

A Practitioner's Manual for Migrant Workers: Pursuing Civil Claims in Hong Kong and from Abroad

First Edition

Published by Justice Without Borders

*In partnership with the Human Rights in Practice Course
(University of Hong Kong Faculty of Law)*

Authors and Editors

Sau Wei CHAN (Stephanie)	Douglas MACLEAN
Natthaya CHUTINIMITKUL (Tang)	Hui Ching WONG (Anson)
Lindsay ERNST	Courtney SO
Chun San LAM (Jonathan)	Eugena TONG
Hui Wai LEUNG (Cody)	Pui Ying TSANG (Catherine)
Fiona LI	Marine ULDRY
Laura LIPINAITE	Tiffany WONG
Stephanie LOK	

With Additional Research and Writing by

Jakub BREKA	Vandanet HING
Joyce KWOK	Saroj NAIR

© 9 December, 2015

All rights reserved. No part of this book may be reproduced in any form or by electronic or mechanical means including information storage and retrieval systems without written permission from Justice Without Borders.



Funding in part by:

United Nations Development Programme
(UNDP)

International Labour Organization Forced
Labour Action in the Asian Region Project
(FLARE)

DISCLAIMER

This manual contains brief general information on the law, which is provided by volunteer lawyers with Justice Without Borders (JWB) and is accurate as of December 2015. The information is provided as a public service by JWB. While it is derived from sources believed to be reliable and accurate, JWB does not make any representation or warranty as to the accuracy of the information. JWB and its representatives also do not accept any responsibility for errors or omissions in the information provided. The information provided is not a definitive analysis of the subject, and professional legal advice should be taken before any course of action is pursued.

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.

ACKNOWLEDGEMENTS

This manual would not have been possible without the feedback of expert lawyers, professors, and direct service providers in the field.

In no particular order, we would like to thank Herbert Smith Freehills and Dechert LLP for the countless hours their lawyers donated to editing and providing feedback on the legal substance of the manual; Zoe LESTER for intensively reviewing the initial completed draft; Lindsay ERNST for providing her clinic students and for reviewing successive versions of the manual; Professor Carol TAN for providing a compelling introductory chapter to our manual, and Professor Rick GLOFCHESKI, Rob CONNELLY, Manisha WIJESINGHE of Daly and Associates, Holly ALLAN, Tania SIM, Michael VIDLER, Leo TANG, Fish IP, Lenlen MESSINA, and others too modest to accept a thank you by name for kindly sharing their experiences and information on the issues and law in practice.

We would also like to thank Helpers for Domestic Helpers, Christian Action, the Hong Kong Confederation of Trade Unions, the International Federation of Domestic Worker Unions and the Equal Opportunity Commission for sharing information and experiences from their years of serving migrant domestic workers, and we look forward to continuing to support their work as partners.

Finally, we would like to thank the University of Hong Kong Faculty of Law, and Lindsay ERNST in particular, without whom this manual would not exist. They are amazing partners, and their students have been integral as Pro Bono Research Fellows at JWB.

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. Additionally, 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 with your feedback.

Douglas MacLean
Executive Director
Justice Without Borders

TABLE OF CONTENTS

CHAPTER 1: AN INTRODUCTION TO HONG KONG'S MIGRANT DOMESTIC WORKERS.....	1
1. Editorial preface	1
2. Introduction	2
3. Globalisation and the History of Migrant Workers in Hong Kong	3
4. Media Stereotypes.....	6
5. Migrant Domestic Workers as Contributors to Hong Kong's Economy and Society	7
6. Migrant Domestic Workers as World Travelers	9
7. Migrant Domestic Workers As Litigants	13
CHAPTER 2: COMMON LEGAL PROBLEMS AND AVAILABLE REMEDIES	16
1. Interpretation	19
Abbreviations	19
Commonly used concepts	19
2. Introduction	21
3. Circumstances where MDWs come in contact with contracts	22
I. Types of contracts MDWs may enter into.....	22
II. Standard Contract.....	23
4. Disputes	24
I. Validity and Factors that can Void a Contract	24
(A) Duress.....	24
(B) Undue Influence	27
(C) Unconscionable bargain	30
(D) Misrepresentation	32
II. Remedies When a Contract is Voidable	38
(A) Availability of remedies	38
(B) Bars to rescission in general	40
III. Variation of contract.....	42
(A) Challenging or enforcing varied terms	42
(B) The collateral term or collateral contract.....	43
(C) Common scenarios in the MDW context involving variation of contract and enforceability	44
IV. Monetary employment disputes	49
(A) Underpayment, non-payment, or late payment of sums owed.....	49
(B) Underpayment and non-payment of wages due.....	50
(C) Late payment of wages due.....	50
(D) Non-payment of wages owed for work on rest days and non-payment of holiday pay and	50
annual leave pay.....	50
(E) Non-payment of severance pay.....	51
(F) Maternity protection	53
(G) Dismissal	54

