by law.\(^ {493}\)

7.10 The Limitation Ordinance (Cap 347) provides a statutory-imposed limitation on recovery. Claims for breach of contract must be brought within six years from the date on which the reason to sue arises.\(^ {494}\) No action may be brought after the limitation period expires. The remedy becomes time-barred but the injured party’s rights under the contract remain.\(^ {495}\)

\(^{488}\) Hong Kong Legal Principles., p 92; see also Black’s Law Dictionary (9th ed 2009) available at Westlaw Black, which defines equitable remedy as a “nonmonetary remedy, such as an injunction or specific performance, obtained when monetary damages cannot adequately redress the injury.”

\(^{489}\) Note that: A traditional view was that specific performance would not be ordered where damages were an adequate remedy. However, the courts recently started to ask ‘whether specific performance was the most appropriate remedy in the circumstances of each case’ to determine which damages would be ordered. See Chitty, para 27-005.

\(^{490}\) Mau, Contract Law in Hong-Kong: An Introductory Guide, p 92 (see n. 504 above).

\(^{491}\) Ibid., p 93. See also Chui & Roebuck (see n 499 above), para. 7.4.1 and Chitty, para 27.020-27.024.

\(^{492}\) Examples of restrictions that may be imposed by the parties to the contract are liquidated damages, the use of deposit and limitation or exemption clauses. See Hong Kong Legal Principles, pp. 95-96.

\(^{493}\) Ibid., pp. 94-95; Also see Shanklin Pier v Detel Products [1951] 2 KB 854.

\(^{494}\) This could be the time of the breach or when the cause of action was discovered or should have been discovered.

\(^{495}\) Hong Kong Legal Principles, p. 96.
XIV. **Sex Discrimination Ordinance (Cap. 480)**

**Section 2: Interpretation**

(5) For the purposes of this Ordinance, a person (howsoever described) sexually harasses a woman if-

(a) the person-
   (i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or
   (ii) engages in other unwelcome conduct of a sexual nature in relation to her, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or

(b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her. (Amended 29 of 2008 s. 91)

(7) In subsection (5)- conduct of a sexual nature (涉及性的行徑) includes making a statement of a sexual nature to a woman, or in her presence, whether the statement is made orally or in writing.

**Section 23: Employees, etc.**

**Sexual Harassment**

(1) It is unlawful for a person, in relation to employment by him at an establishment in Hong Kong, to sexually harass a woman who is seeking to be employed by the person.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Hong Kong, to sexually harass her.

(3) It is unlawful for a person who is employed by another person at an establishment in Hong Kong to sexually harass a woman who is seeking to be, or who is, employed by that second-mentioned person.

(12) It is unlawful for a person residing in any premises to sexually harass a woman-

(a) employed by another person at an establishment in Hong Kong (and whether or not that other person also resides in those premises or those premises are that establishment); and

(b) carrying out in those premises all or part of her work in relation to her employment (and whether or not she also resides in those premises).
### SEXUAL HARASSMENT

**L v Burton [2010] 5 HKLRD 397**

**Holding**
The case for unlawful sexual harassment was clearly established, and P was awarded damages for losses flowing from both the sexual harassment and dismissal from her job.

**Facts**
D interviewed P for a job at his company. After the interview, D made friendly approaches to P over text messages, as well as making conversations of a sexual and private nature after P accepted the position. D then continued making unwelcome sexual advances towards P, who rejected him. Finally, D fired P and P sued for unlawful sexual harassment and sexual discrimination under the SDO,\(^{496}\) claiming damages for injury to feelings, exemplary damages, and loss of earnings.

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**Dr Alice Li Miu Ling v Hong Kong Polytechnic University [2012] HKEC 1494**

**Holding**
The delay in bringing the claim undermined the credibility of P’s claim, and it was found that P only filed the sexual harassment claim after D refused to extend her employment contract. As a result, P failed in her claim.

**Facts**
P was an employee of D. She filed a claim of sexual harassment against her colleague, and sued D for vicarious liability one month after the alleged incident occurred. There were no witnesses to prove the alleged harassment took place, and despite P claiming that she consulted a law firm regarding the claim even though she did not file the complaint immediately, she could not provide the law firm’s name or any further evidence in this respect.

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\(^{496}\) Sexual Discrimination Ordinance, Cap 480.
XV. **Standard Contract (Sample)**

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**EMPLOYMENT CONTRACT**

(For A Domestic Helper recruited from abroad)

This contract is made between ........................................... and ........................................... ("the Employer"), holder of Hong Kong Identity Card/Passport No. * ..........................................., and ........................................... ("the Helper") on ........................................... and has the following terms:

1. The Helper's place of origin for the purpose of this contract is ...........................................

2. (A) The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Helper arrives in Hong Kong.

(B) The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on ..........................................., which is the date following the expiry of D.H. Contract No. ..........................................., for employment with the same employer.

(C) The Helper shall be employed by the Employer as a domestic helper for a period of two years commencing on the date on which the Director of Immigration grants the Helper permission to remain in Hong Kong to begin employment under this contract.

3. The Helper shall work and reside in the Employer's residence at ...........................................

4. (a) The Helper shall only perform domestic duties as per the attached Schedule of Accommodation and Domestic Duties for the Employer.

(b) The Helper shall not take up and shall not be required by the Employer to take up, any other employment with any other person.

(c) The Employer and the Helper hereby acknowledge that Clause 4 (a) and (b) will form part of the conditions of stay to be imposed on the Helper by the Immigration Department upon the Helper's admission to work in Hong Kong under this contract. A breach of one or both of the said conditions of stay will render the Helper and/or any aider and abettor liable to criminal prosecution.

5. (a) The Employer shall pay the Helper wages of HK$ ........................................... per month. The amount of wages shall not be less than the minimum allowable wage announced by the Government of the Hong Kong Special Administrative Region and prevailing at the date of this contract. An employer who fails to pay the wages due under this employment contract shall be liable to criminal prosecution.

(b) The Employer shall provide the Helper with suitable and furnished accommodation as per the attached Schedule of Accommodation and Domestic Duties and food free of charge. If no food is provided, a food allowance of HK$ ........................................... a month shall be paid to the Helper.

(c) The Employer shall provide a receipt for payment of wages and food allowance and the Helper shall acknowledge receipt of the amount under his/her signature.

6. The Helper shall be entitled to all rest days, statutory holidays, and paid annual leave as specified in the Employment Ordinance, Chapter 57.

7. (a) The Employer shall provide the Helper with free passage from his/her* place of origin to Hong Kong and on termination or expiry of this contract, free return passage to his/her* place of origin.

(b) A daily food and travelling allowance of HK$100 per day shall be paid to the Helper from the date of his/her* departure from his/her* place of origin until the date of his/her* arrival at Hong Kong if the travelling is by the most direct route. The same payment shall be made when the Helper returns to his/her* place of origin upon expiry or termination of this contract.

8. The Employer shall be responsible for the following fees and expenses (if any) for the departure of the Helper from his/her* place of origin and entry into Hong Kong:—

   (i) medical examination fees;
   (ii) authentication fees by the relevant Consulate;
   (iii) visa fee;
   (iv) insurance fee;
   (v) administration fee or fee such as the Philippines Overseas Employment Administration fee, or other fees of similar nature imposed by the relevant government authorities; and
   (vi) others: ...........................................

In the event that the Employer has paid the above costs or fees, the Employer shall fully reimburse the Helper forthwith the amount so paid by the Helper upon demand and production of the corresponding receipts or documentary evidence of payment.

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* Delete where inappropriate.

† Use either Clause 2A, 2B or 2C whichever is appropriate.
9. (a) In the event that the Helper is ill or suffers personal injury during the period of employment specified in Clause 2, except for the period during which the Helper leaves Hong Kong of his/her own volition and for his/her own personal purposes, the Employer shall provide free medical treatment to the Helper. Free medical treatment includes medical consultation, maintenance in hospital and emergency dental treatment. The Helper shall accept medical treatment provided by any registered medical practitioner.

(b) If the Helper suffers injury by accident or occupational disease arising out of and in the course of employment, the Employer shall make payment of compensation in accordance with the Employees’ Compensation Ordinance, Chapter 282.

(c) In the event of a medical practitioner certifying that the Helper is unfit for further service, the Employer shall subject to the statutory provisions of the relevant Ordinances terminate the employment and shall immediately take steps to repatriate the Helper to his/her place of origin in accordance with Clause 7.

10. Either party may terminate this contract by giving one month’s notice in writing or one month’s wages in lieu of notice.

11. Notwithstanding Clause 10, either party may in writing terminate this contract without notice or payment in lieu in the circumstances permitted by the Employment Ordinance, Chapter 57.

12. In the event of termination of this contract, both the Employer and the Helper shall give the Director of Immigration notice in writing within seven days of the date of termination. A copy of the other party’s written acknowledgement of the termination shall also be forwarded to the Director of Immigration.

13. Should both parties agree to enter into new contract upon expiry of the existing contract, the Helper shall, before any such further period commences and at the expense of the Employer, return to his/her place of origin for a paid/unpaid vacation of not less than seven days, unless prior approval for extension of stay in Hong Kong is given by the Director of Immigration.

14. In the event of the death of the Helper, the Employer shall pay the cost of transporting the Helper’s remains and personal property from Hong Kong to his/her place of origin.

15. Save for the following variations, any variation or addition to the terms of this contract (including the annexed Schedule of Accommodation and Domestic Duties) during the duration shall be void unless made with the prior consent of the Commissioner for Labour in Hong Kong:

(a) a variation of the period of employment stated in Clause 2 through an extension of the said period of not more than one month by mutual agreement and with prior approval obtained from the Director of Immigration;

(b) a variation of the Employer’s residential address stated in Clause 3 upon notification in writing being given to the Director of Immigration, provided that the Helper shall continue to work and reside in the Employer’s new residential address;

(c) a variation in the Schedule of Accommodation and Domestic Duties made in such manner as prescribed under Item 6 of the Schedule of Accommodation and Domestic Duties; and

(d) a variation of item 4 of the Schedule of Accommodation and Domestic Duties in respect of driving of a motor vehicle, whether or not the vehicle belongs to the Employer, by the helper by mutual agreement in the form of an Addendum to the Schedule and with permission in writing given by the Director of Immigration for the Helper to perform the driving duties.

16. The above terms do not preclude the Helper from other entitlements under the Employment Ordinance, Chapter 57, the Employees’ Compensation Ordinance, Chapter 282 and any other relevant Ordinances.

17. The Parties hereby declare that the Helper has been medically examined as to his/her fitness for employment as a domestic helper and his/her medical certificate has been produced for inspection by the Employer.

Signed by the Employer __________________________
(Signature of Employer)

in the presence of __________________________
(Name of Witness) __________________________
(Signature of Witness)

Signed by the Helper __________________________
(Signature of Helper)

in the presence of __________________________
(Name of Witness) __________________________
(Signature of Witness)

* Delete where inappropriate.
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES

SCHEDULE OF ACCOMMODATION AND DOMESTIC DUTIES

1. Both the Employer and the Helper should sign to acknowledge that they have read and agreed to the contents of this Schedule, and to confirm their consent for the Immigration Department and other relevant government authorities to collect and use the information contained in this Schedule in accordance with the provisions of the Personal Data (Privacy) Ordinance.

2. Employer’s residence and number of persons to be served
   A. Approximate size of flat/house ........ square feet/square metres*
   B. State below the number of persons in the household to be served on a regular basis:
      .......... adult .......... minors (aged between 5 to 18) .......... minors (aged below 5) .......... expecting babies.
      .......... persons in the household requiring constant care or attention (excluding infants).
      (Note: Number of Helpers currently employed by the Employer to serve the household ............ )

3. Accommodation and facilities to be provided to the Helper
   A. Accommodation to the Helper
      While the average flat size in Hong Kong is relatively small and the availability of separate servant room is not common, the Employer should provide the Helper suitable accommodation and with reasonable privacy. Examples of unsuitable accommodation are: the Helper having to sleep on made-do beds in the corridor with little privacy and sharing a room with an adult/teenager of the opposite sex.

   □ Yes. Estimated size of the servant room ................... square feet/square metres*
   □ No. Sleeping arrangement for the Helper:
      Share a room with .......... child/children aged ..........
      Separate partitioned area of .......... square feet/square metres*
      □ Others. Please describe ..........................................................

   B. Facilities to be provided to the Helper:
      (Note: Application for entry visa will normally not be approved if the essential facilities from item (a) to (f) are not provided free.)

      (a) Light and water supply □ Yes □ No
      (b) Toilet and bathing facilities □ Yes □ No
      (c) Bed □ Yes □ No
      (d) Blankets or quilt □ Yes □ No
      (e) Pillows □ Yes □ No
      (f) Wardrobe □ Yes □ No
      (g) Refrigerator □ Yes □ No
      (h) Desk □ Yes □ No
      (i) Other facilities (Please specify)

.................................................................
4. The Helper should only perform domestic duties at the Employer's residence. Domestic duties to be performed by the Helper under this contract exclude driving of a motor vehicle of any description for whatever purposes, whether or not the vehicle belongs to the Employer.

5. Domestic duties include the duties listed below.

   Major portion of domestic duties:—
   1. Household chores
   2. Cooking
   3. Looking after aged persons in the household (constant care or attention is required/not required*)
   4. Baby-sitting
   5. Child-minding
   6. Others (please specify)

   

6. The Employer shall inform the Helper and the Director of Immigration of any substantial changes in item 2, 3 and 5 by serving a copy of the Revised Schedule of Accommodation and Domestic Duties (ID 407G) signed by both the Employer and the Helper to the Director of Immigration for record.

   Employer's name and signature   Date   Helper's name and signature   Date

   * delete where inappropriate
   □ tick as appropriate
XVI. **Statutory Provisions For Entitlements Upon Termination of Contract**

(A) **Termination Payments**

(i) An MDW is entitled to termination payments, which may include:\(^{497}\)

- outstanding wages;
- wages in lieu of notice, if any;
- payment in lieu of any untaken annual leave;
- long service payment or severance payment, where appropriate; and
- any other sum under the employment contract, e.g. free return passage, food and traveling allowance, etc.

(ii) **Long service**

- An employee terminating in accordance with section 10(aa) of the EO may be entitled to a long service in accordance with section 31R(1)(b) of the EO.

(iii) **Time limits for making the termination payments:**\(^ {498}\)

- An employer shall pay all the termination payments, except for severance payment, to the employee as soon as practicable and in any case not later than seven days after the date of termination or expiry of contract.\(^ {499}\)
- For severance payment, an employer shall make payment not later than two months from the receipt of a notice from an employee claiming for severance payment.\(^ {500}\)

(B) **The Right to Severance or Long Service Payment**

(i) **General Provisions of the Right to Severance Payment**\(^ {501}\)

An MDW is entitled to severance payment if the MDW:

- has no less than 24 months of service with the same employer prior to the termination;\(^ {502}\) and
- is dismissed or the contract is not renewed by reason of redundancy.\(^ {503}\)

(ii) **General Provisions to the Right to Long Service Payment**\(^ {504}\)

An MDW is entitled to a long service payment if the MDW:


\(^{498}\) Ibid, p 4.

\(^{499}\) Section 25, EO (Cap 57).

\(^{500}\) Section 31B(1), EO (Cap 57).

\(^{501}\) Section 31B, EO (Cap 57).

\(^{502}\) Section 31B(1)(a), EO (Cap 57).

\(^{503}\) Section 31B, EO (Cap 57).
• has no less than five years of service with the same employer prior to the termination,\textsuperscript{505} and
• is dismissed or the contract is not renewed by reason other than serious misconduct or redundancy;\textsuperscript{506} or
• resigns on ground of ill health;\textsuperscript{507} or
• resigns on ground of old age (i.e. aged 65 or above),\textsuperscript{508} or
• dies in service.\textsuperscript{509}

(C) Amount of Severance Payment or Long service payment (s31V)

(i) Calculation Method

An MDW is entitled to either severance payment or long service payment.\textsuperscript{510} The following formula applies to the calculation of both severance payment and long service payment:

\[
\text{(last full month’s wages) } \times \frac{2}{3} \times \text{years of service.}
\]

Service in respect of an incomplete year should be calculated on a pro rata basis.

“Wages” is defined broadly and will include both salary as well as most allowances (if any) paid to an MDW under the terms of employment.\textsuperscript{511}

\textsuperscript{505} Section 31R(1)(a), EO (Cap 57).
\textsuperscript{506} Section 31R(1)(a)(i), EO (Cap 57).
\textsuperscript{507} Section 31R(1)(a)(ii), EO (Cap 57).
\textsuperscript{508} Section 31R(1)(b), EO (Cap 57).
\textsuperscript{509} Section 31RA(1), EO (Cap 57).
\textsuperscript{511} If an employee receives one or more gratuities from their employer based on length of service (for example, a completion bonus at the end of each employment term) the amount of long service payment or severance payment may be reduced by the total of all such gratuities. However, this provision only applies to contractual gratuities (not ones given at the discretion of the employer) – See A Concise Guide to the Employment Ordinance ‘Chapter 10: Severance Payment and Long Service Payment’ p 4 available at http://www.labour.gov.hk/eng/public/wcp/ConciseGuide/10.pdf (visited 30 September 2015).
XVII. Unconscionable Contracts Ordinance (Cap. 458)

Section 5. Relief where contract unconscionable

(1) If, with respect to a contract for the sale of goods or supply of services in which one of the parties deals as consumer, the court finds the contract or any part of the contract to have been unconscionable in the circumstances relating to the contract at the time it was made, the court may-

(a) refuse to enforce the contract;
(b) enforce the remainder of the contract without the unconscionable part;
(c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.

(2) It is for the person claiming that a contract or part of a contract is unconscionable to prove that it is.

(Enacted 1994)
Chapter 3

PROCEDURES FOR PURSUING REMEDIES
1. Introduction

1.1 This chapter introduces the legal venues in Hong Kong through which Migrant Domestic Workers (MDWs) can bring claims for salary, other monetary claims, or discrimination. The appropriate venue(s) in each case will generally depend upon the nature and monetary amount of the claims brought by the MDW.

1.2 Section 2 provides a broad overview and brief introduction of the available routes to resolving claims that are available to MDWs. These include negotiating with the employer, lodging a complaint with the Equal Opportunities Commission (EOC), and pursuing a civil claim.

1.3 Section 3 analyses the legal routes available to MDWs who remain in Hong Kong. These include bringing a claim in the Small Claims Tribunal (SCT), Minor Employment Claims Adjudication Board (MECAB), Labour Tribunal (LT), the District Court (DC), or lodging a complaint with the EOC.

1.4 Section 4 explains the legal routes available to those who no longer reside in Hong Kong. It details the immigration challenges that these clients may face if they must return to Hong Kong for a court appearance, as well as the potential for appearing in court remotely via the Technology Court (TC).

1.5 Section 5 covers the general rules for bringing claims, and then enforcing any judgment that a court has made in favor of the MDW. It includes an overview of procedures on evidence and settlement, as well as the enforcement procedures available once the client has won a judgment.

1.6 Section 6 provides a conclusive summary of this chapter.
2. Overview of the available routes to remedy for MDWs

2.1 There are four main ways that MDWs may resolve disputes with an employer or agent: I. conducting negotiations directly with the employer or agent, II. sending a letter of demand prior to litigation, III. bringing a civil claim in the courts, and IV. lodging a complaint with the EOC if they have a discrimination claim. These will be explained respectively in Sections I., II., III. and IV. below.

I. Negotiating with the employer or agent

2.2 Practitioners may assist and represent MDWs in settlement negotiations with their employers or agents prior to pursuing action through the civil courts or the EOC. Such out of court negotiations are different from negotiations or mediations procured through the courts after commencing a civil claim.

2.3 While settlements are faster, cheaper and more informal than court action, there are real-world challenges that can impact their client’s ability to negotiate. For example, MDWs who have started new employment since their cause of action arose may feel more pressured to settle as, for instance, their new employers may not allow them to take leave to attend negotiations. Those who are under pressure to depart Hong Kong can face similar challenges. Thus, MDWs commonly settle their claims for amounts lower than what they may be entitled to claim through legal action.

2.4 However, practitioners in Hong Kong can continue to communicate with the client remotely, and help them negotiate with their employers or agents. In certain circumstances, they may also assist the client to pursue their civil claims remotely. This should be made clear to employers and agents during negotiations, as it may strengthen the MDW’s bargaining position by putting the employer on notice that the MDW’s departure from Hong Kong does not prevent them from seeking legal redress or bringing an action.

2.5 Where negotiations with an employer or agent are successful, a clear and accurate written record of the agreement should be drafted, signed, and dated by both parties (and preferably witnessed).

2.6 Where negotiations are unsuccessful, MDWs may wish to begin civil proceedings. In such cases, practitioners can warn the other side that any unreasonable refusal on their part to negotiate may result in a more favourable court order for costs if the MDW successfully proves their case. Even if the claimant is not successful, courts may look upon an MDW’s case more positively where negotiations were attempted and the court may refuse to make any order as to costs.

2.7 Before filing an employment-related monetary claim, unrepresented MDWs will be expected to arrange a conciliation meeting through the Labour Relations Division of the Labour Department. The conciliation service is free and informal. If a settlement is not reached, or the employer does not attend, the conciliation officer will refer the MDW to lodge a claim with MECAB or the Labour Tribunal (see below).

II. Letter before action

2.8 Several opportunities for settling a claim exist before court action begins. In fact, the time and expense involved should make court action the last resort rather
than the first. If the MDW’s claim is monetary, one such method of reaching towards a settlement is a demand letter to the MDW’s employer or agent.

2.9 A demand letter should always:

- specify the relevant claim, e.g., how much the employer or agent owes the MDW and what the basis for that debt is;
- specify the steps that the MDW has already taken to recover the outstanding amount;
- provide a warning to the employer or agent that if they fail to fulfill the claim by the date stipulated in the letter, the MDW will launch legal proceedings against them without further notice; and
- encourage the employer or agent to pay in order to avoid facing further legal action.

2.10 Where the MDW sends a demand letter to their employer or agent, they should retain both a copy of that letter as well as any replies received. In circumstances where the letter from the defendant contains a settlement offer, it may be considered a ‘without prejudice’ communication and not be admissible as evidence.

III. Bringing a claim in Hong Kong’s civil courts

2.11 Depending on the nature and size of their claims, MDWs may bring a civil claim in the Small Claims Tribunal (SCT), Minor Employment Claims Adjudication Board (MECAB), Labour Tribunal (LT), or the District Court (DC). Such claims may range from common law claims, such as negligence, to contractual and statutory claims, such as those under the Standard Employment Contract (SEC) and the Employment Ordinance (EO).

IV. Lodging a complaint with the Equal Opportunities Commission (EOC)

2.12 Finally, where MDWs have been discriminated against because of their gender, disability, family status or race, they can lodge a formal complaint with the EOC. The complaint can be lodged on its own or in parallel with a civil claim. If the complaint is launched in parallel, it could assert additional pressure on the employer to reach a settlement. However, the MDW would not be able to obtain legal aid for lodging complaints with the EOC. That said, there is little to no cost in lodging a complaint with the EOC as its conciliation process is free.
3. Legal options available to MDWs in Hong Kong

I. Introduction

3.1 MDWs in Hong Kong may bring civil claims in different venues depending on the nature and size of their claims. For employment-related monetary claims, MDWs should commence their actions in:

- the MECAB, if their claim involves an amount less than or equal to HK$8,000; or
- the LT, if their claim involves an amount greater than HK$8,000.

3.2 For claims which do not arise from a breach of the contract of employment or Employment Ordinance, MDWs should commence their actions in:

- the SCT, if their monetary claim involves an amount less than or equal to HK$50,000; and
- the DC for monetary claims greater than HK$50,000 and for all non-monetary claims.

3.3 In cases of discrimination, MDWs may also consider lodging a complaint in the EOC, either independently or in parallel to a civil claim.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

Chart 3-1 Overview of civil claim options in Hong Kong

Is the claim only employment related? e.g. wages, dismissal, compensation, rest day compensation

No

Non-employment claims may include agency fees, other contract disputes, and/or claims for injury

Does the claim exceed HK$50,000?

No

Small Claims Tribunal (employment-related causes of action may be sent to MECAB/Labour Tribunal)

Yes

District Court (can hear mix of employment/non-employment causes of action)

Yes

Does the claim exceed HK$8,000?

No

MECAB

Yes

Labour Tribunal

Chart 3-2: Filing a complaint with the EOC

Does the claim involve sex, race, disability or family status discrimination?

Yes

Equal Opportunities Commission

No

Consider civil claims in Chart 1
### Table 3-1: Summary of procedures in different venues

<table>
<thead>
<tr>
<th>Venue</th>
<th>SCT</th>
<th>LT</th>
<th>DC</th>
<th>EOC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Possible causes of action</strong></td>
<td>Non-wage related debt</td>
<td>Employment-related issues (statutory or contractual), e.g., wages, dismissal, and compensation</td>
<td>All civil claims within threshold claim amount</td>
<td>Discrimination claims</td>
</tr>
<tr>
<td><strong>Amount claimed</strong></td>
<td>HK$50,000 or less</td>
<td>Exceeding HK$8,000 for at least one plaintiff, or if 10 plaintiffs have the same claim</td>
<td>Over HK$50,000 but less than HK$1 million</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Estimated time frame until resolution</strong></td>
<td>1-3 months</td>
<td>2-6 months</td>
<td>At least 1 year</td>
<td>Within 1 year after the relevant incident</td>
</tr>
<tr>
<td><strong>Limitation period</strong></td>
<td>6 years from the date that the cause of action accrued</td>
<td>6 years from the date that the cause of action accrued</td>
<td>6 years from the date that the cause of action accrued</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Non-legal representation</strong></td>
<td>Possible for filing initial claim. Hearing requires self-representation</td>
<td>Possible to have union representative if approved for all stages, but must have “equality of arms”</td>
<td>Not applicable</td>
<td>Authorisation possible for a friend, relative, or trade union representative</td>
</tr>
<tr>
<td><strong>Legal representation</strong></td>
<td>Not permitted</td>
<td>Not permitted</td>
<td>Permitted</td>
<td>Not permitted</td>
</tr>
<tr>
<td><strong>Appearance of MDW required?</strong></td>
<td>Must attend hearing – claim can be struck out if absent from hearing. Technology Court theoretically possible</td>
<td>Must attend hearing – claim can be struck out if absent from hearing Technology Court theoretically possible</td>
<td>Record of Technology Court use.</td>
<td>Not required. Claims can be initiated online or authorised to an organization</td>
</tr>
<tr>
<td><strong>Legal Aid</strong></td>
<td>Not applicable</td>
<td>Not applicable</td>
<td>Applicable, but best to apply before returning to home country</td>
<td>Not applicable</td>
</tr>
<tr>
<td><strong>Extension of visa</strong></td>
<td>Not permitted</td>
<td>Permitted</td>
<td>Permitted</td>
<td>Not permitted</td>
</tr>
<tr>
<td><strong>Costs</strong></td>
<td>Low costs Filing costs: HK$20-120</td>
<td>Low costs Filing costs: HK$20-50</td>
<td>High costs Filing costs: HK$630</td>
<td>Low costs Filing costs: nil</td>
</tr>
</tbody>
</table>
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

<table>
<thead>
<tr>
<th>Venue</th>
<th>SCT</th>
<th>LT</th>
<th>DC</th>
<th>EOC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing</td>
<td>Adversarial process</td>
<td>Adversarial process</td>
<td>Adversarial process</td>
<td>Non-adversarial / inquisitorial process</td>
</tr>
<tr>
<td>Review</td>
<td>Review at SCT</td>
<td>Review at LT</td>
<td>Not applicable</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Appeal</td>
<td>Appeal to Court of First Instance (CFI)</td>
<td>Appeal to CFI</td>
<td>Appeal to Court of Appeal</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Advantages</td>
<td>Rules and procedures are less strict</td>
<td>Rules and procedures are less strict</td>
<td>Possibility of technology court</td>
<td>Conciliation possible, can lodge complaints from overseas</td>
</tr>
<tr>
<td>Major concerns</td>
<td>Difficulty of enforcement; legal representation not allowed</td>
<td>Difficulty of enforcement; legal representation not allowed</td>
<td>Strict and complex evidential rules and procedures; difficulty of enforcement</td>
<td>Difficulty lies in communication after MDW returns home; cannot force a resolution on either party.</td>
</tr>
<tr>
<td>Remarks</td>
<td>Exclusive jurisdiction over purely employment cases</td>
<td>Obtaining legal aid and/or (pro bono) legal representation is strongly recommended</td>
<td>Complaint may lead to publicity that puts pressure on an employer to settle the case</td>
<td></td>
</tr>
</tbody>
</table>

II. Employment related monetary claims

(A) Minor Employment Claims Adjudication Board – Employment-related claims not exceeding HK$8,000

3.4 The MECAB is a branch of the LT that handles relatively small monetary employment claims.

3.5 Jurisdiction: the MECAB has absolute jurisdiction over minor employment claims, which are those:
- arising from disputes over statutory or contractual employment rights;
- involving 10 or fewer plaintiffs; and
- not exceeding HK$8,000 per plaintiff.

3.6 Any employment claim falling outside the jurisdiction of the MECAB must be brought in the LT. However, a plaintiff can choose to abandon their excess claim amount so that their case can still be heard by the MECAB. The MECAB’s advantages are that procedures are quick, simple, and inexpensive relative to
other courts and tribunals. Note again that the MECAB does not have jurisdiction over personal injury claims.¹

3.7 **Time limitation:** the MECAB generally only hears claims filed within a 12 month period after the cause of action arose. However, both parties can agree to submit to the MECAB’s jurisdiction for claims that arose outside the 12 month limitation period.²

3.8 The procedures for bringing claims at the MECAB are similar to those at the LT. Details are set out in the following section.

(B) **Labour Tribunal (LT) – Employment-related claims exceeding HK$8,000**

3.9 The LT generally provides an informal and inexpensive way of settling monetary disputes involving employment-related claims. Such claims often arise from the failure of one party to comply with the provisions of the Employment Ordinance.³

3.10 For MDWs, the most common claims at the LT concern employment-related monetary claims:⁴

- unpaid wages;
- wages in lieu of notice of termination;
- payment for untaken statutory holidays, annual leave or rest days; and
- severance pay, long service payments or terminal payments.

3.11 **Jurisdiction:** the LT only hears employment-related claims that involve amounts greater than HK$8,000 per plaintiff. The LT has no jurisdiction over tort claims or claims seeking non-monetary remedies.⁵ If the MDW has both employment and tort claims, the case must be lodged in the DC.⁶ There is no upper limit in relation to the claims that can be pursued in the LT, although more complex cases can be transferred to the Court of First Instance or the DC.⁷ See Chapter 3, Section 3.III.(B) below.

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¹ Section 5(3) of the Minor Employment Claims Adjudication Board Ordinance Cap 453. See Chapter 3, Section 7.IV.(A) for the text of the law.

² See Minor Employment Claims Adjudication Board Ordinance at n 1 above, s 7.


⁴ See Chapter 2, Section 4.IV. for details on employment-related monetary claims.

⁵ Section 7 and Sch of the Labour Tribunal Ordinance Cap 25. See Chapter 3, Section 7.III.(B) for the text of the law.

⁶ [Uterahal v Hansen Larry Douglas] [2015] 2 HKLRD 666 at [22]. See Chapter 3, Section 7.III.(B) for a brief summary of the case.

⁷ See Labour Tribunal Ordinance at n 5 above, s 10(2); See also [Fan Kin Nang v Proview International Holdings Ltd][2005] HKEC 277. See Chapter 3, Section 7.III.(B) for a brief summary of the case.
(i) **Advantages to bringing claims in the LT**

3.12 **General costs**: costs such as for filing a claim (as opposed to legal costs) are generally low compared to the DC and the High Court, and they can be recovered, at least in part, from the other party if the plaintiff MDW wins.

3.13 **Rules**: evidential and procedural rules are not as rigorously applied in LT hearings as they are in the DC and the High Court. A plaintiff is not required to arrange for service of claim documents.

(ii) **Limitations of the LT**

3.14 **Enforcement**: the LT will not enforce judgments for parties. Thus, even where an MDW is successful in their claim at the LT, they must still take enforcement actions separately, which can prove to be time-consuming and costly.

3.15 **Timing**: proceedings in the LT can be time-consuming, taking several months to be decided. Note this is less time-consuming than proceedings in the DC or the High Court.