V.	Remedies	58
(A)	Legislative provisions under the EO	58
(B)	Common law.....	60
(C)	Signing a settlement agreement to accept fewer benefits	61
VI.	Over-charging agency fees	62
VII.	Invalidating loan agency loans	63
(A)	Statutory remedies for entering into loan contracts with a substantially high interest rate	64
(B)	Common law remedies for entering into loan contracts.....	64
VIII.	Non-monetary employment disputes	65
(A)	Actions that breach the Standard Contract.....	65
(B)	Breach of implied terms	66
5.	Injuries	68
I.	The Tort of Deceit	68
(A)	Considerations for bringing a claim under the tort of deceit	68
(B)	What is a false representation?.....	68
(C)	Establishing the tort of deceit	69
(D)	Can the defendant reduce or escape liability?	71
(E)	Remedies for the Tort of Deceit	71
II.	Unintentional harms / accidents	72
(A)	Introduction.....	72
(B)	Claims under the Tort of Negligence at common law	73
(C)	Claims in Occupier’s Liability under the Occupiers’ Liability Ordinance.....	79
(D)	Employees’ Compensation Ordinance (ECO).....	81
III.	Intentional harms	87
(A)	Damages	87
(B)	Claims for intentional physical harm	88
(C)	Claims for intentional wrongful detention (false imprisonment).....	90
(D)	Claims for harassment and intimidation	92
(E)	Defences for Various Tort Claims	95
(F)	Remedies for the tort of trespass to the person	96
6.	Conclusion	98
7.	Black letter law and case analysis	99
I.	Employees’ Compensation Ordinance (Cap. 282)	99
II.	Employment Ordinance (Cap. 57)	102
III.	Immigration Ordinance (Cap. 115)	118
IV.	Intentional harms	119
(A)	Assault	119
(B)	Battery.....	119
(C)	False Imprisonment	120
(D)	Tort of deceit	120
V.	Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)	121
VI.	Limitation Ordinance (Cap. 347)	122
VII.	Misrepresentation Ordinance (Cap. 284)	123
VIII.	Money Lenders Ordinance (Cap. 163)	124
IX.	Negligence	126
(A)	Breach of Duty	126
(B)	Illegality Defence	126

(C)	Negligence	127
(D)	Omission of a Safe System of Work	127
(E)	Primary Psychiatric Injury	128
(F)	Unknown Cause of Accident	129
X.	Occupier’s Liability Ordinance (Cap. 314)	130
(A)	Breach of Common Duty of Care in Occupiers’ Liability	130
(B)	Identifying Defendant Occupier	130
(C)	Identifying Plaintiff Visitor	131
XI.	Race Discrimination Ordinance (Cap. 602)	132
XII.	Remedies for Trespass to the Person	133
(A)	Summary of damages claimed and awarded:	133
(B)	Summary of damages claimed and awarded:	134
(C)	Summary of Damages Claimed and Awarded:	136
XIII.	Remedies under contract law	137
(A)	Remedies under contract law	137
XIV.	Sex Discrimination Ordinance (Cap. 480)	140
XV.	Standard Contract (Sample)	142
XVI.	Statutory Provisions For Entitlements Upon Termination of Contract	146
(A)	Termination Payments	146
(B)	The Right to Severance or Long Service Payment	146
(C)	Amount of Severance Payment or Long service payment (s31V)	147
XVII.	Unconscionable Contracts Ordinance (Cap. 458)	148
CHAPTER 3: PROCEDURES FOR PURSUING REMEDIES		151
1.	Introduction	151
2.	Overview of the available routes to remedy for MDWs	152
I.	Negotiating with the employer or agent	152
II.	Letter before action	152
III.	Bringing a claim in Hong Kong’s civil courts	153
IV.	Lodging a complaint with the Equal Opportunities Commission (EOC)	153
3.	Legal options available to MDWs in Hong Kong	154
I.	Introduction	154
II.	Employment related monetary claims	157
(A)	Minor Employment Claims Adjudication Board	157
(B)	Labour Tribunal (LT) – Employment-related claims exceeding HK\$8,000	158
III.	Monetary claims unrelated to wages	166
(A)	Small Claims Tribunal (“SCT”) – Claims not exceeding HK\$50,000	166
(B)	District Court – Claims exceeding HK\$50,000	175
IV.	Discrimination claims – Lodging a complaint with the Equal Opportunities Commission	188
(A)	Advantages to using the EOC	189
(B)	Limitations to the EOC	190
(C)	Immigration issues	190
(D)	Lodging a complaint	190
(E)	Pursuing a complaint	191
4.	Legal options available to MDWs overseas	192
I.	Introduction	192
II.	Immigrations issues	192