(iii) **Immigration issues**

3.16 Upon termination of their employment contract, an MDW is only permitted to remain in Hong Kong for two weeks from the date of termination. However, it is possible for an MDW to obtain a visa extension on the basis of having filed a case at the LT.\(^8\) Non-legal representation is also available. See Chapter 3, Section 3.III.(B)(xi) below.

(iv) **General costs and expenses involved\(^9\)**

**Table 3-2: Summary of LT filing fees and expenses**

<table>
<thead>
<tr>
<th>Item</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing fee</td>
<td></td>
</tr>
<tr>
<td>Claim of HK$2,000 or below</td>
<td>Filing Fee HK$20</td>
</tr>
<tr>
<td>Claim of HK$2,001 to HK$5,000</td>
<td>Filing Fee HK$30</td>
</tr>
<tr>
<td>Claim of HK$5,001 to HK$10,000</td>
<td>Filing Fee HK$40</td>
</tr>
<tr>
<td>Claim of over HK$10,000</td>
<td>Filing Fee HK$50</td>
</tr>
<tr>
<td>Service of documents</td>
<td>HK$10 per defendant’s address</td>
</tr>
<tr>
<td>Reasonable expenses necessarily incurred and any loss of salary or wages suffered by the party or witnesses to the proceedings(^10)</td>
<td>Amount as determined by the LT</td>
</tr>
</tbody>
</table>

3.17 Those who win their case may be able to claim part of the reasonable expenses and consequential losses they have incurred, not including legal costs. The Presiding Officer of the LT will determine the award of costs on a case-by-case basis.

3.18 Reasonable expenses may include postage fees, photocopying fees and travel expenses. Consequential losses may include any salary lost due to attendance at hearings.

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\(^9\) Sch of the Labour Tribunal (Fees) Rules Cap 25B. See Chapter 3, Section 7.III.(A) for the text of the law.

\(^10\) See Labour Tribunal Ordinance at n 5 above, s 28.
3.19 An MDW should keep receipts and / or records of any expenses incurred, so that they may be adduced as evidence before the LT in order to recover such costs.

(v) Inapplicability of Legal Aid

3.20 Legal Aid is not available for proceedings in the LT. The Labor Tribunal’s administrative staff can assist parties with procedural matters, but will not give any legal advice. If parties wish to obtain legal advice, they should consult their own lawyers.\footnote{Information available at Judiciary of the Government of HKSAR website: http://www.judiciary.gov.hk/en/crt_services/ppht/html/labour.htm#1 (visited 14 Sep 2015).}

3.21 Even where a plaintiff wins their case they will not be able to recover any legal costs.

(vi) Filing a claim

3.22 Before filing a claim, the LT will likely advise the parties to try and settle through a conciliation meeting at the Labour Relations Division of the Labour Department. If the LT asks parties to attempt settlement through a conciliation meeting then the plaintiff then can only commence their claims at the LT upon presentation of evidence that no settlement could be achieved at the conciliation meeting. A written record of attempts at conciliation will be helpful in demonstrating the plaintiff’s efforts to solve the dispute.

Chart 3-3: Summary of LT steps and timeframes

<table>
<thead>
<tr>
<th>Step</th>
<th>Timeframe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing a Claim</td>
<td>10-30 days</td>
</tr>
<tr>
<td>First Hearing</td>
<td>1-3 months (est.)</td>
</tr>
<tr>
<td>Mention Hearing</td>
<td>2-6 months (est.)</td>
</tr>
<tr>
<td>Trial</td>
<td></td>
</tr>
</tbody>
</table>

3.23 To commence proceedings, the plaintiff should call the LT’s 24-hour Telephone Appointment Booking System or make an appointment for filing a claim at the Judiciary’s website.\footnote{Information available at Judiciary of the Government of HKSAR website: http://e-services.judiciary.gov.hk/LT-epamphlet/reDir.do?forward=BeforeFiling#pageAnchor (visited 13 Sep 2015).} On the filing date, the plaintiff MDW should report to the LT Registry and fill in an application form, either in English or Chinese. The registrar may also allow claims to be made orally. The registrar will then reproduce the claim in writing, and give a copy to the plaintiff MDW.\footnote{See Labour Tribunal Ordinance at n 5 above, s 11.} Following completion of filing the claim, the Tribunal Officer will interview the plaintiff to obtain statements and other relevant information about the dispute.

Practical points: It would be helpful at this stage for an MDW to prepare their statement in advance with all the details of important events, and reasons for their claim. They may also request for an interpreter to be present during their interview.

3.24 After the claim is filed, the LT Registry will set a hearing date between 10 and 30 days after the date of filing,\footnote{Information available at Judiciary of the Government of HKSAR website: http://e-services.judiciary.gov.hk/LT-epamphlet/reDir.do?forward=AfterFiling#pageAnchor (visited 13 Sep 2015).} and will also arrange for the claim to be served on
the defendant. An Officer of the LT will then investigate the claim, and ask the defendant to attend an interview and prepare a defence and witness statements.

3.25 Before the first hearing, both parties must file a copy of their statements and supporting documents, which the LT Registry will serve on the other party.

(vii) Procedures for hearings at the LT

3.26 If the parties are unable to settle their dispute through a conciliation meeting, the case will proceed. Unless a party’s attendance has been waived with a letter of authorisation, both parties must attend the First Hearing.

3.27 At the First Hearing, the Presiding Officer may explain the issues and the applicable laws to the parties, and may again encourage the parties to settle. Should the parties decide to engage in settlement discussions, the Presiding Officer may direct a Settlement Tribunal Officer to assist them with their negotiations.

3.28 The Presiding Officer may approve any terms of settlement reached between the parties and grant an order accordingly. However, if the parties cannot settle, the Presiding Officer may adjourn the claim to another date for a Mention Hearing or trial, and give directions for the filing of documentary evidence and witness statements.

Practical points: In practice, the Presiding Officer will seek to encourage MDWs to settle at the First Hearing by reference to factors such as the time and costs associated with taking a case to trial. These are factors that MDWs should be advised on at the outset, before bringing an LT claim, together with the merits of their case.

According to some local service providers interviewed, the usual settlement amount is about 40-50% of the claim if MDWs settle at the First Hearing. Although an MDW may not receive their full entitlements if they settle at the First Hearing, they may prefer a low but speedy settlement rather than face the wait and uncertainty of going to trial.

3.29 If the case proceeds to a Mention Hearing, the Presiding Officer will review the evidence and witness statements filed by each party. If they are satisfied with the available evidence, the case will be set down for trial.

3.30 At trial, the parties to a case must appear at the LT. The Presiding Officer will hear each party’s case, allow the parties to cross-examine each other and their witnesses. The Presiding Officer can also adjourn the hearing if necessary and order the parties to provide further evidence or call further witnesses.

3.31 After all witnesses have given evidence, the Presiding Officer may ask both parties to make closing submissions. Depending on the length and complexity of the case, multiple hearings may be required to finish the trial.

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16 Interview with Tang Kin Wa (Leo), Organizing Secretary, Hong Kong Federation of Asian Domestic Workers Unions, Hong Kong Confederation of Trade Unions, 6 June, 2015.
17 Ibid.
3.32 The Presiding Officer will either deliver judgment at the end of the trial, or on a later date if the issues involved are more complex.

(viii) **Burden of proof**

3.33 The plaintiff carries the burden of proof and must adduce sufficient evidence to prove their case on the balance of probabilities. "This means that the plaintiff must prove that what they allege is more likely than not to be true.

(ix) **Absence at the hearing**

3.34 If the plaintiff is absent from any hearing before the LT, the Labour Tribunal Presiding Officer may strike out the claim. If that happens and the plaintiff still wishes to proceed with their case, they will have 7 calendar days from the time of the order to seek restoration of their claim by completing and filing *Form 18 (Application for Restoration of a Claim)* in duplicate and paying a prescribed fee of HK$45 at the LT Registry.

3.35 Such an application will only be allowed at the LT’s discretion, and may be subject to conditions set by the LT. The LT is unlikely to allow a hearing unless the absence is not deliberate, but due to accident or mistake, or where there are strong reasons for retrial on matters of fact that have already been considered by the LT. The LT may also take into account other factors, including the applicant’s prospects of success at the retrial, delay in the application, whether the other party would be prejudiced by the judgment being set aside, and public interest.

3.36 If the defendant is absent from any hearing before the LT, a default judgment may be entered against them, provided the claim has been served and the Presiding Officer is convinced that the plaintiff can prove their case on the balance of probabilities.

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18 Interview with Tania Sim, Senior Client Advisor, Christian Action. 14 July, 2015.
21 *Shocked v Goldschmidt* [1998] 1 All ER 372 at 381. See Ch 3, Section 7 part III(b) for a brief summary of the case.
22 See Labour Tribunal Ordinance at n 5 above, s 21.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

(x) Security for awards and orders

3.37 If the LT Presiding Officer considers it just and expedient to do so, it may order a party to pay a deposit that it considers sufficient as security for payment of any award or order the court hands down.23 The LT may make the order either on its own motion or upon application by one of the parties.

3.38 The LT Presiding Officer may make an order against a party if satisfied that:

- there is a real risk that the judgment sum will not be paid, or payment will be delayed. Common circumstances include a party that has or is likely to dispose of or otherwise remove their assets from Hong Kong; or
- the party had conducted the proceedings in a manner that has delayed the determination of the case, or had otherwise failed to comply with any previous award, order or direction without a reasonable excuse.24

(xii) Representation at the Labour Tribunal (LT)

3.39 Subject to the LT’s discretion, a party may specifically authorise in writing an office bearer of a registered trade union, an association of employees, or an association of employers (who is not a barrister or solicitor), to represent them.25

3.40 The application for appointment of representatives must be supported by valid reasons and evidence. Its validity is determined by the merits of each case individually.26 The LT will review applications on their own merits and has a broad discretion in granting or refusing individual applications.27

3.41 From one local service provider interviewed, it appears that, when reviewing the application for representation, the LT may consider factors that include:

- timing of the application (late applications may be refused);
- the maintenance of a level playing field between the parties (proposed appointment of a representative may be refused when it would undermine the equality of the parties, for instance where the proposed representative is legally trained);28 and
- the practical difficulty of conducting the case without a representative (the applicant’s proficiency in English or Cantonese may be relevant to the appointment of a representative).

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23 Ibid, s 30.
24 Liao Jian He & Ors v Treasure Consultants Ltd and Another [2003] HKCU 955 at [10], “if a party so conducted himself in a case which brought about an adjournment, the Tribunal would have the option of exercising the power in ordering security for award…the exercise of the power to order payment is the most effective way to protect the interest of the other parties, especially when there is a risk of dissipation of assets.” See Ch 3, Section 7 part III(b) for a brief summary of the case.
25 See Labour Tribunal Ordinance n 5 above, s 23(1)(e).
26 Interview with Manisha Wijesinghe, Paralegal, Daly & Associates, 27 October, 2015.
28 In Suryani v Chan Tung Chi [2012] HKCU 2311 at [22], the Presiding Officer rejected a plaintiff MDW’s request for representation because their proposed representative had legal knowledge, even though they were not qualified to practice law. Their appointment would have been unfairly advantageous to the plaintiff. See Ch 3, Section 7 part III(b) for a brief summary of the case.
Practical points: although a party must generally be present at all LT hearings, an MDW outside Hong Kong may, subject to the Tribunal’s discretion, appoint a representative for the preliminary stages of their case (i.e., the hearings before trial). Should they return to Hong Kong though, they will be required to attend all subsequent hearings of the case, including trial, and this may create practical problems for an MDW in terms of:

- finding a new employer; or
- if they are newly employed in Hong Kong, taking time off to attend hearings etc.

The proceeding could be very time-intensive. Time taken for each case depends on availability of the Tribunal, the ability of the parties to produce required documents, and, if any, any requests made by the parties for rescheduling of dates. If the claim is settled in first hearing, it could take around one or two months from the registration of claims in the LT. However, if the case proceeds to trial, it could take up to two years, or even longer.\(^\text{29}\)

(xii) Review of a judgment

3.42 In the event that a party is not satisfied with the judgment made by the Presiding Officer, they may apply to the LT for review.\(^\text{30}\) They must complete Form 13 (Application for Review of an Award / Order by a Party)\(^\text{31}\) in duplicate and pay a prescribed fee of HK$45 at the LT Registry within 7 calendar days from when the judgment was made.

3.43 The Presiding Officer who made the original judgment must then review that judgment within 14 calendar days from when it was made. During the review, the claim may be re-opened or re-heard in whole or in part, fresh evidence may be called or heard, and the original judgment may be confirmed, varied (i.e. revised), or reversed.

3.44 However, if the judgment was made in accordance with the terms of settlement agreed by the parties, then the LT will not vary the judgment under normal circumstances.

(xiii) Appeal

3.45 If a party wishes to appeal a ruling by the LT, they must first seek permission to do so from the Court of First Instance (CFI), which is part of the High Court. The applicable procedural rules for the appeal (and the High Court in general) are more detailed and complex than those for the LT. For example, High Court proceedings are governed by stringent evidentiary rules and it is highly unlikely that fresh evidence would be accepted during the course of an appeal.

3.46 Legal representation is allowed at the CFI, so parties may engage lawyers to conduct the appeal. The associated legal costs, however may be substantial. The losing party may also have to bear the costs of the other party. Parties should thus seriously consider the risk of litigation before lodging an appeal.

(xiv) Appealing a LT decision

\(^{29}\) See interview with Manisha Wijesinghe at n 26 above.

\(^{30}\) See Labour Tribunal Ordinance at n 5 above, s 31.

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3.47 A party should only consider an appeal if they have good grounds to do so. They must show that the Presiding Officer erred in the application of the law and that the ruling was wrong, or the decision made was outside the LT’s jurisdiction. The Court of First Instance (CFI) has no power to reverse or vary what the LT has determined on questions of fact, so any errors in the application of facts by the Adjudicator will not be grounds for an appeal.

3.48 A party seeking to appeal an LT decision must complete and lodge Form 14 (Application for Leave to Appeal on Point of Law) with the Registrar of the High Court within 7 calendar days after the LT’s written award was served on them.

3.49 Any refusal by the CFI to grant leave to appeal is final.

(xv) Appealing a CFI decision

3.50 If a party proceeds with an appeal to the CFI but is unsuccessful, the party will have 7 calendar days from the time of the CFI’s decision to apply to the Registrar of the High Court and seek leave to appeal to the Court of Appeal. This is done by filling an Application for Leave to Appeal, and paying the application fee. Only after the CA grants leave to appeal and the applicant pays the court fee may an appeal be lodged.

3.51 The CA will, in its discretion, only grant leave to appeal if it considers that the case involves a question of law that is of great general or public importance. It must go beyond the individual parties’ interests. This includes where the dispute’s resolution would have broader consequences beyond the parties’ case, or where legal issues are complex and relevant legal authorities are sparse.

(xvi) Enforcing the judgment

3.52 The LT may specify how the losing party (i.e. the judgment debtor) is to make a payment to the winning party. (i.e. the judgment creditor). If the judgment debtor then fails to pay accordingly, the judgment creditor may apply to the LT for a

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32 See Labour Tribunal Ordinance at n 5 above, s 32.
33 In Lorenzo Buenavilla v Lam Yau Man [2013] HKEC 1048 at [33], an MDW sought leave to appeal against a decision of the Acting Principal Presiding Officer (PPO) of the LT. Their case concerned the payment of funds relating to wages, annual leave, transportation costs, and food / travelling allowance. However, when the CFI reviewed the PPO’s reasons for the original decision, they found that there were no errors in law. Accordingly, the MDW was unable to establish arguable grounds of appeal, and their request was denied. See Ch 3, Section 7 part III(b) for a brief summary of the case.
37 See Labour Tribunal Ordinance at n 5 above, s 35A. Note that no cases related to migrant workers were found by time of publication.
38 Camille Cameron and Elsa Kelly, Principles and Practice of Civil Procedure in Hong Kong (North Point, Hong Kong, 2008), 2nd edn, p 35. See also Chinachem Charitable Foundation Ltd v Chan Chun Chuen (2011) 6 HKC 273 at [57], the Court of Final Appeal’s role in civil cases is to determine points of law of great general or public importance. It is not to provide appellants with a platform to debate factual findings. See Ch 3, Section 7 part III(b) for a brief summary of the case.
CHAPTER 3: PROCEEDURES FOR PURSUING REMEDIES

Certificate of Award and pay a prescribed fee of HK$20. This may be registered in the DC, therefore making it an enforceable judgment of the DC.

3.53 If the judgment cannot be enforced because the judgment debtor is penniless or has disappeared, the judgment creditor can consider applying for an ex-gratia payment from the Protection of Wages on Insolvency Fund. However, this Fund is only for the protection of wages. This includes wages owed in respect of service rendered to an employer during the four months prior to the last day of service, pay for untaken annual leave and statutory holidays, wages in lieu of notice and severance payments payable to an employee under the Employment Ordinance (EO). It will not cover any other contractual entitlements an MDW may have. Such payment is subject to the decision of the Commissioner for Labour in accordance with the Protection of Wages on Insolvency Ordinance.

(xvii) Remote claims

3.54 MDW’s about to leave or who have already left Hong Kong may be able to appoint a representative to assist them with the initial stages of the LT proceedings. To do so, they must first obtain the approval of the Presiding Officer of the LT.

3.55 However, the MDW’s presence at trial is crucial for the purposes of giving evidence, conducting (and being subject to) cross-examination, and delivering the closing statement.

3.56 Thus, unless an MDW is successful in applying for the use of the Technology Court to attend trial remotely via video-link, See Chapter 3 Section 4.III, they must be personally present in Hong Kong whilst the LT hears their case.

III. Monetary claims unrelated to wages

(A) Small Claims Tribunal (“SCT”) – Claims not exceeding HK$50,000

3.57 The SCT has jurisdiction to hear and determine claims for money involving HK$50,000 or less that involve non-employment contract, quasi-contract, or tort claims. In the context of MDWs, such claims are relatively common with respect to loan agreements and agency fees. See Chapter 2, Section 4.VI. and Section 4.VII. for details on over-charging agency fees and invalidating loan agency loans.

3.58 The SCT does not have the power to hear employment or wage-related claims, which should be taken to the LT.

3.59 Note that while the SCT may order a case transferred to another venue on its own or upon application of a party, the size, complexity and nature of cases typically heard by the SCT means that this is unlikely.


40 See Chapter 2 Section 4.VI.(A) for severance payments and its calculation method under the EO.

41 Small Claims Tribunal Ordinance Cap 338, Sch: Jurisdiction of the Tribunal See Ch 3, Section 7 part VII(d) for the text of the law.

42 Ibid.

43 See Small Claims Tribunal Ordinance at n 41 above, s 7.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

3.60 Claims at the SCT cannot exceed HK$50,000. A plaintiff may abandon part of their claim in order to reduce their claim amount to be within that HK$50,000 limit to take advantage of the SCT’s simpler and speedier procedures. See Chapter 3, Section 3.III.(A)(ii) below. Note that the plaintiff cannot divide their claim into two or more parts in order to bring it under the SCT’s jurisdiction.44

3.61 Claims at the SCT must be brought within 6 years from the date when the cause of action arose. In the context of a loan, this would be within 6 years from when the loan should have been repaid. In the context of a breach of contract, this would be 6 years from the date when the contract was actually breached.45

(i) Recommendations

3.62 Before commencing an action in the SCT, a plaintiff must weigh the merits of their case against the risks and costs of litigation, including any likely difficulties associated with enforcing an eventual judgment. MDWs should thus weigh the costs and benefits of litigation against a settlement offer.

3.63 Even if an MDW has a claim for an amount exceeding HK$50,000, they should consider the pros and cons of claiming only HK$50,000 at the SCT and foregoing the rest of the sum for simpler court procedures and lower costs than their case would encounter at the District Court. (DC)

3.64 In practice, the evidentiary rules are less strict in the SCT than they are in the DC. As opposed to the DC rules, which require all evidence to be disclosed at the discovery stage and all documents to be verified by affidavits,46 the SCT rules allow the parties to produce fresh evidence at trial and verify their documents through a process of ‘swearing in’.47

(ii) Advantages of the SCT

3.65 Costs: it is typically much cheaper for a plaintiff to pursue a claim in the SCT rather than the DC. In addition to paying lower filing costs and witness fees, parties to SCT proceedings generally will not incur legal costs because legal representation is not allowed and legal fees associated with obtaining advice are not recoverable from the losing party.

3.66 Timing: cases before the SCT are usually settled within a matter of months, whilst cases before the DC will commonly continue for over one year due to their increased procedural complexity among other things.

3.67 Rules: rules and procedures are less strictly applied in the SCT than in most other Courts. It is easier for MDWs to handle cases on their own in the SCT, although in practice most will still seek assistance from NGOs.

44 See Small Claims Tribunal at n 39 above, s 8.
45 Section 4(1) of the Limitation Ordinance Cap 347 See Ch 3, Section 7 part VII(b) for the text of the law.
46 Section 47A and 47B of the District Court Ordinance Cap 336. See Ch 3, Section 7 part I(b) for the text of the law.
47 See Small Claims Tribunal Ordinance at n 39 above, s 23(1).
(iii) Limitations of the SCT

3.68 **Jurisdiction:** the SCT’s jurisdiction is limited. It can hear claims arising from tort, quasi-contract or contract, but it cannot hear employment-related claims, which fall within the LT’s jurisdiction.\(^{48}\)

3.69 **Representation and appearance at trial:** the SCT does not permit parties to have legal representation,\(^{49}\) so MDWs must appear before the SCT unless they have been granted approval to appoint non-legal representation. However, even where an MDW is allowed to appoint a non-legal representative for the call-over and mention hearings (for instance, because they are not present in Hong Kong), they will still likely be required to attend trial in person. This may involve appearing at multiple hearings before the SCT. Access to the Technology Court is theoretically possible, but currently untested. See Chapter 3 Section 4(III) below for Technology Court.

3.70 **Enforcement:** the SCT will not enforce judgments so parties may need to pursue enforcement action separately. This may be time-consuming and costly. See Chapter 3, Section 3.III.(A)(xv) below.

(iv) Immigration issues

3.71 Unlike for employment-related cases before the LT, visas or visa extensions are normally not granted for non-employment related claims in the SCT.\(^{50}\) Claimants to the SCT who do not otherwise hold a valid visa may not be entitled to stay in Hong Kong to pursue the claim. They thus may need to incur costs travelling to and from Hong Kong if they must attend trial. Again, caseworkers and legal advocates should explore the potential of using the Technology Court to avoid requiring the client to return to Hong Kong.

(v) General costs and expenses involved\(^{51}\)

**Table 3-3: Summary of SCT filing fees and expenses**

<table>
<thead>
<tr>
<th>Item</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing fee</td>
<td></td>
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<tr>
<td>Claim of HK$3,000 or below</td>
<td>HK$20</td>
</tr>
<tr>
<td>Claim of HK$3,001 to HK$17,000</td>
<td>HK$40</td>
</tr>
<tr>
<td>Claim of HK$17,001 to HK$33,000</td>
<td>HK$70</td>
</tr>
<tr>
<td>Claim of HK$33,001 to HK$50,000</td>
<td>HK$120</td>
</tr>
<tr>
<td>Witness summons and copy, including service</td>
<td>HK$33 per witness</td>
</tr>
<tr>
<td>Reasonable expenses necessarily incurred and any loss of salary or wages suffered by the other parties in attending the hearing or costs for calling witnesses to the proceedings(^{52})</td>
<td>Amount as determined by the SCT</td>
</tr>
</tbody>
</table>

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\(^{48}\) See Small Claims Tribunal at n 41 above.


\(^{50}\) In Labour Tribunal cases, visa extensions are allowed because the case outcomes may give rise to an exception to the two-week rule – including death of employer, financial difficulty of employer, employer leaving Hong Kong and proven maltreatment - allowing the MDW to change employer, even if they did not complete their previous contract. However, this does not apply to cases in the SCT. See Legislative Council on 20 May 1992: Reply of Secretary for Education and Manpower (Question No.10) is available at Legislative Council of HKSAR website: http://www.legco.gov.hk/yr91-92/english/lc_sitg/hansard/h920520.pdf (visited 21 Sep 2015).

\(^{51}\) See Judiciary of the Government of HKSAR website at n 49 above.

\(^{52}\) See Small Claims Tribunal Ordinance at n 41 above, s 24.
3.72 If they win their case, an MDW may be able to claim part of the reasonable expenses they have incurred. The Adjudicator of the SCT will determine the award of costs on a case-by-case basis.

3.73 Reasonable expenses may include any loss of salary due to attendance at hearings, postage fees, photocopying fees, and travel expenses.

3.74 An MDW should keep receipts and/or records of any expenses incurred, so that they may be adduced as evidence before the SCT.

(vi) Unavailability of Legal Aid

3.75 Legal Aid is not available for proceedings in the SCT. SCT staff can assist parties with procedural matters, but will not give any legal advice.\(^{53}\)

3.76 As noted previously, even where a plaintiff wins their case, they will not be able to recover any legal costs.

(vii) Filing and serving a claim at the SCT\(^{54}\)

Chart 3-4: Summary of SCT steps and timeframes

3.77 Before filing a claim with the SCT, an MDW plaintiff must have the full name and last known address of the defendant. They should then obtain *Forms 1 & 2* from the Tribunal Registry\(^{55}\) or through the Judiciary’s website, and fill them out in person:

- *Form 1 (Title to Claim: General Form)*\(^{56}\) requires the plaintiff to state their full name and street address, as well as those of the defendant; and
- *Form 2 (Form of Claim)*\(^{57}\) requires the plaintiff to state the amount of their claim in HK$, the reason(s) for their claim, and how the claim amount has been calculated (including a breakdown).

3.78 The completed *Forms 1 & 2* should be filed at the Tribunal Registry. an MDW plaintiff may appoint a representative to file the claim on their behalf after paying a prescribed filing fee at the time of filing the claim.

\(^{53}\) See Judiciary of the Government of HKSAR website at n 49 above.


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3.79 After the claim is filed, the Tribunal Registry will give the plaintiff MDW a Form 3 (Notice of Place and Day Fixed for Hearing) indicating the place (court room number and address), time, and date of the call-over hearing.\(^{58}\)

3.80 The court bailiff will send copies of Forms 1, 2 & 3 to each defendant by ordinary post with the address provided by the plaintiff MDW.

(viii) Procedures of hearings at the SCT\(^ {59}\)

3.81 After a claim is filed in the SCT, the Adjudicator and/or the Tribunal Officer will set a “call-over hearing” in an attempt to encourage the parties to settle the claim. Parties who have a firm understanding of the merits of their case will be in a better position to negotiate a settlement they can be satisfied with.

3.82 Note that while settlement is entirely voluntary, once a settlement agreement is reached, the case will end there.

3.83 While settlements often lead to an amount less than the plaintiff was originally seeking, MDWs may wish to consult with a lawyer or caseworker about the pros and cons of a lower amount versus the potential time, cost and risk involved in bringing litigation.

3.84 In practice, cases are commonly settled at the call-over hearing and in any event before trial. However, if the parties do not agree to settle at the call-over hearing, both sides will receive directions on how to file the required documents, and the Tribunal Officer will identify the main issues in dispute and adjourn the case to another date for a mention hearing.\(^ {60}\)

3.85 Mention hearings serve to enable the Adjudicator to review the sufficiency of the evidence with the parties, including identifying any witnesses.\(^ {61}\) Additional mention hearings may be required if a case involves complex matters, or if either party does not readily comply with the Tribunal Officer’s directions.

3.86 Once the evidence is sufficient for both sides, a date will then be fixed for trial.\(^ {62}\) The amount of evidence required is different for each case. According to a local source, there are claims which go into trial based on the claimant’s statement and other supporting document such as agency payment bill, but there are also cases which go into trial based on the claimant’s statement alone.\(^ {63}\)

3.87 At the trial, both parties will give evidence and be cross-examined, followed by any witnesses. After all witnesses have given evidence, the parties may opt to make final submissions, although this is not required.

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\(^{58}\) See Sch of the Small Claims Tribunal (Forms) Rules Cap 338C for an example of Form 3: Notice of Place and Day Fixed for Hearing.


\(^{60}\) Claims inappropriately commenced in the SCT might be transferred to other courts or tribunals, either at the Call-over hearing or at any subsequent stage of the proceedings.

\(^{61}\) If a party does not comply with the Adjudicator’s direction, they may lose their case and/or lose costs to the other side. See Judiciary of the Government of HKSAR website at n 59 above.

\(^{62}\) If any witness is unwilling to attend trial, the party may apply to the Adjudicator for leave to take out a witness summons to secure the witness’ attendance. Such applications should be made at least three weeks before the trial date. Note that prescribed witness expenses will have to be paid by the applicant. Ibid.

\(^{63}\) See interview with Manisha Wijesinghe at n 26 above.
3.88 Judgment may come at the end of the trial, or on a later date if the issues involved are more complex. If the Adjudicator thinks it is necessary for the parties to provide further evidence, the trial will be adjourned to a later date.

(ix) **Burden of proof**

3.89 The plaintiff carries the burden of proof and must adduce sufficient evidence to prove their case on the balance of probabilities.

(x) **Representation**

3.90 Parties may seek permission from the Tribunal to appoint a non-legal representative. The SCT will review applications on their own merits, and it has broad discretion in granting or refusing individual applications.

3.91 From the limited cases available, it appears that the SCT may consider the following factors when reviewing applications for representation:

- timing and lateness of the application – applications made at a late stage of the proceedings may be refused. Accordingly, such application should be made as soon as possible;
- maintenance of a level playing field – the proposed appointment may be refused in circumstances where it would undermine the equality of the parties (for instance, where the proposed representative is legally trained);
- and practical difficulty of conducting the case without representation – this may be relevant where either party has a disability or will otherwise have difficulty understanding proceedings in English or Cantonese.

3.92 Upon SCT approval and once the plaintiff MDW has signed a letter of authorisation, a representative may act on the MDW’s behalf at all stages except trial.

3.93 At trial, an Adjudicator will seldom allow a representative to answer questions on behalf of a plaintiff MDW. Although there have been some cases where NGOs have successfully appointed a representative to stand in for an MDW at a call-over hearing, MDWs generally must attend trial in person in Hong Kong. This is true even where a plaintiff MDW has had to leave Hong Kong and return to their home country whilst their case was pending in the SCT.

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65 See Small Claims Tribunal Ordinance at n 41 above, s 19(1)(d).
66 Chan Tung Chi v Suryani [2012] HKEC 415 at [13], citing inefficient use of judicial resources, and conferring an unfair advantage on those who seek to make late stage applications. See Ch 3, Section 7 part VII(d) for a brief summary of the case.
67 Ibid at [15], stating that although the representative was not a practicing lawyer, his legal training would possibly offer the defendant (the MDW) an unfair advantage over the claimant.
68 See Judiciary of the Government of HKSAR website at n 64 above.
69 Interview with Rob Connelly, Barrister-At-Law, Hong Kong, 30 March, 2015.
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(xi) Absence at the hearing

3.94 If a plaintiff is absent from any hearing before the SCT, and was not granted leave to appoint a representative in their absence, the SCT may strike out their claim.\(^{71}\)

3.95 If that happens and the plaintiff MDW still wishes to proceed with their case, they should immediately seek restoration of their claim by completing and filing Form 8D (Application to Set Aside an Award / Order),\(^{72}\) within 7 calendar days after the hearing.\(^{73}\) They must set out the reasons for their absence from the hearing, along with any supporting evidence, and pay a prescribed fee of $55.\(^{74}\) The SCT will then fix a hearing date to review the application, and the plaintiff – as the defaulting party – will usually be ordered to pay the defendant’s costs.\(^{75}\)

3.96 Alternatively, the plaintiff may file a new claim as opposed to applying to set aside the order for strike out.\(^{76}\) However, this will cause the plaintiff to incur additional filing costs and time.

(xii) Review

3.97 In the event that a plaintiff is not satisfied with the judgment of the Adjudicator, they will have seven calendar days from the time of that judgment was made to apply to the SCT for review.\(^{77}\) They must complete Form 8C (Application for Review of an Award / Order by a Party)\(^{78}\) setting out the reasons for their dissatisfaction, and pay a prescribed fee of HK$61.

3.98 An Adjudicator, usually the same Adjudicator who presided over the trial, will hear the application within 14 calendar days but will not be bound by the previous finding of facts.\(^{79}\)

3.99 If the applicant is still dissatisfied with the result of the review, they may seek leave to appeal to the CFI. See Chapter 3, Section 3.III.(A)(xiii) below for appealing an SCT decision.

3.100 Representation: no legal representation is permitted at the review.

3.101 Costs: costs associated with SCT review are generally much lower than those needed for appeal proceedings, as the parties will not have to incur costs for legal representation.

(xiii) Appeal


\(^{71}\) See Small Claims Tribunal Ordinance at n 41 above, s 32A(1).


\(^{73}\) See Small Claims Tribunal Ordinance at n 41, s 32A(2).

\(^{74}\) Sch of the Small Claims Tribunal (Fees) Rules Cap 338B. See Ch 3, Section 7 part VII(c) for the text of the law.


\(^{76}\) See Judiciary of Government of HKSAR website at n 70 above.

\(^{77}\) Ibid.


\(^{79}\) See Small Claims Tribunal Ordinance at n 41, s 27A.
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(a) Application to appeal SCT decision or review result

3.102 There is no automatic right of appeal with respect to SCT decisions. It is subject to the discretion of the CFI.\footnote{In Alvares v Ng Ah Ying [1999] HKLRD (Yrbk) 91 at [7], an MDW was HK$7,600 to settle the claim, but she refused and took her former employer to LT. After being awarded less compensation than the settlement offer, she took her former employer to the SCT, seeking living expenses incurred between the time of her dismissal and the award. The Deputy Adjudicator refused the claim on the basis that the living expense incurred was a result of the claimant refusing her employer’s offer, and that she deliberately refused to accept the offer because she wanted to prolong her stay in Hong Kong to look for employment. The MDW then sought to appeal to the CFI, but the application was denied, as there were no contested points of law. The CFI held that leave to appeal will only be granted if the CFI thinks it fit. It may refuse if the question of law posed was, for instance, invalid, frivolous, unreal or academic. See Ch 3, Section 7 part VII(d) for a brief summary of the case.}

3.103 A party should only consider an appeal if they are able to show that either:

- the Adjudicator erred in their application of the law and that the ruling was wrong (for instance, because the Adjudicator misinterpreted an Ordinance, or applied incorrect criteria); or
- the judgment was made outside the SCT’s jurisdiction.\footnote{See Small Claims Tribunal Ordinance at n 41 above, s 29.}

These are the only two grounds of appeal.

3.104 Permission to appeal will not be granted based on errors of fact, because the CFI generally has no power to reverse or vary what the SCT has already determined regarding the facts of a case.\footnote{Ibid, s 29(2).}

3.105 A party seeking to appeal a decision must complete and lodge Form 9 (Application for Leave to Appeal on Point of Law)\footnote{Form 9: Application for Leave to Appeal on Point of Law is available at Judiciary of the Government of HKSAR website: http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/juds9.pdf (visited 9 Sep 2015).} with the Registrar of the High Court and pay a prescribed fee of HK$61\footnote{See Judiciary of the Government of HKSAR website at n 75 above.} within 7 calendar days after the SCT’s written judgment was served.

3.106 The application seeking leave to appeal will be heard by a Judge of the CFI. Any refusal to grant leave by the CFI is final.\footnote{See Small Claims Tribunal Ordinance at n 41 above, s 29A(3).}

3.107 As the appeal is a proceeding before the High Court, more complex and restrictive rules on evidence will apply. Fresh evidence is unlikely to be accepted at the appeal, especially if the relevant party was aware of the existence of this evidence prior to or during the course of the SCT proceeding.\footnote{Ho & Another & Grand Pacific Vacation (Hong Kong) Ltd [2005] HKEC 1167 at [31], the application was refused, as the applicant possessed the document at the time of the Tribunal hearing. The applicant thus was aware of the existence of the documents prior to the Tribunal hearing.}

3.108 **Representation:** legal representation is allowed at the CFI, so parties may engage lawyers to conduct the appeal.\footnote{Information available at Judiciary of the Government of HKSAR website: http://www.judiciary.gov.hk/en/crt_services/pphlt/html/hc.htm#8 (visited 15 Sep 2015).}

3.109 **Costs:** filing costs at the CFI are higher than those at the SCT. Additionally, given that parties may engage legal counsel to assist with their appeal, the legal...
costs associated with CFI proceedings may be substantial, and the losing party is likely required to bear the costs of the other party. Accordingly, a plaintiff MDW should seriously consider such risks before lodging an appeal.

(b) Appeal against CFI decision

3.110 If a party proceeds with an appeal to the CFI but is unsuccessful, they will have 7 calendar days from the time of the CFI’s decision to apply to the Registrar of the High Court and seek permission to appeal to the Court of Appeal. (CA) The application is to be made by way of summons with draft grounds of appeal, affidavit evidence where appropriate (such as reasons for filing such application out of time), and a written outline of arguments in support of the CA granting leave. The applicant should also explain whether the application can be determined on the basis of written submissions only, or if a hearing should be required. After receiving such documents, the CA may determine the application without a hearing, or direct the parties to fix a date for a hearing. An appeal be lodged only if the CA grants leave to appeal.

3.111 The CA will only grant leave to appeal if it finds that the case involves a question of law that is of great general or public importance. See Chapter 3, Section 3.110(b) above for example of general or public importance.

(xiv) Enforcement of judgment

3.112 The SCT will not assist judgment creditors (i.e., the winning party) to enforce the judgment. Accordingly, where the judgment debtor (i.e., the losing party) fails to satisfy the judgment, the judgment creditor will need to take steps on their own to enforce the judgment.

3.113 These steps are likely to involve further expense. See Chapter 3, Section 5.1.112 below for Writ of Fieri Facias below for Writ of Fieri Facias.

3.114 Note that it is essentially impossible to enforce a monetary judgment against a judgment debtor with no assets. It may also be extremely difficult to do so against judgment debtors who keep their assets outside of Hong Kong. Thus, a plaintiff MDW should consider whether the defendant of contemplated legal proceedings has assets in Hong Kong prior to commencing such proceedings.

(xv) Remote claims

3.115 Owing to time constraints and costs considerations, plaintiff MDWs may not be able to – or wish to – stay in Hong Kong for the purpose of commencing or conducting legal proceedings. But they may still wish to do so remotely, after returning to their home countries.

3.116 Lodging a claim remotely in the SCT is possible, and a plaintiff MDW may appoint a representative to file the relevant documents on their behalf. However, there


89 See Small Claims Tribunal Ordinance at nn 41 above, s 29A(1).

are often practical communication difficulties when a plaintiff lives in a foreign country.

3.117 Moreover, when it comes to trial, MDWs are required to appear for questioning and cross-examination. As such, unless the Technology Court can be used (See Chapter 3, Section 4.III. below), an MDW generally must return to Hong Kong, at least for trial.

(B) District Court – Claims exceeding HK$50,000

3.118 The DC is permitted to deal with claims in contract, quasi-contract, tort (including personal injury claims), as well as claims based upon alleged harassment or discrimination (including discrimination on the basis of gender, disability, race or family status). Cases that also involve employment claims may also be brought, although cases involving only employment claims generally must first be brought in the Labour Tribunal. Notably, discrimination claims may also be dealt with by the EOC in addition to the DC.

3.119 In the context of plaintiff MDWs, cases in the DC often relate to harassment and personal injury, in addition to any outstanding employment claim.

3.120 In order to pursue a claim in the DC, a plaintiff must be seeking an amount greater than HK$50,000 but less than HK$1 million. Cases may also be transferred to the DC from the SCT or LT if they are deemed to be sufficiently important or complex. The LT or SCT may consider factors that include complexity of legal issues, whether in terms of legal or factual issues, size of the claim, doubts over jurisdiction, whether the claim involves a counterclaim over which the Tribunal has no jurisdiction, and the necessity of using the Technology Court. See Chapter 3, Section 4.III. below for Technology Court.

3.121 Claims exceeding HK$1 million should be commenced in the CFI, although a plaintiff may choose to abandon any excess claim amount to bring their case within the DC's jurisdiction, where the costs associated with litigation may be relatively lower.

3.122 As the procedures in the DC tend to be more complex than those in either the LT or SCT, plaintiff MDWs should seek pro bono representation or Legal Aid before commencing and conducting DC proceedings.

3.123 Claims in contract and tort claims must be brought before the DC within 6 years from the date on which the cause of action arose. For claims involving personal injuries, they must be brought within 3 years from the date on which the cause of injury.
action arose or the date that the plaintiff became aware of the injury, whichever is later.  

**Practical points:** DC procedures can be highly complex, so a plaintiff’s claim may not justify the costs and time necessary to pursue the claim before the DC. Depending on the claim amount, a plaintiff MDW should therefore consider taking their case to the SCT or the LT instead. Of course, different considerations may apply if their claim relates to a serious personal injury as this may justify the time and costs needed for DC litigation.

Also, as legal representation is allowed in the DC, the costs to be incurred by all parties to the DC proceedings may be substantial; and if the plaintiff MDW fails in their claim, they may be ordered to pay the other party’s costs.

### (i) Advantages to the District Court (DC)

3.124 **Representation:** legal representation is permitted in the DC, so a party may engage legal counsel to appear on their behalf at hearings, and to assist them with preparing pleadings, witness statements, and evidence. However, depending on the case, it is likely that a plaintiff MDW would still need to appear at trial to give oral evidence.

3.125 **Applicability of Legal Aid:** a plaintiff MDW may obtain Legal Aid for DC proceedings. After a successful application for Legal Aid, a lawyer will be appointed to help the MDW prepare their case, and to represent them at DC hearings. However, Legal Aid may not cover all legal costs associated with the litigation and the plaintiff MDW may have to contribute some funds towards the case depending on their financial resources and the outcome of the case.

3.126 **Possibility of Technology Court (TC):** to date, the TC has been used in certain, limited circumstances for cases before the DC. This may be helpful for plaintiff MDWs that need to give evidence remotely. See Chapter 3, Section 4.III. below.

### (ii) Limitations of the DC

3.127 **Legal costs:** plaintiff MDWs can face substantial legal costs as a result of pursuing a claim before the DC. Aside from court fees that those without legal aid may be forced to pay, those who lose may face a court order to pay the costs and expenses that the winning party reasonably incurred.

3.128 **General costs:** filing and other Court fees in the DC are higher than those in the LT or SCT.

3.129 **Enforcement:** the DC will not enforce judgments so parties may need to pursue enforcement action separately, which may be time-consuming and costly.  

3.130 **Timing:** proceedings in the DC are usually lengthy, lasting over one year at the least.

3.131 **Rules:** strict evidentiary and procedural rules apply to proceedings before the DC. For example, parties must disclose all evidence they have to each other during

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98 Ibid, s 27(4).
the ‘discovery’ stage. Any failure to their pleadings, witness statements or supporting evidence within the stipulated time limits, or failure to comply with the court’s order to make discovery of documents, may result in the court dismissing an action or striking out the defense, with judgment against the offending party then entered accordingly.  

(iii) Immigration issues

3.132 Generally, an MDW will only be permitted to stay in Hong Kong for up to two weeks following the termination of their employment contract. However, where they have filed a claim with the DC or the LT, they may be able to obtain a visa extension, allowing them to legally remain in Hong Kong for a longer period of time.

(iv) General costs and expenses involved

3.133 The chart below lists major fees involved in bringing a claim in the DC:

Table 3-4: Summary of DC filing fees and expenses

<table>
<thead>
<tr>
<th>Item</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
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<td>Filing fees</td>
<td>HK$630</td>
</tr>
<tr>
<td>Setting down a cause or issue for hearing</td>
<td>HK$630</td>
</tr>
<tr>
<td>Witness expenses</td>
<td>HK$530/day per witness to attend court</td>
</tr>
<tr>
<td></td>
<td>HK$440/day per public officer to produce or prove any document in court or give evidence as an expert witness</td>
</tr>
<tr>
<td>Copy of documents</td>
<td>HK$4/page</td>
</tr>
<tr>
<td>Translation of documents</td>
<td>HK$72/page</td>
</tr>
</tbody>
</table>

(v) Legal Aid

3.134 A plaintiff MDW may obtain Legal Aid for proceedings in the DC. An application can be made electronically, meaning that applicants need not necessarily be in the jurisdiction when applying. While Legal Aid can help cover much of the legal costs involved in litigation, it may not cover 100% of the costs. Furthermore, not everyone is eligible for legal aid. These issues are discussed below.

Practical points: A plaintiff MDW can make an online application for Legal Aid through the Legal Aid Electronic Services Portal (LAESP). However, the application process can be quite challenging for some MDWs as they need to sign and affirm a number of different documents. For this reason, if a plaintiff MDW is planning to take her case before the DC, it is advisable that the MDW applies for and obtains Legal Aid whilst still

100 District Court Civil Procedure (General) Rules (details at http://oelawhk.lib.hku.hk/items/show/3271), see also Ord 24 r 16 of the Rules of the Supreme Court (details at http://oelawhk.lib.hku.hk/items/show/3867). See Ch 3, Section 7 part I(d) for the text of the law.


102 For full list of fees, please refer to the Schedule of the District Court Civil Procedure (Fees) Rules, Cap 336C. See Ch 3, Section 7 part I(a) for the text of the law.

in Hong Kong.

That said, Legal Aid can be obtained remotely (through a legal representative or otherwise), however, the fact that the applicant is not in Hong Kong would affect the application due to the time it would take for the transmission of original documents from overseas, the absence of the applicant to answer any questions raised by the department.

The Legal Aid application requires a plaintiff MDW to set out the merits of her case. Therefore, for an application to have a strong chance of success, an MDW needs to demonstrate that there are strong grounds in favour of her claim. This may require assistance from pro bono lawyers or NGOs.

Legal Aid applications typically take around 3 months to process, but whilst an application is being considered, any pro bono lawyers advising the MDW may continue working on their case. Further, even after Legal Aid is granted, pro bono lawyers can continue to assist the appointed Legal Aid lawyers with case preparation.

Plaintiff MDWs who are advised they are unlikely to obtain Legal Aid, and are otherwise unable to obtain pro bono assistance, may still bring their claim in the SCT (and forego any exceeding amount of their claim) or the LT, where the procedures are less complex and costs are generally lower, owing to the absence of legal representation.

3.135 A plaintiff MDW may apply for Legal Aid under either the Ordinary Legal Aid Scheme or the Supplementary Legal Aid Scheme.

3.136 The Ordinary Legal Aid Scheme covers claims involving breach of contract, employee compensation cases, immigration matters, employees' wages and related employment benefits cases.

3.137 The Supplementary Legal Aid Scheme covers claims that are likely to exceed HK$60,000 and involve personal injuries or death, medical, dental and legal professional negligence. Claims brought under the Employees' Compensation Ordinance and appeals by employees against awards made by the LT irrespective of the amount of the claim are also covered.

3.138 To successfully apply for Legal Aid under the Ordinary Legal Aid Scheme, a plaintiff MDW must satisfy both a means test and a merits test:

- under the means test, the applicant's financial resources must not exceed HK$290,380; and
- under the merits test, an applicant must have reasonable grounds for pursuing the proceedings. The Legal Aid Department will assess the

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108 Totalling the applicant's annual disposable monthly income, minus certain allowable deductions, plus disposable capital. For more information about what constitutes financial resources, please refer to http://www.lad.gov.hk/eng/las/fe.html (visited 4 October 2015). Exceptions to the means test include cases that involve an alleged breach of the *Hong Kong Bill of Rights Ordinance* or the *International Covenant on Civil and Political Rights*. For such cases, the Director of Legal Aid will have discretion to grant assistance, even where the applicant's resources exceed the threshold. Ibid.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

application, taking into account the background of the case, the available evidence, and the applicable legal principles.\textsuperscript{109} In assessing the merits, the Legal Aid Department must be satisfied that there are reasonable grounds or points of law involved for which it is desirable to grant Legal Aid. For example, Legal Aid may be granted to those who have passed the means test, if the available documents already demonstrate strong ground(s) for taking proceedings or that the issues raised are already covered by previous judgments or advice.\textsuperscript{110}

3.139 The MDW’s financial resources will dictate what percentage of costs they must contribute. Table 3-5 describes this sliding scale.\textsuperscript{111}

3.140 After a successful application for Legal Aid, a lawyer will be appointed to help plaintiff MDWs to prepare their case, and to represent them at DC hearings.

3.141 If a plaintiff MDW’s application for Legal Aid is refused, the MDW may appeal to the Registrar of the High Court within 14 days of the refusal.\textsuperscript{112} However, the Registrar’s decision is final. If Legal Aid is not granted and the MDW cannot afford to engage legal counsel to represent her in the proceedings, she may seek help from the Free Legal Service Scheme provided by the Hong Kong Bar Association.\textsuperscript{113}

3.142 Finally, it is worth noting that legal aid is not necessarily permanent, it may be discontinued in certain circumstances. During proceedings, the Legal Aid Department may determine that a plaintiff MDW (who is receiving Legal Aid) no longer has reasonable grounds to continue with proceedings. This may be the case where, for instance, additional unfavorable evidence comes to light, the other party has declared bankruptcy, or the MDW has unreasonably rejected a settlement offer. In such circumstances, Legal Aid may be withheld from the MDW going forward in the proceedings, although the MDW will not be required to pay back any amount she has already received from Legal Aid.

\textsuperscript{109} Details at http://www.legco.gov.hk/yr14-15/english/panels/ajls/papers/ajls20150323cb4-658-3-e.pdf (visited 17 September 2015). As Legal Aid is publicly funded, it is unlikely to be granted where the cost / expense of a claim far exceeds its potential value, or if the chance of recovery is so slim that even if successful, an ordinary person would not use their own money for such proceedings.

\textsuperscript{110} Ibid.

\textsuperscript{111} Details at http://www.lad.gov.hk/eng/las/lac/olascc.html (visited 7 September 2015)

\textsuperscript{112} Details at http://www.hkclic.org/en/topics/legalAid/freeOrSubsidisedLegalAssistanceInHongKong/legalAidSchemeForCivilCases/q9.shtml (visited 17 September)

### Table 3-5: Current scale of Legal Aid contribution under the Ordinary Legal Aid Scheme\textsuperscript{114}

<table>
<thead>
<tr>
<th>Financial Resources (HK$)</th>
<th>Contribution Rates (%)</th>
<th>Contributions (HK$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 39,297.50</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>36,297.51 - 72,595.00</td>
<td>2</td>
<td>726 - 1,452</td>
</tr>
<tr>
<td>72,595.01 - 108,892.50</td>
<td>2.5</td>
<td>1,815 - 2,722</td>
</tr>
<tr>
<td>108,892.51 - 145,190.00</td>
<td>5</td>
<td>5,445 - 7,260</td>
</tr>
<tr>
<td>145,190.01 - 181,487.50</td>
<td>10</td>
<td>14,519 - 18,149</td>
</tr>
<tr>
<td>181,487.51 - 217,785.00</td>
<td>15</td>
<td>27,223 - 32,668</td>
</tr>
<tr>
<td>217,785.01 - 254,082.50</td>
<td>20</td>
<td>43,557 - 50,817</td>
</tr>
<tr>
<td>254,082.51 - 290,380.00</td>
<td>25</td>
<td>63,521 - 72,595</td>
</tr>
</tbody>
</table>

3.143 The Department of Legal Aid has a right to recover costs in cases of settlement or judgment in favor from those who receive assistance under the Ordinary Legal Aid Scheme.\textsuperscript{115}

3.144 Those with financial resources that exceed the maximum amount allowed under the Ordinary Legal Aid Scheme may still apply for assistance under the Supplementary Legal Aid Scheme.

3.145 Similar to the Ordinary Legal Aid Scheme, the **Supplementary Legal Aid Scheme** subjects applicants to both a means test and merits test:\textsuperscript{116}

- under the **means test**, the applicant’s financial resources must be greater than HK$290,380 but do not exceed HK$1,451,900;\textsuperscript{117} and
- under the **merits test**, they must have reasonable grounds for pursuing the proceedings. See Chapter 3 sub-section (v) Legal Aid above.


\textsuperscript{115} Note that cost recovery can come from property recovered or preserved during the proceedings. Such property includes land or interest in land, as well as pecuniary awards, such as employee’s compensation, wage arrears, damages in personal injury cases, among others. Details at [http://www.lad.gov.hk/eng/documents/ppr/publication/guide_to_legal_aid_services_in_hongkong(e)_lowr.pdf](http://www.lad.gov.hk/eng/documents/ppr/publication/guide_to_legal_aid_services_in_hongkong(e)_lowr.pdf) (visited 17 September 2015).


\textsuperscript{117} Ibid.
### Table 3-6: Current scale of Legal Aid contribution under the Supplementary Legal Aid Scheme

<table>
<thead>
<tr>
<th></th>
<th>Type I Proceedings</th>
<th>Type II Proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial Application Fee</strong></td>
<td>$1,000</td>
<td>$5,000</td>
</tr>
<tr>
<td><strong>Interim Contribution</strong></td>
<td>$72,595</td>
<td>10% of assessed financial resources, but not less than $72,595, whichever is the higher</td>
</tr>
<tr>
<td><strong>Final Contribution</strong></td>
<td>[All costs and expenses incurred by the Director of Legal Aid plus percentage deduction.] MINUS [interim contribution, application fee paid and costs recovered from the opposite party]</td>
<td>[All costs and expenses incurred by the Director of Legal Aid with percentage deduction.] MINUS [interim contribution, application fee paid and costs recovered from the opposite party]</td>
</tr>
</tbody>
</table>

3.146 Type I proceedings cover employee’s compensation claims irrespective of the amount of the claim, representation for employees in appeals against awards made by the LT irrespective of the amount in dispute, and fatal and non-fatal personal injuries claims where the claim is likely to exceed $60,000.

3.147 Type II proceedings cover medical, dental, professional negligence claims where the claim is likely to exceed $60,000.

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(vi) Filing a claim and subsequent pleadings

3.148 A plaintiff MDW can commence an action in the DC by filing either:

- a Writ of Summons, in circumstances where their action is expected to involve a substantial dispute of the facts; or
- an Originating Summons, in circumstances where their action essentially involves issues of law (such as the interpretation of a contract), rather than disputed facts.\textsuperscript{119}

3.149 As most actions brought by plaintiff MDWs in the DC involve substantial disputes of fact, they are normally initiated by a Writ of Summons.

3.150 To commence an action by a Writ of Summons, a plaintiff MDW should file a Form 1\textsuperscript{120} with the Registry of the DC and pay a filing fee\textsuperscript{121} to the DC’s Accounts Office. Form 1 should be completed by setting out an endorsement of claim (a concise statement of the nature of the claim and the relief sought) or a Statement of Claim that sets out the full factual and legal basis of the claim as well as the relief sought.\textsuperscript{122} The plaintiff MDW must also serve the Writ of Summons with three copies of the Acknowledgement of Service form on the defendant. Service may occur by physically handing a copy to the defendant (i.e., personal service), by registered post, or by mail to the defendant at their usual or last known address.\textsuperscript{123}

3.151 If the plaintiff MDW is only claiming for a payment of money, she must also file a Form 16 (for a liquidated claim, e.g. a debt) or Form 16C (for an unliquidated claim, e.g. damages for breach of contract or personal injuries) together with the Writ.

3.152 The defendant must then fill out and file an Acknowledgement of Service to indicate if they intend to defend the action. The Acknowledgement of Service should be filed with the Registry within 14 calendar days of service of the Writ (including the day of service).\textsuperscript{124}

3.153 Following the defendant’s filing of the Acknowledgement of Service, the defendant must file a Defence (and a Counterclaim, if any). If a defendant fails to file an Acknowledgement of Service or Defence, the plaintiff MDW may apply for a default judgment to be entered.

3.154 Following receipt of the defendant’s Defence and (Counterclaim), the plaintiff MDW should file and serve their Reply to any Defence and, if applicable, their Defence to any Counterclaim within 28 calendar days after service of the Defence.


\textsuperscript{120} For an overview of the civil action begun by Writ of Summons please refer to http://www.clic.org.hk/en/topics/civilCase/start_civil_action/q9.shtml (visited 4 October 2015).

\textsuperscript{121} All relevant forms for filing a claim in the DC can be found at http://www.clin.org.hk/en/crt_services/forms/dc.htm (visited 5 October 2015).

\textsuperscript{122} To verify the exact amount of the filing fee, please contact the relevant Court Registry: http://www.judiciary.gov.hk/en/others/contactus.htm.


3.155 The pleadings stage of a DC action will be deemed ‘closed’ 14 days after service of the Reply and/or a Defence to Counterclaim. The tables below outline the options for commencing proceedings.

<table>
<thead>
<tr>
<th>Option 1: Plaintiff issues a Writ of Summons + Statement of Claim, verified by a Statement of Truth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant files an Acknowledgement of Service (within 14 days)</td>
</tr>
<tr>
<td>• Failure to file: Plaintiff can apply for entering judgment against the defendant.</td>
</tr>
<tr>
<td>Defendant files a Defence (and a Counterclaim if applicable) within 28 days after expiry of the time limit for filing an Acknowledgment of Service)</td>
</tr>
<tr>
<td>• Failure to file: Plaintiff can apply for entering judgment against the defendant.</td>
</tr>
<tr>
<td>Plaintiff files a Reply (and a Defence to any Counterclaim if any), verified by a Statement of Truth within 28 days after being served with the Defence.</td>
</tr>
<tr>
<td>Pleadings are closed 14 days after service of the Reply and/or a Defence to Counterclaim.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Option 2: Plaintiff issues a Writ of Summons + Endorsement of Claim, verified by a Statement of Truth</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant files an Acknowledgement of Service (within 14 days)</td>
</tr>
<tr>
<td>• Failure to file: Plaintiff can apply for entering judgment against the defendant.</td>
</tr>
<tr>
<td>Plaintiff files a Statement of Claim verified by Statement of Truth within 14 days of receiving the Acknowledgement of Service.</td>
</tr>
<tr>
<td>Defendant files a Defence (and a Counterclaim if applicable) within 28 days after expiry of the time limit for filing an Acknowledgment of Service)</td>
</tr>
<tr>
<td>• Failure to file: Plaintiff can apply for entering judgment against the defendant.</td>
</tr>
<tr>
<td>Plaintiff files a Reply (and a Defence to any Counterclaim if any), verified by a Statement of Truth within 28 days after being served with the Defence.</td>
</tr>
<tr>
<td>Pleadings are closed 14 days after service of the Reply and/or a Defence to Counterclaim.</td>
</tr>
</tbody>
</table>

(vii) Procedures of DC proceedings after the close of pleadings

**Chart 3-6: Summary of major procedural steps after the close of pleadings**

- Discovery of Documents
- Timetabling Questionnaire
- Case Management Summons
- Listing for Trial
- Trial

3.156 Once the pleadings stage has closed in DC proceedings, there are a number of steps that must be undertaken, in order, prior to trial. These include discovery, timetabling questionnaire, case management summons, along with milestone dates.125

3.157 **Discovery** requires the parties to file and serve a List of Documents within 14 days of the close of pleadings, but in practice the parties are likely to mutually

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agree on an extended time limit. The List of Documents should set out all relevant documents that are within their possession, custody or control, even if any such documents are harmful to their own case. The other party will then be given an opportunity to inspect the documents. Discovery is also a continuing obligation throughout the proceedings. Parties must disclose any new relevant documents that come to light in the course of the trial.

3.158 **Timetabling Questionnaire:** each party must file and serve a Timetabling Questionnaire within 28 calendar days after the close of pleadings. The parties should aim to agree on what directions to seek to prepare a case for trial.

3.159 **Case Management Summons:** a plaintiff MDW should issue a Case Management Summons for the DC to give directions relating to the further conduct of the case (unless such directions are agreed between the parties, in which case a Consent Summons can be filed instead) within 14 calendar days after service of the Timetabling Questionnaire from the defendant(s), or within 14 days upon the expiry of the period for serving a Timetabling Questionnaire, whichever is earlier.

3.160 **Milestone dates:** the DC will fix a timetable for the steps that need to be taken before a case goes to trial. These include:

- a Case Management Conference;
- pre-trial review; and
- the trial itself.

In addition, a plaintiff MDW should appear in court on the milestone dates, otherwise their claim may be struck out.

3.161 Note that milestone dates cannot be altered in most circumstances. This means that extensions are not allowed without special grounds to do so. These can include material and/or unforeseen changes in circumstances, occurring since directions setting milestone dates.

3.162 If the case proceeds to trial, the DC will hear the oral evidence of witnesses and submissions of the parties. It may adjourn the case to another date if further information or evidence is needed, and deliver judgment either at the end of trial or at a later date.

(viii) **Burden of proof**

3.163 The plaintiff carries the burden of proof and must produce sufficient evidence to prove their case on the “balance of probabilities.” This means that the plaintiff must prove that what they allege is more likely than not to be true.

(ix) **Security for costs**

3.164 Plaintiffs may be required to pay a deposit for the defendant’s legal costs in the event that the plaintiff loses. Defendants concerned that a plaintiff MDW will be

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126 Hong Kong Civil Procedure Vo. 1 (the White Book).
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unable to meet an order for payment of legal costs incurred in DC proceedings may make an application for the plaintiff MDW to provide security for costs.\(^\text{127}\)

3.165 MDW’s who will not reside in Hong Kong through the course of the trial are likely to face such an application for security for costs from the defendant.

3.166 The actual amount of the security for costs will vary by case. The DC has some leeway in assessing the amount if it orders security for costs. It will take into consideration an amount that seems just, given all the circumstances of the case.\(^\text{128}\)

3.167 When determining whether an order for security for costs should be granted, the DC will consider factors relevant to each case that may include:

- whether the defendant makes an admission during pleadings or otherwise that money is due;
- whether the application for security is being used oppressively (for example, to stifle a genuine claim);\(^\text{129}\)
- the plaintiff’s financial position and whether their lack of financial resources has been brought about by the defendant’s conduct. This could include delay in payment;
- whether any costs awarded against the plaintiff would be paid out of the Legal Aid Fund.
- whether the plaintiff’s claim is made in good faith and is not a sham;
- whether the plaintiff has a reasonably good prospect of success;
- whether the application for security is being made at a late stage of proceedings;
- how easily a judgment could be enforced against the plaintiff;

3.168 If ordered, security may include both past and future costs,\(^\text{130}\) but must be provided by the plaintiff in the manner and time frame directed by the DC.\(^\text{131}\) Failure to comply with an order requiring security to be paid could result in the plaintiff’s DC claim being dismissed.

3.169 An application for security for costs is only available to defendants. Accordingly, plaintiff MDWs cannot apply for security for costs against defendants. However, if the defendant filed a counterclaim and ordinarily resides outside of Hong Kong (which makes the plaintiff MDW a defendant to the counterclaim), then the

\(^{127}\) Order 23, r 1 of the Rules of the District Court, Cap 336H. See Chapter 3, Section 7.I.(C) for the text of the law.

\(^{128}\) Ibid.

\(^{129}\) In Sunil Khemaney v Vijay Khemaney [2006] HKCU 1749 (unreported, HCAP 4/2005, 12 September 2006), the court refused to order security for costs on the basis that it would unfairly stifle the plaintiff’s claim. The court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled if the order for security for costs is granted. The inference need not be drawn from direct evidence. See Chapter 3, Section 7.VI for a brief summary of the case.

\(^{130}\) Andersen v Huang Kuang Yuan [1997] HKLRD 1360 at 1366. See Chapter 3, Section 7.VI for a brief summary of the case.

\(^{131}\) In practice, this means paying money into court or giving a bank guarantee (which may not be possible for MDWs). Details at http://www.fieldfisher.com/PDF/Briefing-paper-2005-10-01-61818f65-7d93-44f3-b7a5-685fb344095f.PDF (visited 17 November 2015).
plaintiff MDW may apply for security for costs against the defendant in respect of defending their counterclaim.

**Practical points:** Applications for security for costs are sometimes used by defendants as a procedural tactic to delay proceedings or exert pressure on the plaintiff to settle the case. Plaintiff MDWs that reside outside of Hong Kong may find themselves facing such applications. However, the DC is unlikely to order security for costs where doing so would effectively prevent an MDW from being able to continue their claim due to lack of financial resources.

(x) **Absence at the hearing**

3.170 Although a plaintiff MDW may appoint a legal representative to handle their case in the DC, their presence at trial is likely still required in order to give oral evidence and be cross-examined as a witness. Absence may adversely affect the credibility of the MDW as a witness, and ultimately, their case. Again, access to the Technology Court makes remote appearances possible in theory.

(xi) **Representation**

3.171 Legal representation is permissible. Given the cost of private representation, applying for Legal Aid is often the best way for MDWs to obtain a lawyer. If they are unsuccessful in securing Legal Aid, they may always try to engage pro bono legal representation.

3.172 Where a plaintiff MDW wishes to pursue DC proceedings without legal representation, she may make use of the Resource Centre for Unrepresented Litigants, which offers guides to civil proceedings in the DC and the High Court. However, due to the complexity of proceedings in the DC, unrepresented parties may be unable to handle the case on their own and may not fully understand the court procedure. Accordingly, a legally unrepresented plaintiff MDW in DC proceedings will be at a considerable disadvantage against a legally represented defendant. Additionally, an unrepresented plaintiff MDW will have to remain in Hong Kong to conduct the DC proceedings for the duration of it.

(xii) **Appeal**

3.173 Those dissatisfied with a judgment at the DC may seek an appeal. However, there is no automatic right of appeal against DC judgments in civil matters. (emphasis added) The losing party must first apply for leave to appeal, within 14 days from the date of the interlocutory decision, or within 28 days from the date of a final judgment, as the case may be. If leave is refused, an application may then be made to the Court of Appeal (CA) for leave to appeal within 14 calendar days from the date of refusal. The CA’s decision with on this application will be final.

3.174 Leave to appeal will only be granted if the court is satisfied that:

- the appeal has a reasonable prospect of success; or

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133 Order 58, r 2 of Rules of the District Court, Cap 336H. See Chapter 3, Section 7.l.(C) for the text of the law.
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- there is some other reason, in the interests of justice, why the appeal should be heard (for instance, there is a question of constitutional law involving general public importance). \(^{134}\)

3.175 Where leave to appeal is granted, a Notice of Appeal together with written skeleton arguments in support of the appeal must be filed and served no later than 7 calendar days after the date when permission was granted. \(^{135}\)

(xiii) Enforcement of judgment

3.176 Ideally, the losing party will pay the judgment ordered. However, when the losing party fails to do so, the winning party must take action to enforce the judgment.

3.177 All enforcement tools (e.g. garnishee proceedings, charging order and Writ of Fieri Facias) as set out in Section III Enforcement of judgment, are available at the DC. The DC will not assist parties to enforce judgments, so winning parties will have to take enforcement steps on their own if the losing party does not comply with the judgment. Enforcement can be time-consuming and costly.

(xiv) Remote Claims

3.178 Claims in the DC can be commenced even where a plaintiff MDW has left Hong Kong. However, there are certain logistical hurdles that must be overcome in pursuing a claim from abroad.

3.179 Legal Aid applications can be made online through the Legal Aid Electronic Services Portal (LAESP). \(^{136}\) However, if there are persistent and ongoing difficulties in reaching or communicating with an MDW applicant abroad (for instance, in circumstances where the MDW applicant lives in a remote part of another country), the Legal Aid application may fail.

3.180 A plaintiff MDW can theoretically give oral evidence to the DC and attend hearing remotely via the Technology Court if they justifiably cannot appear in person. However, no documented cases were found at time of publication that a plaintiff MDW was granted permission to use the Technology Court. Thus, advocates will need to conduct test litigation to establish when and in what circumstances the DC is likely to approve use of the TC.

IV. Discrimination claims – Lodging a complaint with the Equal Opportunities Commission

3.181 The EOC is a Hong Kong statutory body responsible for handling complaints of discrimination, harassment and vilification under the following Ordinances:

- Sex Discrimination Ordinance (SDO), Cap 480; (See Chapter 2, Section 5.III.(D)(ii))
- Disability Discrimination Ordinance (DDO), Cap 487;
- Family Status Discrimination Ordinance (FSDO), Cap 527; and

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\(^{134}\) Order 63A of the District Court Ordinance, Cap 336. See Chapter 3, Section 7.I.(B) for the text of the law.

\(^{135}\) Order 58, r 2 of Rules of the District Court, Cap 336H. See Chapter 3, Section 7.I.(C) for the text of the law.

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- Race Discrimination Ordinance (RDO), Cap 602. (See Chapter 2, Section 5.III.(D)(iii))

3.182 If a complainant has suffered discrimination due to their gender, disability, marital status, pregnancy, family status or race, they can file a complaint in writing with the EOC. They and the defendant will be encouraged by the EOC to settle the dispute by conciliation.

3.183 If the conciliation fails and the complainant chooses to commence legal proceedings in the DC, she can apply to the EOC for legal assistance, which could include legal advice, legal representation or any other form of assistance which the EOC considers appropriate. Alternatively, the complainants can also commence legal proceedings themselves, or seek Legal Aid.

3.184 A complainant can also simultaneously commence a civil action in the DC and seek compensation for the types of discrimination described above.

3.185 When deciding whether to lodge a complaint with the EOC or file a discrimination claim in the DC, MDWs should consider the remedies available for these actions. The practical purpose of lodging a complaint with the EOC is to put pressure on the MDW’s employer. However, the EOC has no power to order monetary compensation; they can only mediate negotiations that might lead to a conciliation agreement. By contrast, the DC has the power to order monetary compensation if they rule in favor of the claimant.

Practical points: Complaints with the EOC must be lodged within 12 months of the incident. The DC will generally not consider a claim under the previously mentioned Discrimination Ordinances if the claim was filed 24 months after the act complained of occurred, although the DC has a discretion to consider any time-barred claim where it is just and equitable to do so.

The time taken by the EOC to investigate a complaint will not be counted within the 2-year limitation period for taking legal action in the DC.

(A) Advantages to using the EOC

3.186 Remote claims: A complainant can lodge an EOC complaint online, from wherever they are located and parties do not need to return to Hong Kong for the conciliation meetings. This opens up the possibility for a complainant MDW to lodge a complaint even after they have left Hong Kong. The EOC can communicate with complainants through letters, emails, telephone calls, or other suitable means.
3.187 **Conciliation** is a voluntary process that engages parties to negotiate a mutually satisfactory resolution to a dispute. It provides a quick, simple and likely more confidential form of redress compared to going through legal proceedings.

3.188 **Cost:** conciliation by the EOC is free so there should be little or no cost to the parties involved.

(B) **Limitations to the EOC**

3.189 **Lack of incentive:** if an MDW files a complaint with the EOC against their current employer, this may result in their termination, leaving them without a work visa and potentially unable to support themselves whilst their claim is being investigated. An employer may therefore attempt to terminate an MDW’s employment and drag out the EOC process by refusing to conciliate at all, knowing that the MDW may have to leave Hong Kong before any resolution is reached.

3.190 **Effectiveness:** the EOC may not be effective in handling complaints. If conciliation fails, the EOC may provide access to legal assistance for commencing a civil claim, but it does not offer any other means of resolving the dispute.

(C) **Immigration issues**

3.191 Upon termination of their employment contract, a complainant MDW is only permitted to remain in Hong Kong for two weeks. Anecdotally, lodging a complaint with the EOC may not be sufficient to obtain a visa extension. To apply for a visa extension, a plaintiff MDW would likely need to commence a parallel civil claim in the LT or the DC.

(D) **Lodging a complaint**

3.192 EOC complaints must be lodged in writing and may be submitted on the EOC complaint form,[143] either online, or by mail, facsimile, or in person by the complainant themselves, or a non-legal representative acting on their behalf. A representative may be their friend, relative, member of a trade union, or other individual in Hong Kong. Complainants themselves do not need to attend the conciliation meetings in person if they are not in Hong Kong. The EOC will communicate directly with the representative handling the case.[144]

3.193 Even with a representative handling the complaint on the complainant’s behalf, the complainant may still contact the EOC by email, fax or telephone during the conciliation process.[145] This is particularly advantageous for complainant MDWs who are overseas.

3.194 For parties with limited English or Cantonese proficiency, the EOC can provide an interpreter upon request. This may be particularly useful for MDWs who are not conversant in English or Cantonese.

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144 Meeting with the Equal Opportunities Commission, 23 March, 2015.
(E) Pursuing a complaint

3.195 Upon receiving a complaint, the EOC must conduct an investigation into the complaint to determine if it falls within the EOC’s jurisdiction. The EOC will notify the respondent (i.e., subject) of the complaint, and they will have an opportunity to respond to / rebut the complainant’s claims. Witness statements and relevant materials will then be gathered by the parties to determine whether the case should proceed to conciliation or whether the EOC should exercise its discretion to discontinue its investigation.\[146\]

3.196 Before the conciliation process, parties must inform the EOC if they would like a third party (e.g. a friend or a lawyer) to attend the conciliation meeting. The EOC will seek the other party’s consent to this request. If the other party withholds consent, then this third party cannot attend the conciliation meeting. However, they may remain in a separate room during conciliation so that the requesting party may still consult or discuss issues with them as necessary.\[147\]

3.197 During conciliation, EOC officers will act as communication facilitators to assist both parties to examine the issues that led to the complaint, identify any points of agreement, and arrive at a solution in an attempt to resolve the complaint.\[148\] As in all stages of handling complaints, the EOC is required to act fairly and impartially.

3.198 Any information received during conciliation is confidential and not admissible in court proceedings without the consent of the person who gave the information. It is worth noting, however, that all information gathered during the EOC’s investigation into the complaint (i.e. outside of the conciliation stage) can be used in court proceedings (but is kept confidential from third parties).\[149\]

3.199 Although the EOC has the power to call a compulsory conciliation conference, it cannot compel the parties to reach an agreement at conciliation, or direct or suggest the terms of any agreement.

3.200 If the parties voluntarily reach an agreement during conciliation, the terms of that agreement should be written and signed by each party. The agreement will then form a legally binding contract.

3.201 Terms of the conciliation settlement will depend on the circumstances of each dispute. It may be in the form of an apology, changes to existing policies and practices, a review of work procedures, re-instatement, or monetary settlement.\[150\]

3.202 Even though a complaint filed with the EOC may not always be successfully resolved through conciliation, it may be a means of initiating settlement

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negotiations between the parties. This may still result in avoiding time consuming and costly litigation, whilst having the dispute resolved out of court.

**Practical points:** At least one Hong Kong NGO has previously been nominated to assist MDWs with filing their EOC complaints after the MDWs have returned home.\(^{151}\) Although this is a viable option, there may sometimes be difficulties maintaining adequate communication with a remotely-based complainant, due to poor internet access and/or telephone reception. This can inevitably lead to time delays and, in more severe cases, result in a case being discontinued.\(^{152}\)

4. Legal options available to MDWs overseas

I. Introduction

4.1 Remote claims against employers, employment agencies, or other entities in Hong Kong are possible even after a plaintiff MDW has left the jurisdiction. Plaintiffs may either return to Hong Kong for trial as needed, or attempt to make remote appearances in court, via the Technology Court. This section briefly covers the immigration challenges to remaining or returning to Hong Kong for litigation, as well as the use of the Technology Court.

II. Immigrations issues

(A) Staying in Hong Kong

4.2 Remaining in Hong Kong after employment to personally attend trial is the logistically easiest way to conduct litigation, as the plaintiff is available to personally appear in court. However, the two week rule, along with complications in extending a visa, can make this difficult.

   (i) **Two-week rule**\(^{153}\)

4.3 Due to the limited time (two weeks) MDWs are allowed to stay in Hong Kong following the termination or expiry of their local employment, they often face difficulties pursuing claims while they remain in Hong Kong. Many potential plaintiffs are thus focused on finding other employment, or making preparations for returning home.

   (ii) **Extension of visa**

4.4 As a matter of policy, MDWs generally cannot change their employer and process a new working visa in Hong Kong if their employment contract with their existing employer has been terminated prematurely.\(^{154}\) Exceptions include the migration or death of the employer, or if there is evidence suggesting that the MDW has been abused.\(^{155}\) As such, if an MDW does not leave the country within

\(^{151}\) Interview with Holly Allan, Executive Director, Helpers for Domestic Helpers 4 June 2015.

\(^{152}\) Ibid.


\(^{155}\) See also Chapter 2 Section 4.IV.(G) for a discussion on dismissal of MDWs.

\(^{157}\) Ibid.
two weeks of their contract termination, or upon the expiry of their visa, they would be in breach of the conditions of their stay, which may lead to criminal prosecution.

4.5 Where a plaintiff MDW is not able to obtain a visa extension upon filing a claim with the LT or DC, they may therefore wish to explore the use of the Technology Court to assist them with pursuing their claim remotely.

III. Possible use of the Technology Court (TC)

4.6 The TC can enable parties to “appear” in court, even if they are not physically present. In the context of plaintiff MDWs, the use of the video conferencing facilities (VCF) is most pertinent as it permits oral evidence to be given by witnesses abroad.

4.7 Note that the TC also allows for use of video conferencing facilities, multimedia presentation of evidence, electronic documentation and exhibits handling, and enhanced interpretation services.\textsuperscript{156} Guidelines concerning the use of the TC are found in Practice Direction 29 (PD29).

4.8 The TC is available for both civil and criminal cases at all levels of the judicial system, including but not limited to proceedings before the LT, SCT and DC. However, its use is always subject to the discretion of the court or tribunal concerned.\textsuperscript{157}

4.9 In order to use the TC, a party will need to submit an application within the forum they are seeking to pursue their claim.\textsuperscript{158} For claims falling under:

- LT claims, the application is made to the Presiding Officer in charge of the case, or if none is allocated, the Principal Presiding Officer (or if unavailable, the Chief Magistrate);
- SCT claims, he application is made to the adjudicator in charge of the case, or if none is allocated, the Principal Adjudicator (or if unavailable, the Chief Magistrate);
- DC claims, the judge in charge of the case, or if no judge is allocated, the listing judge (or if unavailable, the Chief District Judge).

Practical points: The party seeking access to the TC is responsible for the associated costs and arrangements.

Note that parties using the TC will be responsible for setting up the necessary video conferencing facilities at the remote venue that will connect with the TC. Logistics will include booking the remote site, making the appropriate contractual arrangements with the telecommunications carriers who provide video conferencing services, and paying any carrier charges etc.

\textsuperscript{156} Details at \url{http://www.judiciary.gov.hk/en/crt_services/tech_crt/pamphlet.htm} (visited 7 September 2015)

\textsuperscript{157} PD 29 r 2 and 4. See Chapter 3, Section 7.VIII.(A) for the text of the law.

\textsuperscript{158} PD 29 r 7. See Chapter 3, Section 7.VIII.(A) for the text of the law.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

Additionally, the party must ensure that any witnesses will be at the remote site in time for examination to take place, being mindful of any time differences. Witnesses must be provided with copies of any documents or exhibits relevant to the examination and be provided with an interpreter if so required.¹⁵⁹

For those with clients present in Indonesia or the Philippines, JWB can provide a free consultation on sourcing an appropriate site in these countries.

(A) Justifiable Reasons to use the TC

4.10 There must be compelling reasons for the court to allow a party to give evidence remotely via the TC.¹⁶⁰ This subsection explains the rationale, the considerations the court will make generally, and the factors that have swayed a court’s decision to date.

4.11 The rationale for the high bar to using the TC is that applicants must justify a departure from the general rule that parties should be able to challenge witnesses’ evidence by questioning in a situation where they and the court can observe, from within the courtroom, the witnesses’ demeanour for assessing their credibility and the weight to be given to their evidence. The decision to allow access to the TC is completely discretionary.¹⁶¹ Mere inconvenience is not sufficient.

4.12 Sufficient justification for using the TC depends on the circumstances of each case. The court will consider factors such as the interests of justice, the just and efficient disposal of the proceedings, and whether a party will be denied access to the court if video link evidence is excluded.¹⁶²

4.13 The court will also take into account the views of the parties, the availability of the TC, the subject matter of the proceedings, and all other material circumstances. The latter includes whether the proposed use of the TC is likely to promote the fair and efficient disposal of the proceedings, will save costs, and/or will materially delay disposal of the proceedings.¹⁶³

4.14 Finally, the court will weigh the positions of the parties and strike a balance between the burden and inconvenience for the witness to fly to Hong Kong (including the cost and expenses of travel), and the potential prejudice to the other party in not having the witness present in the courtroom for cross-examination.¹⁶⁴

4.15 Factors supporting the use of the TC include:

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¹⁶⁰ Access to the TC is a privilege and not a matter of right. See Re Chow Kam Fai [2004] 2 HKLRD 260 at [16]. See Chapter 3, Section 7.VIII.(B) for a brief summary of the case.

¹⁶¹ Re Chow Kam Fai [2004] 1 HKLRD 161 at [27]-[32]. See Chapter 3, Section 7.VIII.(B) for a brief summary of the case.

¹⁶² Re Chow Kam Fai at n 161 above.

¹⁶³ PD 29, r 5. See Chapter 3, Section 7.VIII.(A) for the text of the law.

¹⁶⁴ See Re Chow Kam Fai at n 181 above at [30].
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- **The cost and convenience of travel:** the costs of, and convenience for, the witness to travel to Hong Kong will be taken into account. As mentioned above, mere inconvenience alone is not sufficient.

- **Infirmitiy, disability, or old age:** if a witness is suffering from infirmity or disability and living overseas, a court will be more inclined to spare them the difficulty and discomfort of having to attend court, especially if it involves a long flight. In cases where a medical condition and old age render the journey on an airplane “threatening” courts have previously been willing to grant the use of the TC. However, when the medical condition is deemed not severe enough, or the party appears to be trying to evade cross-examination, the court will dismiss the application.

- **Credibility of the witness:** a court will consider whether the credibility of the relevant witness is at issue, and whether their physical attendance in court would provide a better assessment of their credibility. If the witness is only giving technical or purely factual evidence, and there are no issues as to their credibility, then there is a higher chance that the court may grant access to the TC.

- **Technicality of knowledge:** when a party wants to admit highly technical evidence from a well-known / busy physician or surgeon in a foreign country, who has many other patients in their care, a court might be more inclined to permit the use of VCF as the alternative might be losing the evidence altogether.

- **Public policy:** a court may take public policy grounds into account when exercising its discretion, and will consider whether a party is attempting to obtain an advantage over the other in either seeking to use or oppose the use of video link evidence.

4.16 The use of the TC will not be allowed if a party or crucial witness is merely seeking to avoid entering the jurisdiction in order to avoid being investigated, or is a fugitive from justice.

**Practical points:** this is an untested area for plaintiff MDWs. Existing case law only describes successful applications where the applicant was so medically ill that it was threatening or impossible for them to return to Hong Kong. Other cases that explain the considerations described above were not found.

For MDWs, apart from promoting the fair and efficient disposal of the proceedings, the court refused to allow use of video conferencing facilities, as Macau is less than an hour by hydrofoil or 15 minutes by helicopter. This travel was not beyond the debtor’s means, especially given that they were not suffering disability, infirmity or ill-health.

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165 See Re Chow Kam Fai at n 181 above at [38]. The debtor was residing in Macau. The court refused to allow use of video conferencing facilities, as Macau is less than an hour by hydrofoil or 15 minutes by helicopter. This travel was not beyond the debtor’s means, especially given that they were not suffering disability, infirmity or ill-health.

166 Daimler AG v Leiduck (No 2) [2013] 2 HKLRD 822. See Chapter 3, Section 7.VIII.(B) for a brief summary of the case.

167 In Luan Gang v Simpson Marine Ltd [2013] HKEC 1383 at [24], the doctor's report only deemed the plaintiff “not suitable to travel” without potential consequences to him if he did travel to Hong Kong. The claim for VCF was thus dismissed. See Chapter 3, Section 7.VIII.(B) for a brief summary of the case.

168 Re James Henry Ting v Akai Holdings Ltd [2013] HKEC 1514 at [38]. See Chapter 3, Section 7.VIII.(B) for a brief summary of the case.

169 See Re Chow Kam Fai at n 161 above at [6]-[7].

170 Ibid at [19].

171 In H.K.C.T. Trading Ltd v Li Luen Ping [2001] 3 HKLRD 504, the court refused the defendant's request to give evidence by way of video link-up, on the grounds that it would not condone any attempt to avoid investigation by a law enforcement agency. See Chapter 3, Section 7.VIII.(B) for a brief summary of the case.
saving the client the time and costs of travelling to Hong Kong for giving oral evidence is a key reason to apply for the TC. However, such an application has not been tested in any of the courts by the date of publication, so it is presently unclear whether this will sufficiently justify the use of the TC.
5. General procedures to bring claims

5.1 This section covers some of the most common procedural issues that both Hong Kong lawyers and their partners in a client’s home country will encounter in pursuing claims on behalf of MDWs. These include issues of evidence, the procedural aspects of settlements, and enforcing judgments against a losing party.

I. Evidence

5.2 This subsection will address the general principles of evidence, as well as the type of evidence most commonly collected.

(A) General principles

5.3 In civil cases, the plaintiff is responsible for adducing evidence that proves their case, on the balance of probabilities. (i.e. that what they claim is more likely than not to be true) However, all parties to legal proceedings have a duty to disclose all evidence they possess that is relevant to the issues of the case.

5.4 At the SCT and LT, the procedures and rules of evidence for cases are typically less strict, due to legal representation not being permitted, and where the aim is to settle cases as quickly and efficiently as possible. During hearings, the Presiding Officer or Adjudicator will rely on statements made by the parties. Such statements could be made by way of oral evidence given on oath during the hearing, or via witness statements or affidavits / affirmations. Where such statements are uncontroversial and the facts are undisputed, it may not be necessary for the parties to give oral evidence in court.

5.5 If the LT or SCT directs parties to file witness statements, affidavits / affirmations or expert reports, the parties should prepare and file them with the Tribunal accordingly. The Tribunal will then arrange for service of these documents on the other party. While original signed copies of documents must be filed with the Tribunal, supporting documents can be exhibited and filed in copy. The parties must make originals of the documentary evidence available for inspection by the Tribunal or the other party upon request. Accordingly, the safe keeping of all originals and copies of the relevant documentary evidence is imperative.

5.6 For DC proceedings, different and substantially more complicated evidentiary rules apply. Each party has a duty to disclose all documents that are relevant to the dispute pursuant to the parties' pleadings, i.e., their Statement of Claim, Defence, Counterclaim, and Reply, etc. This process is called discovery (please refer to Section 3.III.(B)(vii)).

5.7 Discovery requires the parties to serve a list of documents, which sets out all relevant documents that are within their possession, custody or control, even if such documents are harmful to their own case. Discovery takes place after the pleadings are closed (generally, within 14 days of the close of pleadings). The

172 The test of what constitutes a “relevant document” is very wide. A document is relevant if it contains information which may either directly or indirectly help a party to advance their case, or to damage the case of their opponent. The court has discretion to limit the scope of discovery. Details at http://www.civiljustice.gov.hk/ir/paperHTML/Section_K13_1.html (visited 7 September 2015)
relevant documents themselves are not required to be filed and served, but the parties must allow the other side to inspect such documents upon request.\textsuperscript{173}

5.8 The list of documents that each party must serve consists of the following parts.

- **Schedule I:** is divided into two parts:
  - Part 1 lists the relevant documents that the party preparing the list currently has in their possession and agrees to disclose to the other side; and
  - Part 2 lists the relevant documents that the party currently has in their possession but objects to disclosing the same (for instance, because they are privileged communications);\textsuperscript{174}

- **Schedule II:** lists the relevant documents that were previously in the possession of the party preparing the list, but are no longer in their possession (for instance, they were destroyed, lost or transferred to another party).\textsuperscript{175}

### Practical points

In practice, MDWs may face some difficulties in presenting their evidence appropriately in court. Challenges include:

**Originals vs copies:** Plaintiffs generally must keep originals and / or copies of all relevant documents that support their case. These include but are not limited to contracts and pay slips, and records of communication with their employer. As many MDWs never obtain such records, handwritten records of payment or non-payment, photos of relevant documents with their phones / cameras, or asking for electronic copies of relevant documents that they can store in their email accounts can be reasonable alternatives.

For claims against agencies, documentary evidence can be particularly difficult to obtain.\textsuperscript{176} Unless the court demands that the agency produce the relevant documents, MDWs may be left to rely on any (hand) written recordings of the terms for particular agreements they may have entered into.

**Witness evidence:** could potentially be important to support or corroborate the evidence submitted by an MDW. However, MDWs may find it difficult to find witnesses to support their case, particularly in disputes with their employers.

**Use of evidence:** some evidence, while useful for the MDW’s claim, may actually expose an MDW to legal problems. A common example is where an MDW has been involved in illegal work. Although the MDW may have evidence to establish inhumane working hours etc. to support their claim against the employer, if such evidence is

\textsuperscript{173} Details at \url{http://www.hkclic.org/en/topics/civilCase/preparing_for_court_trial/q1.shtml} (visited 17 September 2015).

\textsuperscript{174} A document may be privileged and protected from compulsory disclosure if it is protected by legal professional privilege (LPP). There are two types of LPP – legal advice privilege and litigation privilege. Legal advice privilege protects communications between a client and his lawyer which have been made for the purpose of seeking legal advice. Litigation privilege protects all communications between a litigant, his lawyer, and third parties which have been created for the dominant purpose of preparing for litigation. Details at \url{http://www.nortonrosefulbright.com/knowledge/publications/74577/basic-guide-to-privilege} (visited 17 November 2015).

\textsuperscript{175} Details at \url{http://rcul.judiciary.gov.hk/rc/eng/sform.jsp} visited (17 September 2015).

\textsuperscript{176} Christian Action, a Hong Kong NGO, reported that claims against agencies are increasingly rare, as there is often insufficient evidence to bring a claim. Interview with Tania Sim, Senior Client Advisor, Christian Action. 14 July, 2015.
disclosed in the LT, the LT may well suspend the MDW’s case if it finds that the case involves illegal employment, and alert the Immigration Department to commence an investigation against the MDW.

(B) Evidence to be collected

5.9 For the purposes of discovery, the definition of “documents” is broad. It includes paper documents, photographs, audio or video tapes, or electronic data, etc.177

5.10 Specific examples of documentary evidence include:
- contracts (e.g., employment contracts, agency contracts, loan agreements etc.);
- photographs (for instance, of accommodation / living conditions, or work performed);
- records of salary payments (e.g., bank statements, payment slips);
- records of holidays taken or unpaid leave;
- airline tickets and / or receipts of payments for the same;
- expert witness statements (e.g., by doctors) and medical reports; and
- Records of communications of any kind, including emails, letters, phone messages (e.g., messages from an employer), chat and SMS records, and contemporaneous documents (e.g., diaries, log books, expense records and Facebook posts).178

5.11 In addition to documentary evidence, parties may need to rely on the oral evidence of factual witnesses regarding the issues to be decided at trial. Generally, such witnesses’ evidence is limited to facts within their personal knowledge. Statements may be written in a foreign language and filed together with a translation into an official court language (i.e., English or Chinese). Additional court procedures may be required to certify the translation’s authenticity. Also, witnesses will generally be required to appear at trial to give oral testimony and be subject to cross-examination.179

5.12 Pro bono lawyers representing MDW litigants should go through any witness statements in detail with the MDW before trial. They should ensure that the MDW is familiar with the nature of the parties’ claims and contentions, as well as the contents of all the evidence (including witness statements, affidavits / affirmations, and the contemporaneous documentary evidence) before all substantive hearings.

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178 Details at http://www.hoganlovells.com/files/Publication/f0a64b8b-4869-417f-8932-f9cf973d1859/Presentation/PublicationAttachment/fe4592d9-311f-455c-8e8b-00b236d9a9ab/DiscoveryincivilproceedingsHongKong.pdf (visited 17 September 2015).
II. Settlement

5.13 At any stage prior to or during trial, or even before filing a claim, settlement is a viable option, and parties should consider it to avoid incurring the costs and hassle of bringing a case to trial.

5.14 Several methods are available for communication of settlement offers out of court. Parties can engage in “without prejudice” oral or written negotiations, although written correspondence is preferred in order to avoid disputes later about the substance of negotiations. They can also make use of tools available under the civil procedure rules. A sanctioned offer or sanctioned payment allowing parties to seek settlement without prejudice to their positions in the case is one example described below.

(A) Without prejudice negotiations

5.15 “Without prejudice” negotiations encourage parties to settle disputes by allowing them and their lawyers to speak freely, knowing that their words cannot be used against them later in court if negotiations break down. In other words, any oral or written correspondence between the parties that appears to be a genuine attempt by the parties to settle the case cannot be referred to or relied upon in the proceedings.

5.16 Negotiations can also be marked “without prejudice save as to costs” in which the standard without prejudice protection applies until the court delivers judgment. The court may then look at the contents of those communications for purposes of deciding upon an appropriate order of costs. These communications can therefore be used to put pressure on the other party to settle, as a refusal of a reasonable settlement offer may otherwise have adverse cost consequences.

5.17 For example, even if a defendant loses at trial, evidence of a defendant’s settlement offer that exceeded the amount awarded to the plaintiff by the court’s judgment may result in the defendant not having to bear the full costs incurred by the successful plaintiff.

(B) Sanctioned Offer / Payment

5.18 Sanctioned offers and sanctioned payments are different forms of settlement offers that a party can make after proceedings have commenced. These are in accordance with Order 22 of the Rules of the District Court.

5.19 The practical difference between the two is that whilst a sanctioned offer is merely an offer to pay or to receive a certain amount for the settlement of a claim, a sanctioned payment involves making a payment into court of a certain amount, which may be accepted by the other party in the settlement of a claim.

180 Order 22 of Rules of the High Court, Cap 4A (or Rules of the District Court, Cap 336H). See Chapter 3, Section 7.V.(A) for the text of the law.
183 Order 22 r 2 of the Rules of the District Court, Cap 336H. See Chapter 3, Section 7.I.(C) for the text of the law.
5.20 A plaintiff can only make a sanctioned offer of settlement. A defendant can make a sanctioned offer, a sanctioned payment, or both, depending on the circumstances.\textsuperscript{184}

5.21 A sanctioned offer must be made in writing, and must state the amount or the settlement terms that the offering party is willing to accept, as well as whether the offer:\textsuperscript{185}

- relates to the whole claim, to part of it, or to any specific issue(s) arising from it;
- takes into account any counterclaim or setoff; and
- is inclusive of interest that has accrued (and if not, give the details relating to interest).

5.22 For monetary claims, a defendant may make a sanctioned payment to the relevant court’s accounts office.

5.23 Generally, a sanctioned offer or payment must be made not less than 28 calendar days before the commencement of trial. The offer will then be open for acceptance for 28 calendar days. After this time expires, leave of court is required for acceptance of a sanctioned offer or payment. Note that a sanctioned offer or payment cannot be withdrawn before the expiry date unless the court grants leave to do so.\textsuperscript{186} Accepting a sanctioned offer or payment requires written notice of acceptance to be served on the other party.\textsuperscript{187}

5.24 If the sanctioned offer or payment is made less than 28 calendar days before trial, it can be accepted without the court's leave, provided that the parties can agree about who will bear the costs of the litigation. Otherwise, leave will still be required.

5.25 A sanctioned offer or payment provides some safeguards to the party making it. In some instances, that party may receive legal costs on an indemnity basis for any costs incurred from the date that their offer could have been accepted but was not. There are two scenarios where this is likely to happen: when the other party fails to take the settlement and loses, or when the other party fails to take the settlement and wins, but is awarded a smaller amount than they could have received by taking the settlement. In addition, the offering party will obtain favorable interest rates on their judgment. This therefore exerts pressure on the other party to settle.\textsuperscript{188}

**Practical points:** engaging in settlement negotiations is generally recommended as parties can save time and costs otherwise incurred by taking a case to trial.

Settlement negotiations can be commenced at any time and out of court by a “without prejudice” communication. Sanctioned offers / payments on the other hand are a powerful procedural tool to put pressure on a party to enter into a settlement and

\textsuperscript{184}Available at \url{http://rcul.judiciary.gov.hk/rc/eng/sform.jsp} (visited 17 September 2015).

\textsuperscript{185}Order 22 r 5 of the Rules of the District Court, Cap 336H. See Chapter 3, Section 7.V.(A) for the text of the law.

\textsuperscript{186}Order 22 r 7 and 10 of the Rules of the District Court, Cap 336H. See Ch 3, Section V part 5(a) for the text of the law.

\textsuperscript{187}Order 22 r 15(1) and 16(1) of the Rules of the District Court, Cap 336H. See Chapter 3, Section 7.V.(A) for the text of the law.

\textsuperscript{188}Details at \url{http://rcul.judiciary.gov.hk/rc/eng/sform.jsp} (visited 17 September 2015).
preserve a party’s costs position, in the event that the counterparty is insisting on taking a case to trial. However, a decision whether to enter into settlement negotiations or to make use of the mechanism of sanctioned offers / payments requires a careful evaluation of the merits of a case. An idea specifically as to the likely sum of damages the plaintiff will be able to obtain from a court judgment on the claim is particularly important in this consideration.

III. Enforcement of judgments

5.26 A final order or judgment does not automatically mean that the judgment creditor (JC) (i.e. the successful party) will obtain payment of the judgment debt from the judgment debtor (JD) (i.e. the losing party). If the JD refuses to comply with the terms of judgment, the JC bears the responsibility for enforcing compliance.

5.27 As per the chart below, the choice of enforcement method depends on the information that the JC has regarding the JD. A JD can be called to court to answer questions about their assets,\(^{189}\) and may also be prohibited from leaving Hong Kong to facilitate the chasing of their judgment debt.\(^{190}\)

**Chart 3-7: Enforcement actions**

<table>
<thead>
<tr>
<th>Bank account information of the JD</th>
<th>Garnishee Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real property owned by the JD</td>
<td>Charging Order</td>
</tr>
<tr>
<td>Address of the JD, goods within the premises</td>
<td>Writ of Fieri Facias (FiFa)</td>
</tr>
</tbody>
</table>

**Practical points:** before commencing an action, a plaintiff should consider whether they will actually be able to practically and financially enforce judgment. Enforcement steps are time-consuming and may ultimately be futile. It is therefore recommended that a plaintiff MDW or their representative make arrangements with a JD to settle payment on the day of judgment to avoid having to incur expenses to enforce judgment. The MDW or their representative may ask for cash or cheque settlement on the spot. As the parties will be present at trial, they may negotiate the mode and time of payment and the MDW or their representative can ask for the JD’s bank account details if the JD has asked for time to settle the payment.

**(A) Enforcement proceedings**

5.28 Enforcement proceedings include garnishee proceedings, charging orders, and writ of Fieri Facias. These are each described below.

(i) Garnishee Proceedings

5.29 Put simply, garnishee proceeds reroute some payments that were originally due to a JD over to a JC in order to satisfy a judgment.

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\(^{189}\) Order 48 or Ord 49B of the Rules of the High Court, Cap 4A (or Ord 48 or Ord 49B of the Rules of the District Court, Cap 336H as appropriate). See Chapter 3, Section 7.II.(C) for the text of the law.

\(^{190}\) Section 21B(1) of the High Court Ordinance, Cap 4 and s 52E(1) of the District Court Ordinance, Cap 336. See Ch 3, Section 7.II.(A) for the text of the law.
5.30 A JC may initiate garnishee proceedings where they have information about a third party (a garnishee) that owes a debt to the JD, which may be used to satisfy the judgment debt either entirely or in part.\(^{191}\) This most commonly applies when the JC has the JD’s bank account information. Here, the bank is the garnishee, and is viewed as being indebted to the account holder for the amount within the account. Through garnishee proceedings, the court may order the garnishee to directly pay to the JC the whole or a part of the judgment debt, plus the costs of the garnishee proceedings.

5.31 Garnishee proceedings are only available if (i) the judgment sum is over HK$1,000, (ii) there is a debt due or accruing due to the JD, and (iii) the garnishee (e.g. the JD’s bank account) is within Hong Kong.\(^{192}\)

5.32 An application for a garnishee order must be made \textit{ex parte} (i.e., the JD or the garnishee need not receive notice of the application and will not be present at the initial hearing of the \textit{ex parte} application). It must also be supported by an affidavit or affirmation:

- stating the name and last known address of the JD;
- identifying the judgment or order to be enforced, and the amount remaining unpaid at the time of the application of the garnishee order;
- stating that, to the best of the JC’s information or belief, the garnishee (who must also be named) is within Hong Kong and is indebted to the JD, and stating the source of information or the grounds for the belief; and
- if the garnishee is a bank having more than one place of business, the name and address of the branch at which the JD’s account is believed to be held or, if it is the case, that such information is not known to the JC.\(^{193}\)

5.33 Two short hearings are necessary for obtaining a garnishee order. After the initial \textit{ex parte} hearing, an interim order (called an order nisi) will set the time and place for further consideration of the matter. In the meantime, the order attaches to the debt that the garnishee has to the JD.\(^{194}\) This debt can be accruing due or already due.

5.34 The order nisi must be served:

- on the garnishee by hand at least 15 calendar days before the hearing date fixed for further consideration of the matter; and
- on the JD at least 7 calendar days after the order has been served on the garnishee and at least 7 calendar days before the hearing date fixed for further consideration of the matter.

5.35 The order nisi is directed to the garnishee to explain why the debt owed to the JD should not be utilized to satisfy the judgment debt and the costs of the garnishee proceedings.

\(^{191}\) Order 49 of the Rules of the District Court, Cap 336H. \textit{See} Chapter 3, Section 7.I.(C) for the text of the law.  
\(^{192}\) Ibid.  
\(^{194}\) See Form No 72 in Appendix A of the Rules of High Court or the Rules of the District Court.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

5.36 Where the garnishee does not attend the next court hearing or does not dispute the debt due to the JD, the court may make an order absolute against the garnishee.\textsuperscript{195} Upon granting this, the garnishee must pay to the JC the amount specified in the order.

5.37 Where the garnishee disputes liability to pay the debt due from him to the JD, the court may have to examine the questions at issue to determine the garnishee’s liability.

\begin{center}
\begin{tabular}{|l|}
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\textbf{Practical points:} garnishee proceedings are less complicated and less costly than the Writ of FiFa. Accordingly, where an MDW or their lawyer has the bank account details of the JD, they may consider enforcing the judgment through garnishee proceedings. \\
\hline
\end{tabular}
\end{center}

\begin{enumerate}(ii)
\item \textbf{Charging order}
\end{enumerate}

5.38 A DC may impose a charge upon specified property that the JD owns for the purposes of securing the payment of any money due under the judgment.\textsuperscript{196} Properties such as land, securities, and funds in court, may be charged.\textsuperscript{197} Most commonly, this applies when the JC has information about real property that the JD owns.

5.39 An application for a charging order on the JD’s beneficial interest may be made \textit{ex parte} (see (i) Garnishee Proceedings above) and must be supported by an affidavit or affirmation:

\begin{itemize}
\item identifying the judgment or order to be enforced, and the amount unpaid as at the date of the application;
\item stating the name of the JD and of any creditor of theirs whom the applicant can identify
\item giving full particulars of the property to be charged; and
\item verifying that the interest to be charged is beneficially owned by the JD.\textsuperscript{198}
\end{itemize}

5.40 Two short hearings are necessary for obtaining a charging order. After the initial \textit{ex parte} hearing, an order nisi (an interim order) will be made which specifies the time and place for further consideration of the matter.\textsuperscript{199}

5.41 The order nisi is directed at the JD to show cause for objecting to the application. The court must then either make the charging order absolute, with or without modifying it, or discharge it.\textsuperscript{200}

\begin{center}
\begin{tabular}{|l|}
\hline
\textbf{Practical points:} a charging order is only an indirect mode of enforcement as it does not directly result in the judgment debt being satisfied. However, the charge can exert pressure on the JD to settle the debt.
\hline
\end{tabular}
\end{center}

\textsuperscript{195} See Form No 73 and 74 in Appendix A of the Rules of the High Court or the Rules of the District Court.
\textsuperscript{196} Section 52A of the District Court Ordinance, Cap 336. See Chapter 3, Section 7.I.(B) for the text of the law.
\textsuperscript{197} Most commonly, this applies when the JC has information about real property that the JD owns.
\textsuperscript{198} An order nisi must be made using form No 75 in Appendix A of the Rules of High Court or the Rules of the District Court.
\textsuperscript{199} Where the order is made absolute, it must be made using Form No 76 in Appendix A of the Rules of the High Court or Form No 76 in Appendix A of the Rules of the District Court, as appropriate.
For land property, a charging order imposes a charge to be entered in the Land Registry records of the property. Such a charge will only affect the JD if or when they attempt to sell the property, in which case a part of the sale proceeds must go to the JC in satisfaction of the judgment debt.

If a charging order fails to push the JD to pay the judgment debt, the JC may apply for an order to take over and sell the property to recover the sum.  

(iii) Writ of Fieri Facias (FiFa)

5.42 This Writ enables seizure and sale of a JD's goods in order to pay for a judgment debt in whole or in part. A writ empowers a Court Bailiff to effect the seizure of goods, which may also be on the JD's premises.

5.43 This method of enforcement is only available if there are sufficient goods on the JD’s premises to justify a seizure. The JC need not know or determine the value of any goods owned by, or within the premises of, the JD. However, the JC should provide the court (and the Court Bailiff) with as much information as possible about such goods to be seized.

5.44 Bailiffs can assist the JC to execute the orders and judgments of a Court or Tribunal. They are authorized to seize goods belonging to the JD at a total value equivalent to or less than the judgment debts plus estimated costs of the execution.

(a) Application for the Writ of FiFa

5.45 If the judgment was made in the LT, the JC should apply to the LT for a Certificate of Award. They then register it with the DC Registry to apply for the Writ of FiFa within 12 months of the judgment.

5.46 The JC should go to the Court or Tribunal where the judgment was made to apply for a Writ of FiFa. There, the JC should fill in an application (i.e., a “praecipe”) and a Writ including the particulars (e.g., address) of the JD and the amount of money to be recovered. The JC should also include a copy of the judgment or order to establish the precise sum of the judgment debt.

5.47 Upon payment of the required deposits and fees, the JC should file the Writ directly with the respective Tribunal or Court Registry, who will pass it to the Bailiff’s Office for execution.

5.48 The associated expenses for issuing a Writ of FiFa are as follows:

- **Filing fees:** the fee of filing a Writ of execution is currently HK$600 for the High Court and HK$400 for the District Court.

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203 Applicable to s. 5.43-44.
205 Part III, Second Sch, Rules of the High Court, Cap 4A. See Chapter 3, Section 7.II.(C) for the text of the law.
**Bailiff’s expenses:** a deposit for payment of travelling expenses is currently HK$400 for Hong Kong Island and Kowloon and HK$800 for New Territories; and

**Security guard fees:** a deposit for a maximum of 8 days’ service.

Practical points: the JC must have the correct street address of the JD (e.g., a work or home address). If goods are seized from the wrong person or location, any claim for wrongful seizure may be made against the JC and not the Bailiff.

The JC must also know what goods belong to the JD and will be responsible for paying the necessary costs involved in effecting the Writ. There is no guarantee that the Bailiff will succeed in seizing any goods of value. JC will still bear Bailiff’s costs regardless of success or failure.207

**(b) Execution of the Writ of FiFa**

5.49 On the date of execution, a Bailiff and a security guard will visit the JD’s premises to seize goods that belong to the JD. They will seize goods of a total value equal to or less than the judgment debts, plus the estimated costs of executing the writ. The JC may accompany them to provide further information regarding the goods.

5.50 If the action is successful, the security guard will be responsible for keeping watch over the items to ensure they are not tampered with or removed unlawfully. The JD then has five working days to settle the debt and the estimated costs incurred for execution. If the JD fails to do so, the seized items will be sold on the first working day thereafter by public auction. The goods may be sold in another way upon application to the court for permission. After deducting relevant execution charges, the proceeds of sale will be applied to settle the judgment debt owed to the JC.208

Practical points: Writs of FiFa are not commonly used in practice, due to the time and expense often associated with recovering judgment debts by this method.

**(B) Enforcement of Judgment During Appeal**

5.51 Judgments may be enforced even if the JD has lodged an application for leave to appeal, unless the JD has obtained an order for a stay of execution of the judgment.209 Thus, checking whether an order for a stay of execution has been granted is important before taking any further enforcement action.
6. Conclusion

6.1 Before considering any action, plaintiff MDWs may seek to resolve disputes with their employer(s) through negotiation and, if applicable, by serving a demand letter. Where negotiations fail or cannot be carried out, various legal routes are still be available to an MDW even if they do not remain in Hong Kong.

6.2 In pursuing a claim and determining which venue to have their proceedings held in, plaintiff MDWs and their legal representatives should consider:

- the nature of the claim,
- any time limitations with respect to filing the claim,
- the amount of the claim, and
- the likely time, costs and risks associated with formal litigation.

6.3 For plaintiff MDWs who must leave Hong Kong before their claim is resolved, remote claims through representation are technically possible in some venues. However, absence from hearings or the trial itself may adversely affect an MDW’s claim. Applying for the use of the TC to give oral evidence by video link may be possible but it has not yet been tested in the context of plaintiff MDWs residing overseas.

6.4 Chapter 4 will further explain the challenges of representing a plaintiff MDW who resides abroad, and the potential avenues to finding a local cooperating partner.
7. Black letter law and case law analysis

7.1 This section is a simplified reference for legal practitioners and others who wish to delve further into the law discussed throughout this chapter. Arranged in alphabetical order by statute and by topic in the case of common law, this section compiles the relevant portions of statutes cited, as well as the most relevant case law. Legal practitioners may find reviewing the relevant laws below a useful first step in preparing a client’s case.

I. District Court

(A) District Court Civil Procedure (Fees) Rules Cap 336C

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<thead>
<tr>
<th>Schedule</th>
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<tbody>
<tr>
<td><strong>Fees</strong></td>
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<tr>
<td><strong>Issue</strong></td>
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<tr>
<td><strong>Commencement of a Cause or Matter</strong></td>
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<tr>
<td>On sealing</td>
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<tr>
<td>a writ of summons (except a concurrent, renewed or amended writ)</td>
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<tr>
<td>an originating summons</td>
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<td>an originating ex parte application</td>
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<td>any other originating document</td>
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<tr>
<td><strong>Entry or Setting Down for Trial in Court</strong></td>
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<tr>
<td>Setting down a cause or issue for hearing</td>
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<tr>
<td>Setting down a civil appeal, motion or summons for hearing</td>
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<tr>
<td>Entering a reference for hearing of an assessment of damages by a judge or the Registrar</td>
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<tr>
<td><strong>Taking Evidence, etc.</strong></td>
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<td>For every witness examined de bene esse by a judge or the Registrar, per day or part thereof</td>
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<tr>
<td>Attendance of a public officer to produce or prove in the District Court any record or document</td>
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<td>Attendance of a public officer to give evidence as an expert witness, per hour or part thereof</td>
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<td>Attendance of a public officer to give evidence other than as an expert witness, per hour or part thereof</td>
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<tr>
<td>Attendance by the Registrar or officer outside the District Court</td>
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<tr>
<td><strong>Copies, Translation and Searches</strong></td>
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<td>Document typed in the Registry and certifying same, per page</td>
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<td>Service</td>
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<td>Additional copies, per page</td>
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<td>Photostatic copy of document made in the Registry, per page</td>
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<td>Photostatic copy and certification, per page</td>
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<td>Photostatic copy of a library book, per page</td>
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<td>Transcription and translation made in the Registry, from Chinese into English, or vice versa, of a tape or recording including certificate, per page</td>
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<tr>
<td>Search in the Registry, for each document or file referred to or required</td>
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**Service**

- Service of a document by a bailiff, per document: 72.00
- Arresting any person: 385.00
- Execution of writ of possession: 630.00

**Execution**

- a warrant for arrest of a defendant or for the attachment of property before judgment: 630.00
- a writ of execution or writ of possession: 630.00
- a prohibitory order: 630.00
- an order for the examination of a judgment debtor (or an officer thereof): 630.00
- a prohibition order: 630.00

**Bailiff’s Expenses**

- Watchman's fee, per day or part thereof for all cases: 330.00
- Caretaker's fee, per day or part thereof: Actual expenditure
- Caretaker's or watchman's transportation expenses: Actual expenditure + 20% for administrative charges

**Taxation of Costs**

- On the filing of a notice of commencement of taxation under Order 62, rule 21(1) of the Rules of the District Court (Cap 336 sub. leg. H) or on any assessment or determination of costs pursuant to any court order or Ordinance (except assessment under Order 62, rule 9 or 9A of the Rules of the District Court (Cap 336 sub. leg. H)), for every $100 or fraction of $100 of the amount claimed: 5.00
- Withdrawal of a bill of costs within 7 days after the application for setting down the taxation under Order 62, rule 21A(1) of the Rules of the District Court (Cap 336 sub. leg. H) is made: 10% of the taxing fee which would be payable if the bill was to be allowed in full or $1,000.00 whichever is less
(B) District Court Ordinance Cap 336

Section 47A: Power of the Court to order disclosure, etc. of documents before commencement of proceedings

(1) A person who appears to the Court to be likely to be a party to subsequent proceedings may apply to the Court for an order for discovery of documents against a person who is likely to be a party to the proceedings and who has in his possession, custody or power documents directly relevant to an issue arising out of the claim.

(2) The application is to be made in accordance with rules of court.

(3) The Court may order the person, if it appears to it that the person is likely to have or to have had in his possession, custody or power any directly relevant documents –

(a) to disclose whether those documents are in his possession, custody or power; and
(b) to produce the documents in his possession, custody or power to the applicant or, on the conditions specified in the order –

(i) to the applicant's legal advisers;
(ii) to the applicant's legal advisers and a medical or other professional adviser of the applicant; or
(iii) if the applicant has no legal adviser, to a medical or other professional adviser of the applicant.

(4) For the purposes of subsections (1) and (3), a document is only to be regarded as directly relevant to an issue arising out of a claim in the anticipated proceedings if –

(a) the document would be likely to be relied on in evidence by any party in the proceedings; or
(b) the document supports or adversely affects any party's case.

Section 47B: Extension of powers of the Court to order disclosure of documents, inspection of property, etc.

(1) A party to proceedings in an action, in which a claim is made, may apply to the Court in accordance with rules of court for an order for discovery of documents against a person who is not a party to the proceedings and who is likely to have or to have had in his possession, custody or power documents relevant to an issue arising out of the claim.

(2) The Court may order the person, if it appears to it that the person is likely to have or to have had in his possession, custody or power any relevant documents

(a) to disclose whether those documents are in his possession, custody or power; and
(b) to produce the documents in his possession, custody or power to the applicant or,
(3) A party to proceedings in an action, in which a claim is made, may apply to the Court for an order against a person who is not a party to the proceedings for, and the Court may order

(a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, a party to the proceedings but which is the subject-matter of the proceedings or as to which any question arises in the proceedings;
(b) the taking of samples of the property mentioned in paragraph (a) and the carrying out of any experiment on or with the property.

(4) An application under this section is to be made in accordance with rules of court.

(5) The powers in this section are in addition to the power of the Court to make orders which is exercisable apart from this section.

(6) In this section, property (財產) includes any land, chattel or other physical property of any description.

Section 52A: Power of Court to impose charging order

(1) The Court may by order impose a charge for securing the payment of any money due or to become due under a judgment or order of the Court on a judgment debtor's property specified in the order.

(2) In deciding whether to make a charging order the Court has to consider all the circumstances of the case and, in particular, any evidence before it as to-
(a) the personal circumstances of the debtor; and
(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

(3) This section applies to a judgment, order, decree or award however called of any court or arbitrator, including a court of justice outside of Hong Kong or arbitrator outside of Hong Kong, which is or has become enforceable, whether wholly or to a limited extent, as it applies to a judgment or order of the Court.

Section 52E: Prohibition on debtor leaving Hong Kong

(1) The Court shall have jurisdiction to make an order prohibiting a person from leaving Hong Kong (a prohibition order) to facilitate the enforcement, securing or pursuance of-
(a) a judgment against that person for the payment of a specified sum of money;
(b) a judgment or order against that person-
   (i) for the payment of an amount to be assessed; or
   (ii) requiring him to deliver any property or perform any other act; or
(c) a civil claim (other than a judgment) -
   (i) for the payment of money or damages; or
   (ii) for the delivery of any property or the performance of any other act.
Section 63A: Leave to Appeal
(1) Leave to appeal granted under section 63 may be granted 
(a) in respect of a particular issue arising out of the judgment, order or decision; and 
(b) subject to such conditions as the judge, the master or the Court of Appeal hearing the application for leave considers necessary in order to secure the just, expeditious and economical disposal of the appeal.

(2) Leave to appeal shall not be granted unless the judge, the master or the Court of Appeal hearing the application for leave is satisfied that 
(a) the appeal has a reasonable prospect of success; or 
(b) there is some other reason in the interests of justice why the appeal should be heard.

(3) In this section, master (聆案官) means the Registrar, a deputy registrar or assistant registrar.

Section 63B: Decision on leave to appeal final

No appeal lies from a decision of the Court of Appeal as to whether or not leave to appeal to it should be granted.

(C) The Rules of the District Court Cap 336H

Order 13A Rule 3: Period for making admission

(1) The period for filing and serving an admission under rule 4, 5, 6 or 7 is - 
(a) where the defendant is served with a writ, the period fixed by or under these Rules for service of his defence; 
(b) where the defendant is served with an originating summons, the period fixed by or under these Rules for filing of his affidavit evidence; and 
(c) in any other case, 14 days after service of the originating process.

(2) A defendant may file an admission under rule 4, 5, 6 or 7 – 
(a) after the expiry of the period for filing it specified in paragraph (1)(a) if the plaintiff has not obtained a default judgment under Order 13 or 19; and 
(b) after the expiry of the period for filing it specified in paragraph (1)(b) if the admission is filed and served before the date or the period fixed under Order 28, rule 2 for the hearing of the originating summons.

(3) If the defendant files an admission under paragraph (2), this Order applies as if he had made the admission specified in paragraph (1)(a) or (b), as the case may be.

Order 23 Rule 1: Security for costs of action

The application of a defendant to an action or other proceeding in the Court will be granted by considering the below circumstances:

(a) that the plaintiff is ordinarily resident out of the jurisdiction; or 
(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or 
(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or
(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in this rule to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

Order 23 Rule 2: Manner of giving security

Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any) as the Court may direct.

Order 23 Rule 3: Saving for enactments

This Order is without prejudice to the provisions of any written law which empowers the Court to require security to be given for the costs of any proceedings.

Order 49 Rule 1: Attachment of debt due to judgment debtor

(1) Where a person (in this Order referred to as “the judgment creditor”) has obtained a judgment or order for the payment by some other person (in this Order referred to as “the judgment debtor”) of a sum of money amounting in value to at least $1000, not being a judgment or order for the payment of money into court, and any other person within the jurisdiction (in this Order referred to as “the garnishee”) is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings. (See Appendix A, Forms 72-74)

(2) An order under this rule shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter, and in the meantime attaching such debt as is mentioned in paragraph (1), or so much thereof as may be specified in the order, to answer the judgment or order mentioned in that paragraph and the costs of the garnishee proceedings.

Order 49 Rule 2: Application for order

An application for an order under rule 1 must be made ex parte supported by an affidavit

(a) stating the name and the last known address of the judgment debtor;
(b) identifying the judgment or order to be enforced and stating the amount remaining unpaid under it at the time of the application;
(ba) if the amount remaining unpaid under the judgment or order is arrears of maintenance, stating -
   (i) the interest payable in respect of the arrears of maintenance that the judgment creditor is entitled to under section 20A(2) of the Guardianship of Minors Ordinance (Cap 13), section 9B(2) of the Separation and
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

Maintenance Orders Ordinance (Cap 16), section 53A(2) of the Matrimonial Causes Ordinance (Cap 179) or section 28AA(2) of the Matrimonial Proceedings and Property Ordinance (Cap 192), as the case may be; and

(ii) the surcharge payable in respect of the arrears of maintenance under section 20B(1) of the Guardianship of Minors Ordinance (Cap 13), section 9C(1) of the Separation and Maintenance Orders Ordinance (Cap 16), section 53B(1) of the Matrimonial Causes Ordinance (Cap 179) or section 28AB(1) of the Matrimonial Proceedings and Property Ordinance (Cap 192), as the case may be; (18 of 2003 s. 23)

(c) stating that to the best of the information or belief of the deponent the garnishee (naming him) is within the jurisdiction and is indebted to the judgment debtor and stating the sources of the deponent’s information or the grounds for his belief; and

(d) stating, where the garnishee is a bank having more than one place of business, the name and address of the branch at which the judgment debtor’s account is believed to be held or, if it be the case, that this information is not known to the deponent.

Order 49 Rule 3: Service and effect of order to show cause

(1) Unless the Court otherwise directs, an order under rule 1 to show cause must be served

(a) on the garnishee personally, at least 15 days before the day appointed thereby for the further consideration of the matter; and

(b) on the judgment debtor, at least 7 days after the order has been served on the garnishee and at least 7 days before the day appointed for the further consideration of the matter.

(2) Such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified.

Order 49 Rule 4: No appearance or dispute of liability by garnishee

(1) Where on the further consideration of the matter the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the Court may make an order absolute under rule 1 against the garnishee.

(2) An order absolute under rule 1 against the garnishee may be enforced in the same manner as any other order for the payment of money.

Order 49 Rule 5: Dispute of liability by garnishee

Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried, without if it orders trial before the master the need for any consent by the parties.

Order 49 Rule 6: Claims of third persons

(1) If in garnishee proceedings it is brought to the notice of the Court that some other person than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien upon it, the Court may order that person to attend before the Court and state the nature of his claim with particulars thereof.
(2) After hearing any person who attends before the Court in compliance with an order under paragraph (1), the Court may summarily determine the questions at issue between the claimants or make such other order as it thinks just, including an order that any question or issue necessary for determining the validity of the claim of such other person as is mentioned in paragraph (1) be tried in such manner as is mentioned in rule 5.

Order 49 Rule 8: Discharge of garnishee

Any payment made by a garnishee in compliance with an order absolute under this Order, and any execution levied against him in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed.

Order 49 Rule 9: Money in Court

(1) Where money is standing to the credit of the judgment debtor in court, the judgment creditor shall not be entitled to take garnishee proceedings in respect of that money but may apply to the Court by summons for an order that the money or so much thereof as is sufficient to satisfy the judgment or order sought to be enforced and the costs of the application be paid to the judgment creditor.

(2) The money to which the application relates shall not be paid out of court until after the determination of the application.

(3) Unless the Court otherwise directs, the summons must be served on the judgment debtor at least 7 days before the day named therein for the hearing of it.

(4) The Court hearing an application under this rule may make such order with respect to the money in court as it thinks just.

Order 49 Rule 10: Costs

The costs of any application for an order under rule 1 or 9, and of any proceedings arising therefrom or incidental thereto, shall, unless the Court otherwise directs, be retained by the judgment creditor out of the money recovered by him under the order and in priority to the judgment debt.

Order 58 Rule 1: Appeals from master to judge in chambers

Except as provided by rule 2 and Order 32 rule 17, an appeal shall lie to a judge in chambers from any judgment, order or decision of a master, irrespective of whether the judgment, order or decision was given or made on the basis of written submissions only or after hearing.

(2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice or as on such other day as may be directed.

(3) Unless the Court otherwise orders, the notice must be issued within 14 days after the judgment, order or decision appealed against was given or made and must be served within 5 days after issue and an appeal to which this rule applies shall not be heard sooner than 2 clear days after such service.
(4) No further evidence (other than evidence as to matters which have occurred after the date on which the judgment, order or decision was given or made) may be received on the hearing of an appeal under this rule except on special grounds. (L.N. 153 of 2008)

Order 58 Rule 2: Appeals to Court of Appeal

(1) Subject to the provisions of this rule, an appeal shall lie to the Court of Appeal from any judgment, order or decision of a judge.

(2) Subject to the provisions of this rule, an appeal lies to the Court of Appeal from -
   (a) a judgment, order or decision of a master on any cause, matter, question or issue tried or assessed before him under Order 14, rule 6(2), Order 36, rule 1, Order 37 or Order 84A, rule 3;
   (b) a judgment, order or decision (other than an interlocutory judgment, order or decision) of a master given or made under Order 49B; and (L.N. 153 of 2008; L.N. 100 of 2014)
   (c) a judgment of order of a master given or made under Order 17, rule 11(2). (L.N. 100 of 2014)

(2A) Notwithstanding paragraph (2)(b), an appeal lies to the Court of Appeal as of right from an order for imprisonment given or made by a master under Order 49B.

(3) (Repealed L.N. 153 of 2008)

(4) An application for leave to appeal must be made to a judge, or to a master in the case of an appeal under paragraph (2), within -
   (a) in the case of an appeal from a judgment, order or decision of a master under paragraph (2), 28 days from the date of the judgment, order or decision;
   (b) in the case of an appeal from a judgment, order or decision (other than an interlocutory judgment, order or decision) of a judge, 28 days from the date of the judgment, order or decision;
   (c) in the case of an appeal from an interlocutory judgment, order or decision of a judge, 14 days from the date of the interlocutory judgment, order or decision. (L.N. 153 of 2008)

(4A) If the judge or master (as the case may be) refuses an application for leave made under paragraph (4), a further application for leave may be made to the Court of Appeal within 14 days from the date of refusal. (L.N. 153 of 2008)

(4B) An application under paragraph (4) or (4A) must be made inter partes if the proceedings to which the judgment, order or decision relates are inter partes. (L.N. 153 of 2008)

(5) So far as is practicable, every application for leave to appeal made to a judge or a master shall be made to the judge or the master against whose judgment, order or decision the appeal is sought. (L.N. 153 of 2008)

(6) In any case in which the Court of Appeal may so allow, any such application may be made direct to the Court of Appeal.

(7) (Repealed L.N. 153 of 2008)

(8) Where leave to appeal is granted under paragraph (4) or (4A), the notice of appeal must be served under Order 59, rule 3(5) of the Rules of the High Court (Cap 4 sub. leg. A), not later than 7 days after the date when leave is granted. (L.N. 153 of 2008)
(9) In the case of an appeal from an order specified in section 63(3) of the Ordinance or an order for imprisonment given or made under Order 49B, the notice of appeal must be served under Order 59, rule 3(5) of the Rules of the High Court (Cap 4 sub. leg. A), not later than 28 days from the date of the order of the Court. (L.N. 153 of 2008)

(10) The Court or the Court of Appeal may, at any time, and notwithstanding that the time for an appeal or an application for leave to appeal may have already expired, extend the time for the appeal or for applying for leave to appeal.

Order 58 Rule 3: Appeal not to operate as stay of proceedings

Except so far as the Court may otherwise direct, an appeal under this Order shall not operate as a stay of the proceedings in which the appeal is brought.

Second Schedule Part III

<table>
<thead>
<tr>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Items</td>
</tr>
<tr>
<td>Where a plaintiff or defendant signs judgment for costs under rule 10, there shall be allowed cost of the judgment</td>
</tr>
<tr>
<td>Where upon the application of any person who has obtained a judgment or order against a debtor for the recovery or payment of money a garnishee order is made under Order 49 against a garnishee attaching debts owing or accruing from him to the debtor, the following costs shall be allowed to the garnishee, to be deducted by him from any debt owing by him as aforesaid before payments to the applicant if no affidavit used</td>
</tr>
<tr>
<td>if affidavit used</td>
</tr>
<tr>
<td>Where a writ of execution within the meaning of Order 46, rule 1 is issued against any party, there shall be allowed cost of issuing execution</td>
</tr>
</tbody>
</table>

(D) The Rules of the Supreme Court

Order 24 Rule 16: Failure to comply with the requirement for discovery, etc.

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents of the purpose of inspection or any other purpose or to supply copies thereof fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the
party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.

(4) A solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.

II. Enforcement Proceedings

(A) High Court Ordinance Cap 4

Section 20A: Property which may be charged

(1) Subject to subsection (3), a charge may be imposed by a charging order only on
   (a) an interest held by the debtor beneficially-
      (i) in any asset of a kind mentioned in subsection (2) or
      (ii) under any trust; or
   (b) an interest held by a person as trustee of a trust (in this paragraph referred to as "the trust"), if the interest is in an asset of a kind mentioned in subsection (2) or is an interest under another trust and-
      (i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust;
      (ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit; or
      (iii) in a case where there are 2 or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.

(2) The assets referred to in subsection (1) are
   (a) land;
   (b) securities of any of the following kinds -
      (i) Government stock;
      (ii) stock of any body incorporated in Hong Kong;
      (iii) stock of any body incorporated outside Hong Kong or of any state or territory outside Hong Kong, being stock registered in a register kept at any place within Hong Kong;
      (iv) units of any unit trust in respect of which a register of the unit holders is kept at any place within Hong Kong; or
   (c) funds in court.

(3) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in subsection (2)(b) or (c), the Court of First Instance may provide for the charge to extend to any interest, dividend or other distribution payable and any bonus issue in respect of the asset. (Amended 25 of 1998 s. 2)

(4) In this section-
   "dividend" (派息) includes any distribution in respect of any unit of a unit trust; [cf. 1979 c. 53 s. 6 U.K.]

   "stock" (證券) includes shares, debentures, loan stocks, funds, bonds, notes, any other securities issued by the body concerned, whether or not constituting a charge on the assets of that body and any rights or options to subscribe for or be allotted any of the foregoing; and
"unit trust" (單位信託) means any trust established for the purpose, or having the effect, of providing, for persons having funds available for investment, facilities for the participation by them, as beneficiaries under the trust, in any profits or income arising from the acquisition, holding, management or disposal of any property whatsoever.

Section 21B: Prohibition on debtor leaving Hong Kong

(1) The Court shall have jurisdiction to make an order prohibiting a person from leaving Hong Kong (a prohibition order) to facilitate the enforcement, securing or pursuance of -
   (a) a judgment against that person for the payment of a specified sum of money;
   (b) a judgment or order against that person-
       (i) for the payment of an amount to be assessed; or
       (ii) requiring him to deliver any property or perform any other act; or
   (c) a civil claim (other than a judgment) -
       (i) for the payment of money or damages; or
       (ii) for the delivery of any property or the performance of any other act.

(2) The Court shall not make an order under subsection (1)(b) unless it is satisfied that -
   (a) the person against whom the order is sought is about to leave Hong Kong; and
   (b) by reason of paragraph (a), satisfaction of the judgment or order is likely to be obstructed or delayed.

(3) The Court shall not make an order under subsection (1)(c) unless it is satisfied that -
   (a) there is a good cause of action;
   (b) the person against whom the order is sought -
       (i) incurred the alleged liability, which is the subject of the claim, in Hong Kong while he was present in Hong Kong; or
       (ii) carries on business in Hong Kong; or
       (iii) is ordinarily resident in Hong Kong;
   (c) that person is about to leave Hong Kong; and
   (d) by reason of paragraph (c), any judgment that may be given against that person is likely to be obstructed or delayed.

(4) (a) The Court may, on application, discharge a prohibition order, either absolutely or subject to such conditions as the Court thinks fit.
   (b) The Court may make a prohibition order subject to such conditions as it thinks fit, including the condition that the order shall have no effect if the judgment debtor or person against whom the claim is made satisfies the judgment or the claim or provides such security as the Court may order.

(5) (a) An order under subsection (1) shall lapse -
       (i) on the expiry of one month but the Court may, on the application of the judgment creditor or claimant, extend or renew the order for a period which does not exceed, with the initial period of one month and any other period of extension or renewal, 3 months; and
       (ii) on the service upon the Director of Immigration and the filing with the Registrar of a notice by the judgment creditor or claimant advising that the order is no longer required.
   (b) The judgment creditor or claimant shall serve and file the notice mentioned in paragraph (a)(ii) as soon as reasonably possible after the order is no longer required.

(6) A copy of an order under subsection (1) and any other order ancillary thereto shall be
served on the Director of Immigration, the Commissioner of Police and, if he can be found, the judgment debtor or person against whom the claim is made.

(7) Where the Court makes an order under subsection (1) prohibiting a person from leaving Hong Kong, any person who, having been served with a copy of the order or otherwise informed of its effect, attempts to leave Hong Kong in contravention of that order may be arrested by any immigration officer, police officer or bailiff.

(8) (a) A person arrested under subsection (7) shall be brought before the Court before the expiry of the day after the day of arrest and the Court may-

(i) in the case mentioned in subsection (1)(a), make such order, for the examination or imprisonment of that person, under rules of court, as is appropriate;

(ii) in the case of any other person, make an order for the imprisonment of that person until the lapse or discharge of the prohibition order; or

(iii) in any case, make an order discharging that person from arrest either absolutely or upon compliance with such conditions as the Court thinks fit.

(b) Section 71 of the Interpretation and General Clauses Ordinance (Cap 1) shall not apply to this subsection.

(9) The Director of Immigration shall not be liable for any failure to prevent any person against whom an order is made under this section from leaving Hong Kong.

(10) In this section, "Court" includes the Registrar or any Master.

(11) The form of order under this section may be prescribed by rules of court.

(B) Hong Kong Court of Final Appeal Ordinance Cap 484

Section 26: Stay of Execution

(1) Where a judgment appealed from requires the appellant to pay money or perform a duty, the Court of Appeal or the Court, as the case may be, shall have power, when granting leave to appeal or subsequently, either to direct that the judgment shall be carried into execution or that the execution shall be suspended pending the appeal.

(2) Where the Court of Appeal or the Court directs the judgment appealed from to be carried into execution, the person in whose favour it was given shall, before the execution, enter into good and sufficient security, to the satisfaction of the Court of Appeal or the Court, as the case may be, for the due performance of such order as the Court shall make in respect of the appeal.

(3) Where the Court of Appeal or the Court directs that the execution of the judgment appealed from shall be suspended pending the appeal, the appellant shall enter into good and sufficient security, to the satisfaction of the Court of Appeal or the Court, as the case may be, for the due performance of such order as the Court shall make in respect of the appeal.

(C) Rules of the High Court Cap 4A

Second Schedule Part III
### Fees

<table>
<thead>
<tr>
<th>Items</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
<tr>
<td>Where upon the application of any person who has obtained a judgment or order against a debtor for the recovery or payment of money a garnishee order is made under Order 49 against a garnishee attaching debts owing or accruing from him to the debtor, the following costs shall be allowed to the garnishee, to be deducted by him from any debt owing by him as aforesaid before payments to the applicant if no affidavit used</td>
<td>$100</td>
</tr>
<tr>
<td>If affidavit used</td>
<td>$300</td>
</tr>
<tr>
<td>Where a writ of execution within the meaning of Order 46, rule 1 is issued against any party, there shall be allowed cost of issuing execution</td>
<td>$600</td>
</tr>
</tbody>
</table>

**Order 48 Rule 1: Order for examination of judgment debtor**

(1) Where a person has obtained a judgment or order for the payment by some other person (hereinafter referred to as “the judgment debtor”) of money, the Court may, on an application made ex parte by the person entitled to enforce the judgment or order, order the judgment debtor or, if the judgment debtor is a body corporate, an officer thereof, to attend before the Registrar or such officer as the Court may appoint and be orally examined on the questions
   (a) whether any and, if so, what debts are owing to the judgment debtor, and
   (b) whether the judgment debtor has any and, if so, what other property or means of satisfying the judgment or order,
and the Court may also order the judgment debtor or officer to produce any books or documents in the possession of the judgment debtor relevant to the questions aforesaid at the time and place appointed for the examination.

(2) An order under this rule must be served personally on the judgment debtor and on any officer of a body corporate ordered to attend for examination.

(3) Any difficulty arising in the course of an examination under this rule before the Registrar or officer, including any dispute with respect to the obligation of the person being examined to answer any question put to him, may be referred to a judge and he may determine it or give such directions for determining it as he thinks fit.

**Order 48 Rule 2: Examination of party liable to satisfy other judgment**

Where any difficulty arises in or in connection with the enforcement of any judgment or order, other than such a judgment or order as is mentioned in rule 1, the Court may make an order under that rule for the attendance of the party liable to satisfy the judgment or order and for his examination on such questions as may be specified in the order, and that rule shall apply accordingly with the necessary modifications.

**Order 48 Rule 3: Record of judgment debtor's evidence given at examination**

The Registrar or officer conducting the examination shall cause to be recorded, by means of shorthand notes or mechanical, electronic or optical device or otherwise, the evidence given.
by the judgment debtor or other person at the examination.

**Order 49B Rule 1: Securing attendance at examination**

(1) Where a judgment for the payment of a specified sum of money is, wholly or partly, unsatisfied, the Court, on an ex parte application of the judgment creditor, may order that the judgment debtor be examined under rule 1A and shall, for the purpose of securing the attendance of the judgment debtor at an examination under rule 1A either
   (a) order the judgment debtor, by an order which shall be served personally upon him, to appear before the Court at a time appointed by the Court, with such documents or records as the Court may specify; or
   (b) where it appears to the Court that there is reasonable cause, from all the circumstances of the case, including the conduct of the judgment debtor, to believe that an order under paragraph (a) may be ineffective to secure the attendance of the judgment debtor for examination, order that he be arrested and brought before the Court before the expiry of the day after the day of arrest.

(2) On an application under paragraph (1), the Court may make an order prohibiting the judgment debtor from leaving Hong Kong.

(3) Where a judgment debtor fails to appear as ordered under paragraph (1)(a), the Court may order that he be arrested and brought before the Court for examination before the expiry of the day after the day of arrest.

(4) Section 71 of the Interpretation and General Clauses Ordinance (Cap 1) shall not apply to this rule.

(5) The order for arrest shall be in Form No. 102 in Appendix A.

**Order 49B Rule 1A: Examination of debtor**

(1) Upon appearance of the judgment debtor for examination, he shall give evidence and he may be examined on oath by the judgment creditor and the Court; and the Court may receive such other evidence as it thinks fit.

(2) The judgment debtor shall, at his examination, make a full disclosure of all his assets, liabilities, income and expenditure and of the disposal of any assets or income and shall, subject to the directions of the Court, answer all questions put to him.

(3) Where the examination is adjourned, the Court shall order that the judgment debtor appear at the resumption of the examination and may
   (a) order that he be prohibited from leaving Hong Kong; or
   (b) where it appears to the Court that there is reasonable cause, from all the circumstances of the case, including any evidence heard by the Court and the conduct of the judgment debtor, to believe that he may not appear at the resumption of the examination, order that he be imprisoned until that resumption.

(4) The order under paragraph (3)(b) shall be in Form No. 103 in Appendix A.

III. **Labour Tribunal**

(A) **Labour Tribunal (Fees) Rules Cap 25B**

Schedule
## CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

### Fees

<table>
<thead>
<tr>
<th>Issue</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue</td>
<td>HKD $</td>
</tr>
</tbody>
</table>

#### Filing of Claim and Subpoenas

<table>
<thead>
<tr>
<th>Filing Claims</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where the claim does not exceed $2000</td>
<td>20</td>
</tr>
<tr>
<td>where the claim exceeds $2000 but does not exceed $5000</td>
<td>30</td>
</tr>
<tr>
<td>where the claim exceeds $5000 but does not exceed $10000</td>
<td>40</td>
</tr>
<tr>
<td>where the claim exceeds $10000</td>
<td>50</td>
</tr>
</tbody>
</table>

| Subpoena and copy including service, each witness | 25 |
| Application for review | 45 |
| Application for leave to appeal | 45 |
| Certificate of award or order issue of certificate of award or order, including copy | 20 |
| each additional copy of the above | 10 |

#### Copies, Certification, Searches

<table>
<thead>
<tr>
<th>Activity</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copy of any document (including written award or order) typed in the Registry of the Tribunal and certifying the same, per page</td>
<td>5</td>
</tr>
<tr>
<td>Every search in the Registry of the Tribunal for each document</td>
<td>15</td>
</tr>
<tr>
<td>Photostatic copy of document made in Registry of the Tribunal and certification for each page or portion of a page</td>
<td>5</td>
</tr>
<tr>
<td>for each page or portion of a page exceeding in size 210 mm x 297 mm</td>
<td>Such additional fees as the registrar may fix</td>
</tr>
<tr>
<td>Translation of any foreign document and certificate, per page</td>
<td>At the discretion of the registrar</td>
</tr>
<tr>
<td>Certifying translation, per page</td>
<td>15</td>
</tr>
</tbody>
</table>

#### Baliff’s Expenses

<table>
<thead>
<tr>
<th>Activity</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transportation or conveyance expenses and overtime, according to distance and time (to be paid in cash)</td>
<td>At the discretion of the registrar</td>
</tr>
</tbody>
</table>

#### Miscellaneous

<table>
<thead>
<tr>
<th>Activity</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any other matter or proceeding for which no fee has been specified herein</td>
<td>At the discretion of the registrar</td>
</tr>
</tbody>
</table>

### (B) Labour Tribunal Ordinance Cap 25

#### Section 7: Jurisdiction of Tribunal

1. The tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule.
(2) Save as is provided in this Ordinance, no claim within the jurisdiction of the tribunal shall be actionable in any court in Hong Kong.

(3) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73B of the District Court Ordinance (Cap 336).

(4) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73C of the District Court Ordinance (Cap 336).

(5) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73D of the District Court Ordinance (Cap 336).

(6) Subsection (2) shall not operate to prevent the transfer of any claim to the tribunal in accordance with any rules made under section 73E of the District Court Ordinance (Cap 336).

**LABOUR TRIBUNAL HAS NO JURISDICTION OVER CASE THAT HAS BOTH EMPLOYMENT AND TORT CLAIMS**

**Uferahal v Hansen Larry Douglas [2015] 2 HKCU 666**

<table>
<thead>
<tr>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>[31] Note that the court need not inquire into the amount in controversy for these claims. “The test remains whether the claim is in tort either on its own or also in contract. If the answer is yes, the claim falls outside the Tribunal.”</td>
</tr>
</tbody>
</table>

Application for stay refused because Plaintiff’s claims involving tort were beyond the jurisdiction of the Tribunal. The stay could also cause a split trial, which could lead to inconsistent findings.

<table>
<thead>
<tr>
<th>Legal Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Some examples of claims founded in tort and contract include - [24] breach of confidence</td>
</tr>
<tr>
<td>- [25] breach of statutory duty imposed by section 57(a) of the Employment Ordinance, Cap 57 is founded in tort, and thus excluded from the LT’s jurisdiction. (See also Estinah v Golden Hand Indonesian Employment Agency [2001] 4 HKC 607</td>
</tr>
<tr>
<td>- [26] breach of common law duties or statutory duties generally. (See also AXA China Region Insurance Co Ltd v Lin Kwai Ying Katie [2012] 2 HKLRD 1139, §30)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Defendant sought action in the LT against the Plaintiffs for breach of contract, as they had summarily dismissed him. Claims included non-employment claims, such as negligence, breach of implied terms and breach of statutory duties. Plaintiff 1 applied for transfer of the claim to High Court. The defendant applied to stay plaintiff 1’s action.</td>
</tr>
</tbody>
</table>
### Section 10: Declining jurisdiction

(1) The tribunal may, at any stage of proceedings, if it is of the opinion that for any reason the claim should not be heard and determined by it, decline jurisdiction.

(2) The tribunal may, when it declines jurisdiction under subsection (1), transfer the claim to the Court of First Instance, the District Court or the Small Claims Tribunal, in such manner as may be prescribed.

(3) This section shall not apply to any claim transferred to the tribunal in accordance with any rules made under section 73B of the District Court Ordinance (Cap 336).

(4) This section shall not apply to any claim transferred to the tribunal in accordance with any rules made under section 73C of the District Court Ordinance (Cap 336).

(5) This section shall not apply to any claim transferred to the tribunal in accordance with any rules made under section 73D of the District Court Ordinance (Cap 336).

(6) This section shall not apply to any claim transferred to the tribunal in accordance with any rules made under section 73E of the District Court Ordinance (Cap 336).

<table>
<thead>
<tr>
<th>TRANSFERRING CASE FROM LABOUR TRIBUNAL TO DISTRICT COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fan Kin Nang v Proview International Holdings Ltd [2005] HKEC 277</strong></td>
</tr>
<tr>
<td><strong>Holding</strong></td>
</tr>
<tr>
<td><strong>Legal Analysis</strong></td>
</tr>
<tr>
<td><strong>Facts</strong></td>
</tr>
</tbody>
</table>

### Section 11: Filing claims

(1) A proceeding in the tribunal shall be commenced by filing a claim with the registrar.

(2) Subject to subsection (3), a claim shall be in writing in the prescribed form, in either the English or Chinese language, and shall be signed by the claimant.

(3) The registrar may permit a claim to be made orally and shall cause it to be reduced to writing, in the language in which it is made, and shall supply a copy thereof to the claimant.

(4) Subject to subsection (5), a claim shall be signed by each claimant and person represented as being correct to the best of his knowledge and belief.
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

(5) In any joint or representative claim –

(a) the registrar may permit the claim to be filed if it has not been signed by all the claimants or persons represented named therein on condition that all such claimants or persons will do so before the date of hearing; and

(b) the name of a claimant or person who has not so signed the claim before it is heard may, if the presiding officer so directs, be struck out of the claim and the amount of the claim reduced accordingly.

Section 20A: Failure of claimant to appear at hearing

(1) If, upon the hearing of a claim, the claimant does not appear, the tribunal may strike out the claim, without prejudice, however, to the restoration thereof by the tribunal, on the application of the claimant, on such terms as it thinks just.

(2) An application under subsection (1) shall be made within 7 days after the hearing or such further period as the tribunal may allow.

<table>
<thead>
<tr>
<th>COURT’S REASON FOR GRANTING APPLICATION TO SET ASIDE JUDGMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Holding</strong></td>
</tr>
<tr>
<td>Appeal against setting aside a default judgment and allowing retrial was granted.</td>
</tr>
<tr>
<td>Defendant was deliberately absent from trial, no real prospects of success in retrial, and she delayed in her application to set aside the judgment. It would be prejudiced to the appellant if retrial was granted.</td>
</tr>
<tr>
<td><strong>Legal Analysis</strong></td>
</tr>
<tr>
<td>381* General guidelines for setting aside a judgment after trial are fact specific. Weight accorded to relevant factors will thus vary accordingly. Factors include: (quoting directly)</td>
</tr>
<tr>
<td>(1) where a party with notice of proceeding has disregarded the opportunity to appear and participate in the trial, he will be bound by the decision.</td>
</tr>
<tr>
<td>(2) The Court is unlikely to allow hearing unless the absence is not deliberate but due to accident or mistake.</td>
</tr>
<tr>
<td>(3) The Court is unlikely to allow retrial on matters of fact already been investigated by the Court unless there are strong reasons to do so.</td>
</tr>
<tr>
<td>(4) The Court will not consider setting aside judgment unless there is a prospect of success in retrial.</td>
</tr>
<tr>
<td>(5) Delay in applying to set aside the application is relevant to the decision.</td>
</tr>
<tr>
<td>(6) Conduct of the party applying is also taken into account. The court is unlikely to grant the order if the party</td>
</tr>
</tbody>
</table>
has failed to comply with the Court’s order.

(7) The Court also taken into account whether or not the order would prejudice the successful party.

(8) Public interest is also taken into account.

Facts

The claimant sought to terminate the agreement, and claim damage against the defendant. The claimant was unable to attend the hearing and did not request an adjournment. The judgment was given in favour of the defendants, and the claimant made application to set aside the judgment. The deputy judge granted the application, and the defendant appealed.

Section 21: Hearing of claim in absence of defendant

If a defendant who has been duly served with a copy of the claim and a notice of hearing fails to appear at the hearing, by himself or by a person authorized by the tribunal to appear on his behalf, the tribunal may, if it is of the opinion that the facts relating to the claim are sufficiently established, hear and determine the claim and make such award or order as it may think fit, notwithstanding the absence of the defendant.

Section 23: Right of audience

(1) The following persons shall have a right of audience before the tribunal -

(a) a claimant or defendant;
(b) a tribunal officer;
(c) an authorized officer;
(d) an officer or servant of an unincorporated or incorporated company or a member of a partnership, if the company or partnership is a party
(e) with the leave of the tribunal, an office bearer of a registered trade union or of an association of employers who is authorized in writing by a claimant or defendant to appear as his representative; and
(f) a public officer, not being a barrister or solicitor, who appears on behalf of the Secretary for Justice, if the Secretary for Justice is a claimant or a defendant.

(2) A barrister or solicitor shall have a right of audience before the tribunal only if he is-

(a) acting on his own behalf as a claimant or a defendant; or
(b) appearing before the tribunal on behalf of an offender for the purpose of section 42.

Legal Analysis

Legal training can be grounds for disqualification, even if the proposed
Section 28: Costs

(1) Subject to subsection (2), the tribunal may award to a party costs and expenses, which may include

(a) any reasonable expenses necessarily incurred and any loss of salary or wages suffered by that party; and

(b) any reasonable sum paid to a witness for the expenses necessarily incurred and any loss of salary or wages suffered by him, in attending a hearing of the tribunal or in being interviewed by a tribunal officer.

(2) In making an award of costs under this section, the tribunal shall include a direction as to the amount to be paid by each party who is so liable to pay costs.

(3) An award of costs shall be enforceable in the same way as any other award made by the tribunal.

Section 30: Security for awards and orders

(1) The tribunal may order a party to give security for the payment of an award or order that has been or may be made if the tribunal considers it just and expedient to do so.

(2) The tribunal may make the order either of its own motion or on the application of a party.

(3) The order may require security to be given —

(a) by payment into the tribunal a sum of money that the tribunal considers sufficient; or

(b) in any other form and manner that the tribunal considers appropriate.

(4) Without limiting subsection (1), the tribunal may make an order under that subsection against a party if —

(a) the tribunal is satisfied that there is a real risk that the payment of an award or order that has been or may be made will be obstructed or delayed because —

(i) the party has disposed of, removed from Hong Kong or lost control of assets belonging to the party;

(ii) the party is about to dispose of, remove from Hong Kong or lose control of assets belonging to the party; or

(iii) there is a real risk of the party disposing of, removing from Hong Kong or losing control of assets belonging to the party;
(b) the tribunal is satisfied that —
   (i) the party has conducted the proceedings in a manner that delays the determination of the case; or
   (ii) the party’s conduct otherwise constitutes an abuse of the process; or
(c) the tribunal is satisfied that the party has, without reasonable excuse, failed to comply with any award, order or direction.

(5) If a party fails to comply with an order under subsection (1), the tribunal may —

(a) dismiss the party’s claim;
(b) stay the proceedings; or
(c) enter judgment on the claim against the party.

(6) On a party’s failure to comply with an order under subsection (1), the tribunal may exercise the powers referred to in subsection (5) without further hearing or considering the party’s case if the order expressly indicates the tribunal’s intention to do so on such non-compliance without further hearing or consideration.

<table>
<thead>
<tr>
<th>LT’S POWER TO GRANT SECURITY FOR AWARD AND ORDER ON ITS OWN MOTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Holding</strong></td>
</tr>
<tr>
<td><strong>Legal Analysis</strong></td>
</tr>
<tr>
<td></td>
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<tr>
<td><strong>Facts</strong></td>
</tr>
</tbody>
</table>

**Section 31: Review of awards and orders**

(1) Except where a party has filed an application for leave to appeal and does not agree to withdraw the application, a presiding officer may, within 14 days from the date of an award or order given or made by him, review the award or order and on such review may re-open and re-hear the claim wholly or in part and may call or hear fresh evidence and may confirm, vary or reverse his previous award or order.

(2) The power conferred by subsection (1) may be exercised —

(a) by a presiding officer of his own motion, on notice in the prescribed form to all
parties;
(b) on the application of a party within 7 days, on notice in the prescribed form to all other parties.

(3) The exercise of the power conferred by subsection (1) shall not operate as a bar to appeal by a party against the award or order or thereafter against the determination of the review.

(4) After a party has applied for a review of an award or order, the presiding officer may order the applicant to give security for the payment of any award or order that has been or may be made if the presiding officer considers it just and expedient to do so.

(4A) The presiding officer may make the order either of the presiding officer’s own motion or on the application of a party.

(4B) The order may require security to be given —
(a) by payment into the tribunal a sum of money that the presiding officer considers sufficient; or
(b) in any other form and manner that the presiding officer considers appropriate.

(4C) Without limiting subsection (4), the presiding officer may exercise the power under that subsection if the presiding officer is satisfied that —
(a) the application for a review of an award or order —
(i) is devoid of merit; or
(ii) is made to delay the process; or
(b) assets that may be available to satisfy an award or order may be disposed of to the prejudice of any party.

(4D) If a party fails to comply with an order under subsection (4), the presiding officer may dismiss the application for review.

(4E) On a party's failure to comply with an order under subsection (4), the presiding officer may dismiss the application for review under subsection (4D) without further hearing or considering the party's case if the order expressly indicates the presiding officer’s intention to do so on such non-compliance without further hearing or consideration.

(5) A presiding officer may transfer the hearing and consideration of a review to another presiding officer who shall have all the powers and functions which he would have if he had originally heard the claim and had prepared the record of proceedings.

Section 32: Leave to appeal on point of law

(1) If any party is dissatisfied with an award, order or determination by the tribunal on the grounds that the award, order or determination is —
(a) erroneous in point of law; or
(b) outside the jurisdiction of the tribunal, such party may, within 7 days after the date on which the award, order or determination was served on him, or within such extended time as may be allowed by the Registrar of the High Court on good cause, apply to the Court of First Instance for leave to appeal and the Court of First Instance may grant such leave.

(2) An application for leave to appeal under this section shall be —
(a) in the prescribed form which shall set out the grounds of appeal and the reasons in support of such grounds; and
(b) lodged with the Registrar of the High Court.

(3) A refusal by the Court of First Instance to grant leave to appeal shall be final.

### NO APPEAL ALLOWED ABSENT ARGUABLE POINTS OF LAW

<table>
<thead>
<tr>
<th>LORENZO BUENAVENTURA V LAM YAU MAN [2013] HKEC 1048</th>
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<tbody>
<tr>
<td><strong>Holding</strong></td>
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<table>
<thead>
<tr>
<th><strong>Legal Analysis</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>[6] In an ordinary employment contract, if the commencement date was deferred to some later date, then the actual date on which the employee started to work and perform her contractual duty would be regarded as the commencement date of employment. Thus, no arguable point of law</td>
</tr>
<tr>
<td>[16]-[18] There is no arguable point of law because there was no finding as to fact that the MDW acted involuntarily when signing the leave records. She did take two days off, and broken annual leave was permitted by the Employment Ordinance (EO) as it is less than 10 days.</td>
</tr>
<tr>
<td>[28] Although the Principal Presiding Officer (PPO) erred in her construction of the term &quot;passage: in Clause 7(a) of the Contract, she is correct in interpreting Clause 7(b), thus the applicant is not prejudiced. The MDW was entitled to her bus fare. Therefore, there is no arguable point of law.</td>
</tr>
<tr>
<td>[30] Using interpretation from Clause 7(b), Macau was not the applicant's place of origin, she could not make claim under Clause 7(b), hence no arguable point of law</td>
</tr>
</tbody>
</table>

### Facts

An MDW sought leave to appeal against a decision of the PPO of the LT. Their case concerned the payment of funds relating to wages, annual leave, transportation costs, and food/travelling allowance.

### Section 35A: Appeal to Court of Appeal

(1) If any party is dissatisfied with a decision of the Court of First Instance on an appeal heard by leave given under section 32, such party may, within 7 days after the date of the decision, apply to the Court of Appeal for leave to appeal and, if the Court of Appeal considers that a question of law of general public importance is involved, it may grant leave.

(2) An application for leave to appeal under this section shall be –

   (a) in the prescribed form, setting out the question of law; and
   (b) lodged with the Registrar of the High Court.

(3) A refusal by the Court of Appeal to grant leave to appeal shall be final.
**COURT’S REASON IN GRANTING LEAVE OF APPEAL**

*Chinachem Charitable Foundation Ltd v Chan Chun Chuen* (2011) 6 HKC 273

<table>
<thead>
<tr>
<th>Holding</th>
<th>[105] Dismissing the application for leave to appeal because there is “no reasonable basis” for an argument of risk of miscarriage of justice.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Analysis</td>
<td>[57] The Court of Final Appeal’s role in civil cases is to determine points of law of “great general or public importance.” The Court does not exist to allow appellants to debate factual findings that were made at lower court and then reviewed by the Court of Appeal.</td>
</tr>
<tr>
<td>Facts</td>
<td>The applicant’s sought leave to appeal to the Court of Final Appeal after the Court of Appeal dismissed his appeal.</td>
</tr>
</tbody>
</table>

**Schedule**

1. A claim for a sum of money, whether liquidated or unliquidated, which arises from
   
   (a) the breach of a term, whether express or implied or (if relevant) arising by force of section 10(1) of the Minimum Wage Ordinance (Cap 608), of a contract of employment, whether for performance in Hong Kong or under a contract to which the Contracts for Employment Outside Hong Kong Ordinance (Cap 78) applies; 
   
   (aa) the breach of a term, whether express or implied or (if relevant) arising by force of section 10(1) of the Minimum Wage Ordinance (Cap 608), of a contract of apprenticeship; or
   
   (b) the failure of a person to comply with the provisions of the Employment Ordinance (Cap 57), the Minimum Wage Ordinance (Cap 608) or the Apprenticeship Ordinance (Cap 47), (Amended 39 of 1973 s. 9; 8 of 1976 s. 49) other than a claim specified in the Schedule to the Minor Employment Claims Adjudication Board Ordinance (Cap 453).

2. A claim for contribution under section 26(2).

3. Notwithstanding paragraphs 1 and 2, the tribunal shall not have jurisdiction to hear and determine a claim for a sum of money (whether liquidated or unliquidated), or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of a duty imposed by a rule of common law or by any enactment.

4. Any question as to
   
   (a) the right of an employee to a severance payment under Part VA of the Employment Ordinance (Cap 57); or
   
   (b) the amount of such payment, (Added L.N. 178 of 1974) other than a claim specified in the Schedule to the Minor Employment Claims Adjudication Board Ordinance (Cap 453).

5. Any question as to
   
   (a) the right of an employee to payment of wages by a person other than his employer under Part IXA of the Employment Ordinance (Cap 57); and
   
   (b) the amount of such payment, (Added 54 of 1977 s. 3) other than a claim specified in the Schedule to the Minor Employment Claims Adjudication Board Ordinance (Cap 453).

6. Notwithstanding paragraphs 1, 2, 4 and 5, the tribunal shall have jurisdiction to hear
and determine a claim transferred to the tribunal under section 8(3) of the Minor Employment Claims Adjudication Board Ordinance (Cap 453) or section 7 or 10 of the Small Claims Tribunal Ordinance (Cap 338).

7. A claim for remedies under Part VIA of the Employment Ordinance (Cap 57).

IV. Minor Employment Claims Adjudication Board

(A) Minor Employment Claims Adjudication Board Ordinance Cap 453

Section 5: Jurisdiction of the Board

(1) Subject to subsection (3), the Board shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule.

(1A) Without derogation from the generality of subsection (1), the Board shall have jurisdiction to inquire into, hear and determine a claim or counterclaim or set-off and counterclaim transferred to it under section 7 or 10 of the Small Claims Tribunal Ordinance (Cap 338).

(2) Save as is provided in this Ordinance, no claim within the jurisdiction of the Board shall be actionable in any court.

(3) The Board shall not have jurisdiction to inquire into, hear or determine

(a) any claim for a sum of money, or otherwise in respect of a cause of action, founded in tort whether arising from a breach of contract or a breach of duty imposed by a rule of common law or by any enactment; and
(b) any claim submitted to proof in a bankruptcy or winding up under the Bankruptcy Ordinance (Cap 6) or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

Section 7: Limitation

(1) Subject to subsection (2), the Board shall not have jurisdiction to inquire into, hear or determine a claim or part of a claim if the right of action arose more than 12 months before the date on which the claim is filed, unless the parties to the claim, by a memorandum signed by them and filed with the registrar, have agreed that the Board shall have jurisdiction.

(2) When the right of action in a claim arose partly before and partly after the 12 month period of limitation prescribed by subsection (1), the Board may, with the consent of the parties, sever that part of the claim over which it has no jurisdiction and inquire into, hear and determine the part over which it has jurisdiction.

(3) Nothing in this section shall preclude the institution of proceedings in the Small Claims Tribunal, the District Court or the Court of First Instance in respect of a claim which, by reason of the expiration of the limitation period prescribed by subsection (1), is not actionable in accordance with this Ordinance.

V. Sanctioned Offer / Payment

(A) Rules of the High Court Cap 4A

Order 22 Rule 2: Offer to settle with specified consequences
(1) A party to an action containing a money claim or a non-money claim or both arising from any cause or causes of action may make an offer to settle the whole claim, a part of it or any issue arising from it in accordance with this Order.

(2) An offer made under paragraph (1) may take into account any counterclaim or set-off in the action.

(3) An offer made under paragraph (1) has the consequences specified in rules 20, 21, 22, 23 and 24 (as may be applicable).

(4) Nothing in this Order prevents a party from making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Order, it does not have the consequences specified in this Order, unless the Court so orders.

**Order 22 Rule 5: Form and content of sanctioned offer**

(1) A sanctioned offer must be in writing.

(2) A sanctioned offer may relate to the whole claim or to part of it or to any issue arising from it.

(3) A sanctioned offer must
   (a) state whether it relates to the whole claim or to part of it or to an issue arising from it and if so to which part or issue;
   (b) state whether it takes into account any counterclaim or set-off; and
   (c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 26(2).

(4) A defendant may make a sanctioned offer limited to accepting liability up to a specified proportion.

(5) A sanctioned offer may be made by reference to an interim payment.

(6) A sanctioned offer may be made at any time after the commencement of the proceedings but may not be made before such commencement.

(7) A sanctioned offer made not less than 28 days before the commencement of the trial must provide that after the expiry of 28 days from the date the sanctioned offer is made, the offeree may only accept it if
   (a) the parties agree on the liability for costs; or
   (b) the Court grants leave to accept it.

(8) A sanctioned offer made less than 28 days before the commencement of the trial must provide that the offeree may only accept it if
   (a) the parties agree on the liability for costs; or
   (b) the Court grants leave to accept it.

**Order 22 Rule 7: Withdrawal or diminution of sanctioned offer**

(1) A sanctioned offer made not less than 28 days before the commencement of the trial may not be withdrawn or diminished before the expiry of 28 days from the date the sanctioned offer is made unless the Court grants leave to withdraw or diminish it.

(2) A sanctioned offer made less than 28 days before the commencement of the trial may
be withdrawn or diminished if the Court grants leave to withdraw or diminish it.

(3) If there is subsisting an application to withdraw or diminish a sanctioned offer, the sanctioned offer may not be accepted unless the Court grants leave to accept it.

(4) If the Court dismisses an application to withdraw or diminish a sanctioned offer or grants leave to diminish the sanctioned offer, it may by order specify the period within which the sanctioned offer or diminished sanctioned offer may be accepted.

(5) If a sanctioned offer is withdrawn, it does not have the consequences specified in this Order.

Order 22 Rule 10: Withdrawal or diminution of sanctioned payment

(1) A sanctioned payment may not be withdrawn or diminished before the expiry of 28 days from the date the sanctioned payment is made unless the Court grants leave to withdraw or diminish it.

(2) If there is subsisting an application to withdraw or diminish a sanctioned payment, the sanctioned payment may not be accepted unless the Court grants leave to accept it.

(3) If the Court dismisses an application to withdraw or diminish a sanctioned payment or grants leave to diminish the sanctioned payment, it may by order specify the period within which the sanctioned payment or diminished sanctioned payment may be accepted.

(4) If a sanctioned payment is withdrawn, it does not have the consequences specified in this Order.

Order 22 Rule 15: Time for acceptance of defendant’s sanctioned offer or sanctioned payment

(1) Subject to rules 7(3) and 10(2), a plaintiff may accept a sanctioned offer or a sanctioned payment made not less than 28 days before the commencement of the trial without requiring the leave of the Court if he files with the Court and serves on the defendant a written notice of acceptance not later than 28 days after the offer or payment was made.

(2) If -

(a) a defendant’s sanctioned offer or sanctioned payment is made less than 28 days before the commencement of the trial; or

(b) the plaintiff does not accept it within the period specified in paragraph (1), then the plaintiff may -

(i) if the parties agree on the liability for costs, accept the offer or payment without the leave of the Court; and

(ii) if the parties do not agree on the liability for costs, only accept the offer or payment with the leave of the Court.

(3) Where the leave of the Court is required under paragraph (2), the Court shall, if it grants leave, make an order as to costs.

(4) A notice of acceptance of a sanctioned payment must be in Form No. 24 in Appendix A.

Order 22 Rule 16: Time for acceptance of plaintiff’s sanctioned offer

(1) Subject to rule 7(3), a defendant may accept a sanctioned offer made not less than 28 days before the commencement of the trial without requiring the leave of the Court if he files with the Court and serves on the plaintiff a written notice of acceptance not later than 28 days after the offer was made.
(2) If
   (a) a plaintiff's sanctioned offer is made less than 28 days before the commencement of the trial; or
   (b) the defendant does not accept it within the period specified in paragraph (1), then the defendant may -
      (i) if the parties agree on the liability for costs, accept the offer without the leave of the Court; and
      (ii) if the parties do not agree on the liability for costs, only accept the offer with the leave of the Court.

(3) Where the leave of the Court is required under paragraph (2), the Court shall, if it grants leave, make an order as to costs.

VI. Security for Costs

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<tr>
<th>SECURITY FOR COSTS</th>
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<tr>
<td><strong>Andersen v Huang Kuang Yuan</strong> [1997] HKLRD 1360</td>
</tr>
</tbody>
</table>

**Holding**

*1374 Appeals against discretionary powers such as ordering security costs cannot be overridden unless the judge made a decision that was “palpably wrong” in exercising discretion.

*1375 Amount of security overturned, as it went beyond the amount that the party's actions, which gave rise to the security for costs, would have incurred.

**Legal Analysis**

Rules on the order for security:

*1362 a. In determining whether a foreign plaintiff should provide security for costs, considerations include the plaintiff's chances of success, “the conduct of the litigation and delay, especially when the plaintiff had been led to act to his own detriment or might be caused hardship in the further conduct of the action.”

*1362 b. “Where the court had previously refused an application for security for costs, there would have had to be a substantial change in circumstances before it would consider exercising its discretion fresh” but “…a judge's assessment of the parties’ relative prospects of success might change during the course of the trial.”

*1365 c. However, “Security for costs should be ordered sooner rather than later so that the plaintiff has a sensible opportunity to decide, at an early stage in the proceedings, whether or not to invest additional funds for the prosecution of the action.” “…rejection of a defendant's previous applications for security for costs can positively encourages a plaintiff to continue with the action.”

*1367 d. Where security for costs is ordered due to a party’s actions that seek to prolong the case, the “amount of security should logically be limited to the additional costs” would incur as a result of their conduct.
Facts

Ds applied for security for cost three times, the judge rejected the first two applications, but on the third occasion, day 34 of the trial, the judge ordered Plaintiffs to provide security for costs in the sum of $2m. The basis of the ruling was that Plaintiffs were obsessed with detail, that they had conducted the case in a manner which had bordered "on the oppressive" and which had amounted at times to "a personal vendetta" against some or all of the defendants.

Ps did not provide the security ordered, the judge dismissed Ps' action and Ps appealed against the order for security and the dismissal of the action.

Sunil Khemaney v Vijay Khemaney [2006] HKCU 1749

Holding

Agreed with applicant’s formulation that resisting an application for security for costs requires showing:

[12] “that there is a very high probability of success or that his case is so obviously strong at this stage that it should become a factor to be weighed in the exercise of discretion.”

[16] Limited financial means is only one factor in the balance of factors used to determine whether to stifle the application for security of costs.

[17] A party resisting an order for cost must convince the court that he “has tried his best endeavours to look for assistance from other backers or interested parties within his knowledge.”

Legal Analysis

[12] The Plaintiff failed to submit sufficient evidence that would enable him to clear the high bar for showing probability of success in the case.

[16] The Plaintiff also failed to provide his “true and up-to-date” financial situation

Facts

Defendants applied for security for costs against the 1st Plaintiff (P) who was ordinarily resident outside the jurisdiction, living in the USA. Counsel for Ps asked the court to exercise the discretion in favour of the P on 3 matters, namely (1) merits, (2) lack of financial means and (3) unavailability of financial assistance. The court rejected all three and ordered the P to provide security for cost.

VII. Small Claims Tribunal

(A) Labour Tribunal (General) Rules Cap 25A

Rule 7: Transfer of claim to Court of First Instance, District Court or Small Claims Tribunal

(1) Where the tribunal transfers a claim to the Court of First Instance, the District Court or the Small Claims Tribunal under section 10(2) of the Ordinance, the registrar shall send to the registrar of the court or of the Small Claims Tribunal to which the claim is transferred a certified copy of the entries in the register, and the documents in his custody, relating to the claim.

(2) The registrar of the court or of the Small Claims Tribunal to which the claim is transferred shall appoint a day for the hearing and send notices in the prescribed form to all
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

parties interested. (See Form 5)

**REASON FOR TRANSFERRING CLAIM TO THE DISTRICT COURT (DC)**

| Holding | [8] “A tribunal may decline jurisdiction for any reason so long as it is of the opinion that the claim should not be heard and determined by it.” |
| Legal Analysis | [8] “the Tribunal may, to their discretion, decline jurisdiction in many circumstances, such as for reason of complexity of the claim, party’s best interest in legal representation, counterclaim over which it has no jurisdiction and doubt whether it has jurisdiction.”  
[10] “…the tribunal had doubt whether it has jurisdiction and thought it best for the matter to be fully argued in another venue which would allow legal representation.” |
| Facts | The plaintiff, an employee of the defendant, filed claim with Labour Tribunal for damages for breach of employment contract. The Presiding Officer had doubt over its jurisdiction over the foreign Defendant, and transferred the case to the Court of First Instance. The defendant applied to have the jurisdictional question determined and successfully obtained an order to dismiss the plaintiff’s action on grounds that Hong Kong courts had jurisdiction over the foreign defendant. The plaintiff appealed against that decision, arguing that the Labour Tribunal had found jurisdiction over the defendant initial and had simply declined to exercise it in transferring the case to another court. |

**B) Limitation Ordinance Cap 347**

**Section 4: Limitation of actions of contract and tort, and certain other actions**

(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say -

(a) actions founded on simple contract or on tort;  
(b) actions to enforce a recognizance;  
(c) actions to enforce an award, where the submission is not by an instrument under seal;  
(d) actions to recover any sum recoverable by virtue of any Ordinance or imperial enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture: Provided that-  
   (i) (Repealed 31 of 1991 s. 4)  
   (ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

(2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued: Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Ordinance.
(4) An action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Ordinance or imperial enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued:
Provided that for the purposes of this subsection the expression "penalty" (罰金) shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding enactment contained in the Limitation Act 1980 (1980 c. 58 U.K.) is applied in the English Courts

Section 27: Time limit for personal injuries

Special provisions applicable to certain actions in respect of personal injuries

(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an Ordinance or imperial enactment or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) Section 4 shall not apply to an action to which this section applies.

(3) Subject to section 30, an action to which this section applies shall not be brought after the expiration of the period specified in subsections (4) and (5).

(4) Except where subsection (5) applies, the said period is 3 years from –
   (a) the date on which the cause of action accrued; or
   (b) the date (if later) of the plaintiff's knowledge.

(5) If the person injured dies before the expiration of the period in subsection (4), the period as respects the cause of action surviving for the benefit of the estate of the deceased by virtue of section 20 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) shall be 3 years from -
   (a) the date of death; or
   (b) the date of the personal representative's knowledge, whichever is the later.

(6) In this section, and in section 28, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -
   (a) that the injury in question was significant; and
   (b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
   (c) the identity of the defendant; and
   (d) if it is alleged that the act or omission was that of a person other than the
CHAPTER 3: PROCEDURES FOR PURSING REMEDIES

defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant, and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(7) For the purposes of this section an injury is significant if the plaintiff would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) For the purposes of this section and section 28 a person's knowledge includes knowledge which he might reasonably have been expected to acquire –
   (a) from facts observable or ascertainable by him; or
   (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek, but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

(9) For the purposes of this section "personal representative" (遺產代理人) includes any person who is or has been a personal representative of the deceased, including an executor who has not proved the will (whether or not he has renounced probate); and regard shall be had to any knowledge acquired by any such person while a personal representative or previously.

(10) If there is more than one personal representative, and their dates of knowledge are different, subsection (5)(b) shall be read as referring to the earliest of those dates.

(C) Small Claims Tribunal (Fees) Rules Cap 338B

Schedule

<table>
<thead>
<tr>
<th>Fees</th>
<th>Fees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Issue</strong></td>
<td><strong>HKD$</strong></td>
</tr>
<tr>
<td><strong>Filing Claims</strong></td>
<td></td>
</tr>
<tr>
<td>where the claim does not exceed $3000</td>
<td>20</td>
</tr>
<tr>
<td>where the claim exceeds $3000 but does not exceed $17000</td>
<td>40</td>
</tr>
<tr>
<td>where the claim exceeds $17000 but does not exceed $33000</td>
<td>70</td>
</tr>
<tr>
<td>where the claim exceeds $33000 but does not exceed $50000</td>
<td>120</td>
</tr>
<tr>
<td>Summons and copy including service, each witness</td>
<td>33</td>
</tr>
<tr>
<td>Application for review</td>
<td>61</td>
</tr>
<tr>
<td>Application for leave to appeal</td>
<td>61</td>
</tr>
<tr>
<td><strong>Copies, Certification, Searches</strong></td>
<td></td>
</tr>
<tr>
<td>Copy of any document (including written award or order) made in the registry of the tribunal and certifying the same, per page</td>
<td>5.50</td>
</tr>
</tbody>
</table>
### Photostatic copy of document made in the registry of the tribunal and certification
- for each page or portion of a page: 5.50
- for each page or portion of a page exceeding in size 210 mm x 297 mm: Such additional fees as the registrar may fix

### Translation of any document made in the registry and certificate, per page
- In discretion of the registrar

### Certifying translation made elsewhere, per page
- 20

### Every search in the registry of the tribunal for each register, file or document
- 18

### Bailiff's Expenses
- **Watchman's fee per diem** (to be paid in cash): 83
- **Transportation or conveyance expenses and overtime, according to distance and time** (to be paid in cash): Actual expenditure +20% administrative charges

### Taking Evidence
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- **Attendance of any Government official to give any other evidence in the tribunal**
  - when called as an expert: In the discretion of the registrar
  - when not called as an expert, per hour or portion of an hour of attendance: 61
- **Filing any affidavit or declaration (other than affidavit or declaration of a bailiff of Court) (including administering any oath or taking any declaration in the registry)**: 121

### Miscellaneous
- **Filing any notice or document in the tribunal not hereinbefore referred to (other than a notice or document expressing an intention not to proceed with a claim or a defence)**: 55
- **Sealing any document in connection with proceedings in the tribunal not hereinbefore referred to**: 55
- **Any other matter or proceeding not hereinbefore referred to and for which no fee has been specified herein**: Such fee as the registrar may fix

---

(D) Small Claims Tribunal Ordinance Cap 338

### Section 7: Transfer of claims

The tribunal may at any stage of proceedings in the tribunal, either of its own motion or upon the application of any party, transfer the proceedings to the Board, the Labour Tribunal, the Lands Tribunal, the District Court or the Court of First Instance, whereupon the practice and procedure of the Board, the Labour Tribunal, the Lands Tribunal, the District Court or the Court of First Instance, as the case may be, shall apply.

### Section 8: Division of causes of action
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES

No claim shall be split or divided and pursued in separate proceedings in the tribunal for the sole purpose of bringing the sum claimed in each of such proceedings within the jurisdiction of the tribunal.

Section 19: Right of Audience

1. The following persons shall have a right of audience before the tribunal:
   a. any party;
   b. an officer or servant of a corporation, if the corporation is a party;
   c. a member of a partnership, if the persons comprising the partnership are parties;
   d. with the leave of the tribunal, any person, other than counsel or a solicitor, who is authorized in writing by a party to appear as his representative;
   e. a public officer, not being a barrister or solicitor, who appears on behalf of the Secretary for Justice, if the Secretary for Justice is a party.

2. Except for the purposes of proceedings under section 35A for insulting behaviour, no barrister or solicitor, including a barrister or solicitor who is a public officer whether or not qualified to practise in a court in Hong Kong, shall have a right of audience before the tribunal unless he is acting on his own behalf as a claimant or defendant.

### MDW’S APPOINTMENT OF REPRESENTATIVE IN SMALL CLAIMS TRIBUNAL

*Chan Tung Chi v Suryani* [2012] HKEC 415

<table>
<thead>
<tr>
<th>Holding</th>
<th>The Court of First Instance refused to grant leave to appeal against the decision of refusal to allow the defendant MDW to have representative to appear on her behalf because her application was made too late, and her representative has legal knowledge even though he is not a qualified lawyer.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Analysis</td>
<td>[13] The Representation Application was made too late. It is not efficient use of judicial resources, and it would confer unfair advantage on the person who seeks to make such application at such late stage.</td>
</tr>
<tr>
<td></td>
<td>[15] Although her representative is not a practicing lawyer, his legal training would possibly offer the defendant unfair advantage over the claimant.</td>
</tr>
<tr>
<td>Facts</td>
<td>An application by the defendant MDW for leave to appeal against the decision made by the Adjudicator in Small Claims Tribunal in refusing to allow the defendant to have representative to appear on her behalf in the review hearing.</td>
</tr>
</tbody>
</table>

Section 23: Evidence

1. The tribunal may at any time during the hearing of a claim allow a witness or a party to give evidence on oath or unsworn.

2. The rules of evidence shall not apply to proceedings in the tribunal, which may receive any evidence which it considers relevant.

Section 24: Costs

1. Subject to subsection (2), the tribunal may award to a party costs and expenses, which
may include –

(a) any reasonable expenses necessarily incurred and any loss of salary or wages suffered by that party; and
(b) any reasonable sum paid to a witness for expenses necessarily incurred and any loss of salary or wages suffered by him, in attending the hearing.

(2) In making an award of costs under this section, the tribunal shall include a direction as to the amount to be paid by each party who is liable to pay costs.

(3) An award of costs shall be enforceable in the same manner as any other award of the tribunal.

Section 27A: Review of awards and orders

(1) Except where a party has filed an application for leave to appeal and does not agree to withdraw the application, an adjudicator may, within 14 days from the date of an award or order given or made by him, review the award or order and on such review may re-open and re-hear the claim wholly or in part and may call or hear fresh evidence and may confirm, vary or reverse his previous award or order.

(2) The power conferred by subsection (1) may be exercised –

(a) by an adjudicator of his own motion, by notice in the prescribed form to all parties;
(b) on the application of a party within 7 days, by notice in the prescribed form to all other parties.

(3) The exercise of the power conferred by subsection (1) shall not operate as a bar to an appeal by a party against the award or order or against the determination of the review.

(4) On the application of a party for a review under this section, the adjudicator, having regard to the possibility of assets which may be available to satisfy an award being disposed of to the prejudice of any party, may make such order regarding payment into the tribunal, giving of security or otherwise as he may think fit.

(5) An adjudicator may transfer the hearing and consideration of a review to another adjudicator who shall have all the powers and functions he would have if he had originally heard the claim and had prepared the record of proceedings.

Section 28: Leave to appeal on point of law

(1) Any party who is aggrieved by a decision of the tribunal -

(a) on any ground involving a question of law alone; or
(b) on the ground that the claim was outside the jurisdiction of the tribunal, may apply to the Court of First Instance for leave to appeal and the Court of First Instance may grant such leave if it thinks fit.

(2) An application for leave to appeal under this section shall be –

(a) in the prescribed form, specifying the ground of the appeal and the reasons in support of such ground; and
(b) lodged with the Registrar of the High Court within –

(i) 7 days after the date on which the written award or order is served on the aggrieved party; or
(ii) if within that period the aggrieved party applies to the tribunal for the reasons for the award or order, 7 days after the date on which the reasons are served on him; or

(iii) such time as may be extended by the Registrar of the High Court on good cause.

(3) A refusal by the Court of First Instance to grant leave to appeal shall be final.

(4) Nothing in this section shall affect any right of appeal under section 50 of the High Court Ordinance (Cap 4).

### APPEALING FROM SMALL CLAIMS TRIBUNAL ON GROUNDS OF LAW

<table>
<thead>
<tr>
<th><strong>Alvares v Ng Ah Ying [1999] HKLRD (Yrbk) 91</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Holding</strong></td>
</tr>
<tr>
<td>[8] There were no errors in law. The MDW was unable to establish sufficient arguable grounds of appeal, and their request was denied</td>
</tr>
<tr>
<td><strong>Legal Analysis</strong></td>
</tr>
<tr>
<td>[7] The Court of First Instance will grant leave to appeal only if it sees fit. Examples of CFI finding a lack of fitness include:</td>
</tr>
<tr>
<td>- Questions of law or jurisdiction are “invalid, frivolous or unreal”</td>
</tr>
<tr>
<td>- Serious questions of law may still be insufficient to grant leave for appeal if the case decision rests on “incontrovertible findings of fact” that render the legal argument academic.</td>
</tr>
<tr>
<td><strong>Facts</strong></td>
</tr>
<tr>
<td>MDW was offered a sum of HK$7,600 by her employer to settle the claim, but she refused and first took action at the LT. She was awarded some compensation in LT, but she then took action at the SCT, seeking living expense incurred between the time of their dismissal and the award. Her claim was dismissed and she sought leave to appeal from Court of First Instance.</td>
</tr>
</tbody>
</table>

### Section 29: Powers of Court of First Instance on appeal

(1) On an appeal for which it has granted leave under section 28, the Court of First Instance may -

- (a) allow the appeal;
- (b) dismiss the appeal; or
- (c) remit the matter to the tribunal with such directions as it thinks fit, which may include a direction to the tribunal for a new hearing.

(2) On an appeal for which it has granted leave under section 28, the Court of First Instance may –

- (a) draw any inference of fact; and
- (b) make such order as to costs and expenses as it thinks fit, but may not -
  - (i) reverse or vary any determination made by the tribunal on questions of fact; or
  - (ii) receive further evidence.

(3) Subject to section 29A, the decision of the Court of First Instance shall be final.

### Section 29A: Appeal to the Court of Appeal
(1) Any party who is aggrieved by a decision of the Court of First Instance on an appeal heard by leave given under section 28 may, within 7 days after the date of the decision, apply to the Court of Appeal for leave to appeal and, if the Court of Appeal considers that a question of law of general public importance is involved, it may grant leave.

(2) An application for leave to appeal under this section shall be –

(a) in the prescribed form, setting out the question of law; and
(b) lodged with the Registrar of the High Court.

(3) A refusal by the Court of Appeal to grant leave to appeal shall be final.

Section 32A: Setting aside award or order given in absence of party

(1) Any award or order of the tribunal obtained where one party did not appear at the hearing may be set aside by the tribunal, on the application of that party, on such terms as it thinks just.

(2) An application under subsection (1) shall be made within 7 days after the hearing or such further period as the tribunal may allow

Schedule: Jurisdiction of Tribunal

1. Any monetary claim founded in contract, quasi-contract or tort where the amount claimed is not more than $50000, whether on balance of account or otherwise:

   Provided that the tribunal shall not have jurisdiction to hear and determine –

   (a) any action in respect of -

   (i) defamation;

   (b) any action or proceeding in respect of a maintenance agreement within the meaning of section 14 of the Matrimonial Proceedings and Property Ordinance (Cap 192);

   (c) any action by a money lender licensed under the Money Lenders Ordinance (Cap 163) for the recovery of any money lent, or the enforcement of any agreement or security made or taken in respect of money lent;

   (ca) any action that lies within the jurisdiction of the Minor Employment Claims Adjudication Board established by section 3 of the Minor Employment Claims Adjudication Board Ordinance (Cap 453);

   (d) any action that lies within the jurisdiction of the Labour Tribunal established under the Labour Tribunal Ordinance (Cap 25);

   (e) any action which is submitted to the jurisdiction of the Estate Agents Authority established by section 4 of the Estate Agents Ordinance (Cap 511) and in respect of which the Estate Agents Authority has not declined jurisdiction, under or pursuant to section 49 of that Ordinance;

   (f) any action or proceeding for an order for the costs of and incidental to a dispute in relation to which no proceedings have been commenced in the tribunal.

   1A. Notwithstanding subparagraph (d) of the proviso to paragraph 1, the tribunal shall have jurisdiction to hear and determine a claim transferred to the tribunal under section 10(2) of the Labour Tribunal Ordinance (Cap 25).

2. Any claim for the recovery of any penalty, expenses, contribution or other amount which is recoverable by virtue of any enactment and for the recovery of any amount which is declared by any enactment to be recoverable as a civil debt if –
(a) it is not expressly provided by that or any other enactment that the demand shall be recoverable only in some other court; and
(b) the amount claimed does not exceed $50000.

For the purposes of this paragraph, "penalty" (罰金) shall not include a fine imposed on the conviction of any person for an offence.

(E) The Rules of the High Court Cap 4A

Order 59 Rule 2: Application of Order to application for new trial

This Order (except so much of rule 3(1) as provides that an appeal shall be by way of rehearing and except rule 11 (1)) applies to an application to the Court of Appeal for a new trial or to set aside a verdict, finding or judgment after trial with or without a jury, as it applies to an appeal to that Court, and references in this Order to an appeal and to an appellant shall be construed accordingly.

Order 59 Rule 2A: Application to Court of Appeal for leave to appeal

(1) An application to the Court of Appeal for leave to appeal must be made by a summons supported by a statement setting out -

(a) the reasons why leave should be granted; and
(b) if the time for appealing has expired, the reasons why the application was not made within that time.

(2) An application under paragraph (1) must be made inter partes if the proceedings in the court below are inter partes.

(3) An application under paragraph (1) must include, where necessary, an application to extend the time for appealing.

(4) A party who intends to resist an application under paragraph (1) made inter partes shall, within 14 days after the application is served on him, file in the Court of Appeal and serve on the applicant a statement as to why the application should not be granted.

(5) The Court of Appeal may –

(a) determine the application without a hearing on the basis of written submissions only; or
(b) direct that the application be heard at an oral hearing, and in both cases, the Court of Appeal may give such directions as it thinks fit in relation to the application.

(6) Where the Court of Appeal grants the application, it may impose such terms as it thinks fit.

(7) Subject to paragraph (8), if the application is determined on the basis of written submissions only, a party aggrieved by the determination may, within 7 days after he has been given notice of the determination, request the Court of Appeal to reconsider the determination at an oral hearing inter partes.

(8) Where the Court of Appeal determines the application on the basis of written
submissions only, it may, if it considers that the application is totally without merit, make an order that no party may under paragraph (7) request the determination to be reconsidered at an oral hearing inter partes.

(9) An oral hearing held pursuant to a request under paragraph (7) may be before the Court of Appeal consisting of –

(a) the Justice of Appeal; or
(b) one or more of the Justices of Appeal, who have determined the application on the basis of written submissions only.

VIII. Technology Court

(A) Practice Direction 29

Use of the Technology Court

Rule 2

Subject to the direction of the court or tribunal concerned, the Technology Court is available for use, where appropriate, upon the application of one or more of the parties in relation to proceedings or particular parts of proceedings, both civil and criminal, in the Court of Final Appeal, the Court of Appeal, the Court of First Instance, the District Court, the Lands Tribunal, the Magistrates’ Courts, the Coroner’s Court, the Labour Tribunal and the Small Claims Tribunal.

Rule 4

It is a case management question within the discretion of the court or tribunal concerned whether any proceedings or parts of any proceedings should be conducted in the Technology Court.

Rule 5

In making its decision, the court or tribunal will take into account the views of all the parties, the availability of the Technology Court, the subject-matter of the proceedings or the relevant part of the proceedings and all other material circumstances, including in particular, whether the proposed use of the Technology Court is likely:

(a) to promote the fair and efficient disposal of the proceedings;
(b) to save costs; and/or
(c) materially to delay disposal of the proceedings.

Rule 7

Applications for use of the Technology Court should be made to the court or tribunal in question as follows:

<table>
<thead>
<tr>
<th>Court or tribunal</th>
<th>Applies to</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Final Appeal</td>
<td>A single judge of the Court of Final Appeal.</td>
</tr>
<tr>
<td>Court of Appeal</td>
<td>A Vice-President of the Court of Appeal. If unavailable, the Chief Judge of the High Court.</td>
</tr>
<tr>
<td>Court of First Instance</td>
<td>The judge in charge of the case; or if no judge is allocated, the listing judge. If unavailable, the Chief Judge of the High Court.</td>
</tr>
</tbody>
</table>
District Court | The judge in charge of the case; or if no judge is allocated, the listing judge. If unavailable, the Chief District Judge.
---|---
Lands Tribunal | The presiding officer in charge of the case; or if none is allocated, the President. If unavailable, the Chief District Judge.
Magistrates Courts | The magistrate in charge of the case; or if none is allocated, the Principal Magistrate. If unavailable, the Chief Magistrate.
Coroner’s Courts | The Coroner in charge of the inquest. If unavailable, the Chief Magistrate.
Labour Tribunal | The presiding officer in charge of the case; or if none is allocated, the Principal Presiding Officer. If unavailable, the Chief Magistrate.
Small Claims Tribunal | The adjudicator in charge of the case; or if none is allocated, the Principal Adjudicator. If unavailable, the Chief Magistrate.

(B) Reason to Use Technology Court

### I. ILLNESS

*Daimler AG v Leiduck (No 2) [2013] 2 HKLRD 822*

**Holding**

*824 Application for TC on appeal approved based on calculations of what would “achieve a just result for both parties.”*

This took into account the inconvenience of travel for the defendant and the prejudice caused to the plaintiff if video conferencing facilities were used to give evidence.

**Legal Analysis**

*825 Medical evidence showed it would be “life-threatening” for the Defendant to travel to Hong Kong. The lower court judge also erred in believing the stress due to cross-examination would be greater than traveling to Hong Kong.*

*823 “D was not seeking to avoid coming to Hong Kong: he desired to do so but could not because of ill health.”*

**Facts**

*822 Defendant (D) sought leave to give evidence from Germany via video link. Medical evidence showed that D was virtually blind and immobile, “suffered various severe cardiac diseases and lived in an old people’s home with round-the-clock medical care.”…“any attempt to travel to Hong Kong would be hazardous to his health and life, and was not advised.” The judge in the lower court refused the application, ruling that it was not shown that it was impossible for D to come to Hong Kong to give evidence.*

*Luan Gang v Simpson Marine Ltd [2013] HKEC 1383*

**Holding**

Insufficient medical evidence was provided to show that the applicant was precluded from travel due to a medical condition.

[24] To establish this, a medical certificate should show:

- Stating in “no uncertain terms and with reasons” why the applicant was unfit for travel.
- This includes explaining the potential consequences if the applicant did travel. Vague phrases such as “not suitable for
### Legal Analysis

Applicants medical evidence “did not even come close” to meeting the standard, even taken on its face. Medical certificates also failed various evidentiary rules as well.

### Facts

Mr Luan was seeking to give evidence via VCF. He was an important witness for the plaintiff and his credibility would be an issue at the trial. Mr Luan is 50 years old and resides in the USA. Three medical certificates were submitted, which showed that Mr Luan had been diagnosed with Bipolar Disorder and Post-traumatic Stress Disorder (PTSD). In the opinion of Dr Liu, Mr Luan was not suitable to travel during the next 3 months.

### II. OTHER JUSTIFIABLE REASONS TO USE TECHNOLOGY COURT

*Re Chow Kam Fai [2004] 1 HKLRD 161*

D’s application to give evidence via video link was refused.

The Court has discretion to allow witnesses to use video conferencing facilities to give evidence. In deciding whether to allow, the court will consider:

*163 - The starting point of conducting the "proper administration of justice" and “seen to be conducted by proceedings within the courtroom.”

- It is a privilege and an exception to give evidence from outside the courtroom. The applicant party must show good reason in departing from the general rule of in person appearance.

- a good reason must be the “interests of justice” and the “efficient disposal of the proceedings,” and “whether a party would be denied access to court without video link evidence."

- “Whether the applicant or party opposing the application was seeking a collateral advantage against the other or had ulterior motives” is relevant.

- Video link access will not be granted if “the witness’s credibility was crucial and his physical attendance in court would assist in assessing his credibility”

- However, noting in dicta, that access to VCF might be important where witness testimony is technical or “purely factual” and was “not likely to be attacked on the basis of credibility.”

- “The discretion should not be exercised in favour of a witness who had a history of disobeying the orders of the court.”

### Legal Analysis

*163 Reasons for refusal to grant video link included:
### Facts

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td></td>
<td>Defendant (D) had failed to pay a judgment debt that he owed the Plaintiff. A warrant was issued for the former's arrest. D argued that the court had no jurisdiction over his person, as he was domiciled in Macau. He filed affidavits attesting to his residence, and the Bankruptcy Court ordered his appearance for cross-examination on the affidavits. Among other motions, D filed for permission to use video link to be cross-examined and thus not appear personally in Hong Kong.</td>
</tr>
<tr>
<td></td>
<td>Applicant sought a collateral advantage over his opponent by asking the Court to “protect him from the consequence of disobeying the court's order.”</td>
</tr>
<tr>
<td></td>
<td>His evidence would not have been excluded if he did not have access to the video link.</td>
</tr>
<tr>
<td></td>
<td>He no relevant health problems and lived nearby in Macau.</td>
</tr>
<tr>
<td></td>
<td>His credibility and his “subjective intention were central to the cross-examination.”</td>
</tr>
<tr>
<td></td>
<td>He also had a “history of wilful disobedience to the court’s order.”</td>
</tr>
</tbody>
</table>
Chapter 4
FINDING LOCAL PARTNERS
CHAPTER 4: FINDING LOCAL PARTNERS

1. Introduction

1.1 This chapter explains the logistics and challenges involved in finding and working with local partners in the client’s home community, or finding a lawyer in Hong Kong if the practitioner is located in the client’s home community. Partners are indispensable to ensuring the client remains in contact and can see their Hong Kong-based claims through to completion.

1.2 This chapter is thus divided into eight sections. Section 1 provides a brief overview of the importance of finding a local partner, Section 2 describes the major challenges involved in remote representation, Section 3 provides an overview of how local partners can support remote representation, Section 4 discusses preparations needed for remote representation, Section 5 describes how to find a partner in the client’s home country, Section 6 introduces the mechanics and considerations in forming a partnership with another entity, Section 7 discusses how practitioners in clients’ home communities may attempt to seek legal assistance in Hong Kong, and Section 8 closes with an overview of how to assess the viability of a client’s claims for remote representation.

1.3 Pursuing a legal claim from abroad is difficult. Even when the law, as in Hong Kong, enables clients to pursue claims remotely, the logistical hurdles often prove very challenging for both the lawyer and the client. This is particularly true for migrant workers, who generally must rely upon legal aid or pro bono representation, are often busy attempting to find work, may not be fluent in their lawyer’s language(s) and may live in remote areas where reliable telecommunications are scarce.

1.4 A local lawyer, direct service organisation,¹ or other individual or organisation who can serve as a reliable liaison/partner for the Hong Kong lawyer in the client’s community can help to overcome some of these barriers. This chapter discusses how home country partners can meet Hong Kong lawyers’ specific needs during the litigation, how to find potential partners, and the legal considerations in partnering with another individual or entity.

1.5 For readers in the client’s home country who believe their client may have a viable legal claim in Hong Kong, please see Section 7 for methods of finding legal assistance in Hong Kong.

2. Major challenges in remote representation

2.1 Hong Kong service providers and legal aid lawyers have reported that clients who have suffered labour exploitation or even human trafficking are less likely to bring claims if they believe they cannot stay in Hong Kong long enough to conclude the claim. Faced with financial pressures to find new work, the client is much more likely to accept an unfair settlement or forego complaint procedures entirely. For those who attempt to pursue civil claims after return, the simple logistical barriers can be enough to bring the legal claim to a halt. Below are four of the most common issues that lawyers and clients face in remote representation.

¹Direct service organisations are generally community organisations that provide social services directly to a client population. This can include legal consultations, medical care, counselling, job training, and other such services.
I. **Telecommunication challenges**

2.2 Unfortunately, maintaining contact with a client post-return can be immensely challenging. Internet telecommunications such as Skype are often unreliable, causing frustration when calls are repeatedly dropped. Phone calls can be expensive, and when the client lives in a more remote area, telecommunications may be poor or non-existent. Finally, clients may move within their own country, or change cell phone numbers, complicating continued contact. The latter has been reported amongst Indonesian clients, as new phone numbers are inexpensive to obtain in Indonesia.

II. **Language barriers**

2.3 Lack of fluency in the lawyer’s spoken language can make communication particularly difficult, and again give rise to frustration. Miscommunication can result in clients missing important deadlines, providing the wrong materials, or simply becoming confused about the state of their claim and/or the nature of the decisions that they as clients must make. Clients may also misunderstand their chances of success or of the pace of process, becoming impatient with or even distrusting their lawyer. Facing other responsibilities and challenges in their own lives, these frustrations may compel clients to simply drop the case.

III. **Cultural differences and lack of understanding about the legal process**

2.4 Many clients are unlikely to have had much experience with legal systems in the past, or perhaps have had a negative experience. Their own country’s legal system may be quite different and/or vulnerable to corruption, causing the client to distrust the Hong Kong legal system as well. Like most non-lawyers, clients are also generally unaware of the processes required to pursue a claim and collect a judgment, let alone the amount of time such tasks will require. Compounded with language barriers, clients may not have a full understanding of the legal process, leading to frustration when this process fails to produce results.

IV. **Time and availability**

2.5 Finally, clients may have irregular schedules when they return home, making regular meetings particularly challenging. Missed appointments can become the norm, forcing the Hong Kong advocate to expend time and resources following up with the client by phone and e-mail.

3. **How a local partner can support remote representation**

3.1 A reliable local partner can help take on many of the burdens of case management that clients are ill-equipped to handle. Partners are often direct service providers, pro bono lawyers, or university legal clinics in the client’s place of residence. The following subsections explain the advantages of having a local partner, as well as the different types of partners generally available.

3.2 For those with clients from Indonesia, the Philippines or Thailand, contact Justice Without Borders for a free consultation in locating a partner in these countries.
I. **Advantages of having a local partner**

3.3 Face-to-face communication is vital for many clients, and local partners provide an immediate point of contact for their case. Clients are also more likely to trust someone they can meet directly, who speaks their language, and who understands their culture. For Hong Kong lawyers, a local partner can both translate case updates into the client’s language, and also explain the case in a way that is easier to understand and culturally appropriate. Most importantly, a local partner can work with the client’s schedule, following up with them in person as needed.

3.4 Additionally, local partners are more likely to have a higher level understanding of general legal principles, as well as issues specific to migrant workers. While Hong Kong advocates will need to explain legal and logistical issues that are unique to the Hong Kong legal system, their more specialised grounding makes communication between practitioners easier. Finally, local partners are in a better position to collect needed evidence and testimony, and can help arrange teleconferences as needed.

II. **Legal, paralegal, and non-law practitioners as partners**

3.5 While a Hong Kong-licensed lawyer is generally required to meet clients’ legal needs within Hong Kong, home country support usually does not actually require the help of a licensed lawyer. While local lawyers can certainly be very valuable partners, most of the needs of the Hong Kong lawyer can be met by using paralegals (such as caseworkers with some practical background in legal matters) or even properly trained non-legal partners.

3.6 Note that different countries have different licensing requirements for conducting law-related activities. This manual’s focus on remedies within the Hong Kong jurisdiction means that activities carried out in the client’s home country will generally be unrelated to local legal processes. However, practitioners should confirm that activities such as evidence collection and taking depositions do not require a specific license in the client’s home country. Finally, if clients decide to bring suit against local employment agents or brokers in their home countries, a locally-licensed attorney will be necessary.

4. **Preparing for remote representation**

I. **For clients who have not yet left Hong Kong**

4.1 Lawyers should conduct as much case preparation as possible prior to the client’s departure. While each case will have slightly different tasks, practitioners should attempt to complete the items mentioned below before the client leaves Hong Kong:

(A) Obtain relevant contact information in the client’s destination

4.2 Practitioners should obtain as much information as possible from the client to ensure that they may keep in contact. Such information can include:
• Local cell phone number(s)
• E-mail address(es)
• Next physical address
• Address and phone number for family members
• Notification of any plans to move within their home country or to migrate again
• Contact information for a friend in Hong Kong as a backup

(B) **Explain and provide a written copy of the expected next steps and overall course of the litigation. Include next steps and a scheduled time to talk once the client has returned home.**

4.3 A full consultation prior to departure is essential to preparing the client for the challenges of remote representation. Practitioners should fully explain the course of the negotiations or litigation as it stands at that time. Where possible, written copies of the same information should be provided in both English and the client’s home language. These documents will also be essential for partners in the client’s home country, and preparing them in advance will smooth the process of building a good working relationship. Finally, clients should have a concrete understanding of what they must do when they return home, even if that only involves contacting their lawyer for a follow-up. While clients may require flexibility in scheduling their first meeting post-return, setting an initial date and time to follow up will help to maintain a sense of momentum and keep the client involved in the case.

(C) **Complete procedures that require the client’s presence**

4.4 Once the client leaves Hong Kong, civil claims only require the client’s presence under certain conditions. The following table broadly outlines the minimum amount of work that must be done in order to successfully continue (or postpone) a case after the client departs Hong Kong. For complete details on civil processes, please see Chapter 3.
### Table 1: Legal remedy procedures and necessary preparation while client is in Hong Kong

<table>
<thead>
<tr>
<th>Type of procedure</th>
<th>Necessary preparation while in Hong Kong</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department of Labour mediation</td>
<td>Client generally must remain in Hong Kong until mediation is finalized or until a settlement is entered.</td>
</tr>
<tr>
<td>Worker’s injury claim under Employees’ Compensation Ordinance</td>
<td>Collect all relevant documents, including medical certificates. Certificates from a Hong Kong hospital may be more persuasive than those from a hospital in the home country. Client’s presence during mediation at the Employees’ Compensation Department is beneficial. Otherwise, negotiation and any litigation do not necessarily require the client’s presence.</td>
</tr>
<tr>
<td>Civil claim—Contract, tort, or Employment Act, etc.</td>
<td>All relevant evidence the client holds should be collected, photocopied (one copy for client), and documented. Engagement letter with the lawyer and any other necessary power of attorney should also be signed and filed.</td>
</tr>
<tr>
<td>Enforcing a judgment</td>
<td>Appropriate engagement letter and/or power of attorney should also be signed and filed as needed.</td>
</tr>
</tbody>
</table>

### II. For clients who are or have already returned home.

4.5 Clients who cannot remain in Hong Kong fall under several categories, but together have similar needs, which are explained below. Types of clients under this category include: clients who must immediately leave Hong Kong and those who first contact a Hong Kong lawyer from abroad.

(A) **Clients in Hong Kong who must return immediately**

4.6 Establishing and maintaining contact is paramount to continuing representation, and practitioners should work quickly to inform the client of immediate next steps and to establish a regular meeting schedule. While the client is ultimately responsible for maintaining contact, the lawyer must be cognizant of the challenges that clients face in doing so. A clear set of next steps and an initial calling schedule will provide both structure and momentum for both the client and the lawyer.

(B) **Potential clients who make first contact from abroad**

4.7 In some cases, initial contact with a lawyer may occur after a worker has returned to their home country. Although currently a rare occurrence, direct service organisations in Indonesia, the Philippines, and elsewhere are increasingly working with counterparts in host countries like Hong Kong to establish lines of communication so that workers with potentially viable legal claims can attempt to seek legal remedies in the host country even after they return home.

4.8 In most such cases, Hong Kong lawyers will first be contacted by a direct service or legal aid organisation in the client’s home country. This organisation may either act only as a referral agency or as the lawyer’s partner in bringing the case.
Practitioners should first confirm whether the organisation has the capacity and willingness to continue as a liaison with the client should the lawyer agree to take the case.

4.9 In cases where a potential client makes contact with a Hong Kong practitioner via a local organisation, the practitioner should first assess the extent to which that organisation is willing to continue serving as a liaison. Lawyers should be prepared to fully explain both what the partner organisation would be asked to do in the near term, and to give an idea of the duration and level of support needed should civil litigation proceed.
5. Avenues to finding a partnering organisation in the client’s home country

5.1 This section describes some of the potential organisations in clients’ home countries that lawyers in Hong Kong may be able to approach as partners and liaisons after the client has returned home. These are not listed in any particular order, and the benefits and drawbacks to working with each group will be explored.

5.2 Note that the best potential partners are very likely to vary from location to location. It may well take approaching several of the entities listed below before an appropriate partner is identified. Lawyers should thus investigate which entities seem the most appropriate, given the client’s geographic point of return, and approach them first.

5.3 Finding a partner in the client’s home country can be the most challenging step in the representation. Clients who move to large urban areas will likely have multiple options, while those who move to more remote areas may have none and must settle for a liaison some distance away in a larger town. Where possible, clients should be encouraged to help find an appropriate partner, as their relationship with the local partner is as important as that between the partner and the practitioner.

5.4 In many cases, practitioners’ first points of contact in the client’s home country may simply lead to referrals, either in the same city where the client lives or hopefully somewhere nearby. International and national organisations in the home country may be able to help in locating an appropriate partner within their own professional networks.

5.5 Those seeking partners in Indonesia, the Philippines, or Thailand, can contact Justice Without Borders for a free consultation in locating partners.

5.6 For practitioners who have no contacts within a client’s home country, the following entities can serve as productive first points of contact:

I. National bar associations

5.7 These organisations are likely to have the largest directory of legal partners in a given country. Unfortunately, pro bono services within the bar association may be minimal or non-existent, with many lawyers refusing to take cases without compensation. Another crucial disadvantage in finding a local lawyer is that it can be quite difficult to vet them. Bar associations usually include both lawyers who represent labour interests and those who serve employers and brokers. Without the ability to properly vet the attorney, practitioners run the risk of engaging a local partner who could actively work against the client’s interests. Thus, it is important to obtain references from other credible sources for any lawyer contacted through a national bar association.

5.8 Pro bono directories may be a safer alternative, but not all bar associations keep such lists. Where they do, practitioners will need to find and vet lawyers who live near the client and who express interest in assisting the case.
II. Law faculty (legal clinics)

5.9 Many home country universities now house pro bono or reduced fee legal clinics to serve the local community.

5.10 The major advantage of working with a law faculty partner is that the law students frequently have better command of at least written English, and are often enthusiastic to help. Where clients have returned to their home community, they may well be more trusting of working with faculty and students who are from their community as well. Note that students may require additional training and supervision, so it is vital to ensure that the supervising clinical staff are fully informed and understand the scope and details of the work.

5.11 A key disadvantage is that migrant worker-focused legal clinics are still relatively rare, and in some countries, even legal scholars who are familiar with labour migration can be difficult to find. That said, it may be worth contacting a law faculty closest to the client to learn whether a staff member may be willing to help (and bring in student volunteers in the process) or may be able to provide a reference to someone in the common who can serve as a liaison.

III. Community-based and non-governmental organisations (CBOs and NGOs)

5.12 Most partners are likely to be local direct service organisations. These can be divided between local legal aid organisations, organisations with paralegals (i.e. trained caseworkers who are not licensed attorneys), and organisations without paralegal staff. While all three types of organisations may be able to provide sufficient assistance, Hong Kong lawyers will need to fully discuss the intended scope of the partnership to ensure that the organisation has sufficient capacity to undertake both the technical and non-technical aspects of the casework.

5.13 Additionally, these organisations should be vetted to ensure that they are known entities, particularly in the field in which they work. Although support from international organisations is often a good indicator of credibility, smaller organisations that have been vetted by national level NGOs or other entities can also be appropriate. Practitioners serving clients living in remote areas may have few choices, and may need to adjust their expectations accordingly. However, where an organisation is unknown, or there is any suspicion that the organisation is unreliable or seems otherwise suspicious, lawyers should opt instead for a more reliable organisation even if it is somewhat distant from the client.

IV. Relevant religious institutions

5.14 In many countries, religious institutions are the key community organisations within their area. If the client is comfortable with a religious institution, practitioners should consider finding and vetting such potential partners. A critical advantage of these partners is that clients from their religion may be much more likely to trust and engage with these actors on the basis of shared religion, even when they do not personally know the particular church, mosque, or temple.
5.15 Several considerations exist in pursuing religious organisations as partners, however. First and most importantly, the major religions are by no means monolithic. Cultural, ethnic and sectarian divisions amongst many of the major religions will require the lawyer to determine the particular sect of the religion to which the client belongs. When in doubt, consulting with local service providers or other experts is strongly recommended. These experts may recommend against attempting to engage religious institutions in the client’s home community, especially given considerations of whether such institutions are structured to provide the sort of liaison services needed.

5.16 Second, where such organisations in the client’s home community appears to be the best opportunity for finding an appropriate partner, the lawyer may be able to inquire with Hong Kong-based religious organisations that serve the same ethnic and sectarian community as the client’s. Again, care must be taken to ensure that the lawyer approaches the appropriate organisation. An Indian Muslim organisation is unlikely to have many useful connections to Muslim organisations in Central Java in Indonesia, for example.

5.17 Finally, even after such introductions are made, care must still be taken to ensure that these local partners fully support migrant workers and do not have conflicts of interest via ties to employment agencies or brokers in the area. Again on a practical level, not all such partners will have caseworkers on staff, so assessing capacity is also crucial.

V. International organisations

5.18 International governmental and non-governmental organisations with local offices in the client’s home country often have the most extensive networks of local partners. Introductions from these organisations can save time in the vetting process, as such local entities are likely to be known and more trustworthy. Practitioners are still encouraged to vet the organisation for sufficient capacity, however.

(A) International governmental organisations

5.19 Three governmental organisations are most involved in migrant worker issues and are likely to have access to potential local partners: the International Labour Organisation (ILO), various other branches of the United Nations, and the International Organisation for Migration (IOM). Note that these organisations’ presences in each country are likely to vary significantly, and the size of their local office and particular mission focus for that country will have a large impact on the level of help they may be able to provide in finding a local partner. While practitioners should not expect direct partnerships with these organisations, it is certainly worth inquiring whether they have caseworkers to assist, particularly where clients locate themselves near these entities’ offices. All three organisations have mission goals that include supporting greater access to justice for migrant workers. The client’s goals of just compensation will thus align with their mission and these organisations thus may be willing to provide help in finding local partners where possible.
5.20 The ILO is perhaps the most directly involved in labour migration issues in the region. Access to justice is often a high mission priority, and the organisation has partnered with governments and local labour unions to establish local migrant worker centres. Practitioners should examine the programs that the ILO has set up in the client’s country to determine whether such programs exist near the client’s current location. Where they do not, a phone consultation with ILO staff may help in identifying a reliable partner closer to the client.

5.21 The IOM frequently assists victims of human trafficking and exploitation in ensuring safe migration home and reintegration into their home communities. Those who use official IOM channels are most likely to obtain direct assistance from the IOM. These offices may have staff or volunteers who are equipped to partner with practitioners. However, lawyers should be prepared to ask IOM staff for referrals to local partner organisations instead, as their capacity may be limited.

5.22 The most relevant UN agencies are the UN Development Program (UNDP) and, where the client is female, UN Women. As of printing, the former has a stated interest in access to justice for vulnerable populations, particularly (although not exclusively) for women, while the latter works to advance women’s rights, including for migrant workers. Note that each agency has separate and varying sizes of presence in home countries, with differing priorities by country. As these organisations often contract with local universities and NGOs to implement their missions, UNDP and UN Women are both good first points of contact for referrals to reliable agencies.

5.23 International law firms may be willing to assist pro bono, should they have an office in the client’s home country. For law firms, the opportunity to assist the client can help the firm either fulfil pro bono obligations to which it has committed, or else to create a positive story of community engagement in the client’s home country. Note that many international firms will not have a firm-wide pro bono program; they will instead set their pro bono activities at a national level, particularly in countries that require the firm to partner with a local entity. Thus, firms that support migrant worker cases in Hong Kong may not necessarily do so abroad.

5.24 As always, proper vetting of the firm is important, particularly where home country offices are essentially once-separate local law firms that have formed a partnership with an international firm. Local labour brokers that supply employers in Hong Kong hire their own lawyers, and it is critical to confirm that law firms engaged in the home country are free of such conflicts of interest.
5.25 Should the firm prove appropriate, however, a law firm is one of the stronger partners that a practitioner can find. Local knowhow, experience with cross-border litigation, and sufficient capacity, including the potential for assisting in remote appearances via the firms’ own telecommunications equipment, are a few of the unique advantages that cooperating law firms can provide.
6. Establishing a partnership with a liaison organisation

6.1 Potential partner organisations usually have relatively limited capacity. Providing a clear understanding of the potential commitment will make it more likely for them to either make a commitment or else assist in finding a local partner who has sufficient capacity to assist. The following describes the vetting process, followed by the most common activities that partner organisations will need to carry out.

I. Vetting potential partners

6.2 Prior to establishing a relationship, practitioners should vet potential partners to ensure that they are not only trustworthy, but have the capacity to meet the client’s and the practitioner’s needs. The following points apply to both organisations and individual pro bono attorneys who may partner with the practitioner:

(A) What is the partner’s reputation?

6.3 Some basic background research may be sufficient to determine whether the potential partner is trustworthy. This is a key consideration in some home countries, where an organisation’s NGO status may simply be used to avoid tax liability for commercial activity. At worst, such organisations may actually have connections to unscrupulous employment agents or even human traffickers. Where information on the potential partner does not exist, practitioners should contact trustworthy entities in the client’s country to confirm that the potential partner is reliable. The International Labour Office (ILO), the International Organisation for Migration (IOM) or the UN, particularly the UN Development Program (UNDP) or UN Women, are appropriate places to start, as their staff is often knowledgeable about local organisations.

(B) Does the partner organisation have sufficient language ability?

6.4 In addition to speaking a language the lawyer understands, practitioners should confirm that the organisation has staff who speak the client’s own language or dialect. This is particularly important where the client’s first language is not the national language in their home country.

(C) Is there sufficient capacity to assist the lawyer?

6.5 Organisations and pro bono attorneys are often already at capacity. While they may be willing to help, an honest assessment of whether they have the time and resources to assist is essential, particularly where case deadlines are involved. Practitioners should carefully map out the time commitment, the potential time span of the case, and the logistical issues that partner organisations will have to address so that both sides have a clear understanding of the people, time and monetary resources required for the case. Where potential partners do not have such capacity, these entities can still be helpful in recommending other appropriate partners.
II. Creating a formal agreement with a partner

6.6 Direct service and other aid organisations are usually bound by duties of client confidentiality that are similar to those of Hong Kong lawyers. Practitioners will thus need to draw up a memorandum of understanding that authorizes cooperation, sharing of confidential client information, and procedures for transferring any monies collected in Hong Kong. The client should authorize this agreement after being fully informed of the nature of the agreement. The agreement should be in languages that the parties each understand, although this may be difficult, given resource constraints.

III. Maintaining contact with the client

6.7 Partners’ most important task is making sure that clients can remain in contact with their lawyers in Hong Kong. While a partner cannot keep a client locked into a case should she decide that she no longer wishes to pursue the matter, the relationship with the client is critical to ensuring that the client continues to trust and engage in the process.

6.8 Maintaining contact often requires only periodic phone conversations, or where possible, in-person visits between the local partner and client. Partners who are based in the client’s home community can more easily accomplish this, while clients who reside in more remote areas may need to rely upon organisations that are based in larger cities. Setting a regular check-in schedule, even when updates do not exist, is important not only in keeping the client connected, but also in building a relationship between the client and the partner.

6.9 Finally, migrant worker clients can be mobile. Both practitioners and partner organisations should be prepared for clients to move locations multiple times throughout the course of the case, including to other countries. These clients may be incredibly difficult to keep connected. For those clients who move within their own country, practitioners and partners should be prepared to find organisations in the client’s new location who can serve as the new liaison.

IV. Collecting evidence and taking depositions

6.10 Although much of the evidence for legal claims highlighted in this manual will reside in Hong Kong, clients may have taken home personal bankbooks, logs of payments, or other information vital to the case. Where evidence of dealings with brokers or employers that took place prior to the client’s departure are necessary to the case, partner organisations may need to collect such information, either from the client, the employment agency, or local government offices. Practitioners should determine what information is necessary and ensure that partner organisations have a clear understanding of what is needed, how to collect the information, and any deadline(s) that must be obeyed.

(A) Explaining critical differences in evidence collection methods

6.11 Legal systems often have different requirements for how evidence is recorded and presented. Differences can range from required level of detail to proof of authenticity requirements, to even document formatting. Practitioners must provide partners with clear instructions, and where possible, pre-formatted forms.
that can help ensure that the evidence collected is admissible in Hong Kong court. Failure to do so will result in wasted time and effort, as well as frustration for all involved. That said, practitioners should be prepared for delays and mistakes in evidence collection with new partners. Partner organisations may not be fully aware of the level of detail needed for Hong Kong forms, and may rely upon methods that are valid in their own country in carrying out their tasks.

(B) Arranging remote appearance in Hong Kong court

6.12 Clients pursuing legal claims may be required to make an appearance in court. In some cases, they can do so remotely, via video conferencing.²

6.13 As of this printing, the minimum requirements for acceptable teleconferencing equipment or location is as yet unknown for migrant worker cases. It may be possible that a Skype meeting via a strong internet connection may be acceptable. However, as the courts look to whether a location is acceptably secure,³ the court may impose additional restrictions on the form of telecommunications used.

6.14 Lawyers and their partners should therefore be prepared to locate facilities that meet the court’s requirements. The authors expect the following locations are more likely to prove acceptable:

- Universities with professional telecommunications equipment.
- United Nations facilities
- Government-run facilities
- Embassy facilities
- International law firms
- Television studios

6.15 Note that these facilities may require a fee to use. Practitioners and their partners will need to negotiate with facility owners for reduced or free use. For clients in Indonesia, the Philippines, or Thailand, please contact Justice Without Borders for assistance in locating such facilities.

²See Chapter 3, Section 4.III.B. for information on the legal requirements of remote appearances.
³Ibid.
7. Home country practitioners seeking legal assistance in Hong Kong

7.1 For entities in the client’s home country who believe that their client may have a viable claim in Hong Kong, connecting with a Hong Kong NGO, religious entity, or their own country’s embassy in Hong Kong can be an effective way to find legal assistance. This section first provides basic questions useful in assessing the viability of a client’s claims before introducing the various options for seeking legal assistance.

7.2 To determine whether your client may have a viable legal claim in Hong Kong, please first consult Chapter 2 for potential remedies. Should you believe your client has a claim and you reside in Indonesia, the Philippines, or Thailand, please contact Justice Without Borders for a free consultation.

I. Hong Kong’s legal aid scheme

7.3 The Hong Kong legal aid scheme is one of the more robust in the region. However, applying for legal aid may be somewhat complicated, and assistance from a Hong Kong based NGO or lawyer is advised. See Chapter 3, Section 3.III.(A)(vi) for more information.

II. Relevant NGOs

7.4 Hong Kong NGOs are more familiar with the law and may be able to help make a further determination whether a viable case exists. Note however that any lawyers on staff at Hong Kong NGOs are not allowed to provide legal representation. That said, these organisations may be able to assist in connecting to legal aid or a pro bono lawyer willing to take on a case:

- Christian Action
  http://www.christian-action.org.hk
- Helpers for Domestic Helpers
  http://www.hdh-sjf.org
- Hong Kong Confederation of Trade Unions (HKCTU)
  http://www.hkctu.org.hk
- Mission for Migrant Workers
  http://www.migrants.net
- Pathfinders
  http://www.pathfinders.org.hk

III. Religious organisations

7.5 Hong Kong includes institutions of most major religions, including Hinduism, Islam, Christianity, and others. Readers should consult related organisations in their own country on whether the institution may have connections with affiliated organisations in Hong Kong.

IV. Consulates in Hong Kong
7.6 Many of the countries in the region have a consulate in Hong Kong. Some of these will have a labour attaché on staff, who is tasked with helping migrant workers from their country resolve legal and other issues encountered while in Hong Kong. Please note that the capacity to help workers will vary by consulate, and that consular staff are not empowered to provide legal assistance in Hong Kong. Consulates may maintain a list of local lawyers who may be able to assist clients. These lawyers generally do not work pro bono. However, they may do so under exceptional circumstances or else provide referrals to a pro bono attorney. Note that, as is the case with other countries, pro bono attorneys in Hong Kong are often working at capacity and will likely prioritize those currently residing in Hong Kong. Seeking legal aid may be a more effective option, although it is not clear whether most consulates are equipped to help with applying for legal aid.
8. Assessing client’s claims

8.1 Caseworkers in clients’ home countries should consider the following questions in assessing a client’s potential claim. Most important are amounts of money to be claimed, the amount of evidence available, and the commitment of clients to remaining in contact with their lawyer and pursuing the case.

I. How much can the client claim?

8.2 Also known as the “amount in controversy,” clients must be able to reasonably claim a sufficiently large amount of money to overcome the costs of remote representation. Even where a client obtains legal aid, or a Hong Kong lawyer works for free, clients may still be responsible for some costs. At least some of these costs can be recovered should the client win, but the up-front costs can be expensive. Clients with proof of a Hong Kong court judgment or a settlement are good candidates for pro bono assistance, as the Hong Kong lawyer need only attempt to enforce the judgment.

II. Calculating costs

8.3 Those with unpaid wage, contract fraud, or illegal payment claims should calculate what they believe is owed, based on either written or oral evidence. Service providers should check these amounts against the evidence that the client has provided. Where the client claims that the employer orally promised a certain wage or other terms, evidence of payment or at least of hours worked will be essential to substantiating the claim.

8.4 For those injured in on the job accidents, please consult Chapter 2 for potential compensation under the Hong Kong Employees’ Compensation Ordinance (ECO) and requirements for making a claim. Those who are unable to claim under this scheme may still seek damages via civil litigation. However, costs can vary widely. Service providers should use the amounts set out in ECO as a baseline. Medical bills that can substantiate harm caused are particularly helpful. Where unsure, consultation with one of the Hong Kong entities described above is recommended.

8.5 Those who claim other damages, including assault, battery, or sexual assault, should also contact one of the Hong Kong entities above for additional assistance.

III. Assessing available evidence and procedural barriers to claims

8.6 Please see Chapter 2 for information on the evidence required for each claim. Evidence may be official documents, records that the client personally kept, phone or email records, or testimony from the client, coworkers, and/or other witnesses. Claims based entirely on oral evidence are likely very difficult to bring if the client is absent from Hong Kong.

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4 See Chapter 2 Section 5.II.(D) for details on making claims under the Employees’ Compensation Ordinance.
8.7 Time limitations are often the biggest barriers that returnees will face in bringing claims. Please note the time barriers in Chapter 3.\(^5\) Additionally, incidents that happened further in the past are more difficult to substantiate. Records are more likely to have been lost or destroyed, witnesses may have moved or disappeared, and clients' own memories may be faulty. Generally, the more recent the client’s experience, the more easily the case can be brought.

IV. Paying security for court costs

8.8 Defendants in Hong Kong civil claims may ask the court to order out-of-country plaintiffs to pay a security deposit for the defendant’s court and legal fees. It is theoretically possible to plead indigence and convince the court to waive the security deposit, but it is unclear at the time of publication the standard or rule that the courts apply in evaluating a request for a waiver when the applicant is an MDW attempting to claim from overseas.

V. Assessing the client’s interest in bringing the claim

8.9 Clients are often unaware of the time and effort involved in bringing a case, particularly remotely. Practitioners should fully inform the client that regular communication will be essential, and that claims can take six months to two to three years before the case concludes. However, by breaking the process down into smaller, more manageable steps, practitioners can provide a sense of progress even though it is tempered with the possibility that the client may not be able to recover in the end.

8.10 Finally, in terms of potential outcomes, clients should be aware of all possibilities, from obtaining a settlement relatively rapidly to cases going through both trial and appeal. At the same time, practitioners should inform the client that they do not need to immediately make such a long term commitment to the case. Should an initial assessment suggest the client has a viable claim, practitioners should start by offering to investigate on the client’s behalf. The act of simply following up on a potential claim can be very helpful for clients, giving them a sense that others are working on their behalf. This can contribute to their recovery from exploitation, whether or not they are ultimately able to recover in the end. In some circumstances, initial negotiations with the employer may lead to a settlement to the client’s satisfaction. As unscrupulous employers usually rely upon the client’s departure to end any legal complaint, the presence of a lawyer representing an overseas client may convince the employer to settle in order to avoid further legal headaches.

9. Conclusion

9.1 A reliable partner in the client’s home community can make the difference between a successful case and another case that ends in disappointment. While the legal and procedural hurdles are very real, the non-legal issue of client contact is the most critical to address in making cross-border litigation a reality for migrant workers. Finding a reliable partner who has the time and capacity to support the litigation can be difficult, but the avenues introduced in this chapter should provide

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\(^5\) See Chapter 3, Section 3.I. Table 3-1 and Chapter 3, Section III.(B) for an overview and discussion of the limitation periods of different claims.
a starting point in finding a suitable counterpart. Justice Without Borders can also serve as a helpful resource in the countries in which it works, including Thailand, The Philippines and Indonesia. Service providers in those countries with clients returning from Hong Kong can also contact the organisation for a free consultation. As the field of cross-border pro bono litigation develops, JWB will update this manual, providing additional know-how in finding and working with partners abroad.