(A)	Staying in Hong Kong.....	192
III.	Possible use of the Technology Court (TC)	193
(A)	Justifiable Reasons to use the TC	194
5.	General procedures to bring claims	197
I.	Evidence	197
(A)	General principles.....	197
(B)	Evidence to be collected.....	199
II.	Settlement.....	200
(A)	Without prejudice negotiations.....	200
(B)	Sanctioned Offer / Payment	200
III.	Enforcement of judgments	202
(A)	Enforcement proceedings	202
(B)	Enforcement of Judgment During Appeal	206
6.	Conclusion	207
7.	Black letter law and case law analysis.....	208
I.	District Court	208
(A)	District Court Civil Procedure (Fees) Rules Cap 336C	208
(B)	District Court Ordinance Cap 336	210
(C)	The Rules of the District Court Cap 336H	212
(D)	The Rules of the Supreme Court.....	217
II.	Enforcement Proceedings	218
(A)	High Court Ordinance Cap 4	218
(B)	Hong Kong Court of Final Appeal Ordinance Cap 484	220
(C)	Rules of the High Court Cap 4A	221
III.	Labour Tribunal	223
(A)	Labour Tribunal (Fees) Rules Cap 25B	223
(B)	Labour Tribunal Ordinance Cap 25	224
IV.	Minor Employment Claims Adjudication Board	233
(A)	Minor Employment Claims Adjudication Board Ordinance Cap 453.....	233
V.	Sanctioned Offer / Payment	234
(A)	Rules of the High Court Cap 4A	234
VI.	Security for Costs.....	236
VII.	Small Claims Tribunal	238
(A)	Labour Tribunal (General) Rules Cap 25A.....	238
(B)	Limitation Ordinance Cap 347	239
(C)	Small Claims Tribunal (Fees) Rules Cap 338B	241
(D)	Small Claims Tribunal Ordinance Cap 338	242
(E)	The Rules of the High Court Cap 4A.....	247
VIII.	Technology Court.....	248
(A)	Practice Direction 29	248
(B)	Reason to Use Technology Court.....	249
CHAPTER 4: FINDING LOCAL PARTNERS		251
1. Introduction		251
2. Major challenges in remote representation		251
I. Telecommunication challenges.....		252

II.	Language barriers	252
III.	Cultural differences and lack of understanding about the legal process	252
IV.	Time and availability.....	252
3.	How a local partner can support remote representation	252
I.	Advantages of having a local partner.....	253
II.	Legal, paralegal, and non-law practitioners as partners.....	253
4.	Preparing for remote representation.....	253
I.	For clients who have not yet left Hong Kong.....	253
(A)	Obtain relevant contact information in the client’s destination	253
(B)	Explain and provide a written copy of the expected next steps	254
(C)	Complete procedures that require the client’s presence.....	254
II.	For clients who are or have already returned home.	255
(A)	Clients in Hong Kong who must return immediately.....	255
(B)	Potential clients who make first contact from abroad	255
5.	Avenues to finding a partnering organisation in the client’s home country	256
I.	National bar associations.....	256
II.	Law faculty (legal clinics)	257
III.	Community-based and non-governmental organisations (CBOs and NGOs)	257
IV.	Relevant religious institutions	258
V.	International organisations	258
(A)	International governmental organisations	258
6.	Establishing a partnership with a liaison organisation	260
I.	Vetting potential partners	260
(A)	What is the partner’s reputation?	260
(B)	Does the partner organisation have sufficient language ability?	260
(C)	Is there sufficient capacity to assist the lawyer?	261
II.	Creating a formal agreement with a partner	261
III.	Maintaining contact with the client.....	261
IV.	Collecting evidence and taking depositions	262
(A)	Explaining critical differences in evidence collection methods	262
(B)	Arranging remote appearance in Hong Kong court.....	262
7.	Home country practitioners seeking legal assistance in Hong Kong.....	263
I.	Hong Kong’s legal aid scheme.....	263
II.	Relevant NGOs	263
III.	Religious organisations	263
IV.	Consulates in Hong Kong	264
8.	Assessing client’s claims	264
I.	How much can the client claim?	264
II.	Calculating costs	264
III.	Assessing available evidence and procedural barriers to claims	265
IV.	Paying security for court costs	265
V.	Assessing the client’s interest in bringing the claim	265
9.	Conclusion	266

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,¹ 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 For specific guidance on techniques for cross-cultural advocacy when working with migrant domestic workers, see Justice Without Borders, *A Practitioner's Manual for Migrant Workers: Pursuing Civil Claims in Singapore and From Abroad* (Singapore: Justice Without Borders, 2014), pp. 12 – 18.

BEYOND MEDIA STEREOTYPES: HONG KONG'S MIGRANT DOMESTIC WORKERS AS TRAVELLERS AND LITIGANTS

by Carol G.S. Tan

Professor of Law, SOAS, University of London

2. Introduction

- 2.1 Few visitors to Hong Kong fail to notice its army of female migrant domestic workers.³ Although domestic work is almost unique in that it occurs mainly in the privacy of the home, Hong Kong's migrant domestic workers ("MDW")⁴ 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 facilities⁵ 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.⁶ 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.

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://hkhelppercampaign.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.

⁶ Carol G.S. Tan, "How Dewi Became a Litigant: Migrant Domestic Workers as Litigants in Hong Kong", *SEARC, City University of Hong Kong, Working Papers*, No. 153 (2014), p 2.

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”.⁷ It is now a top destination for MDWs, boasting one of the highest densities of MDWs in the world.⁸ 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.⁹
- 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.¹⁰ 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.¹¹
- 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”.¹²
- 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,

⁷ Census and Statistics Board, Hong Kong Government 1995, F2.

⁸ Lily Kuo, "How Hong Kong's 'maid trade' is making life worse for domestic workers throughout Asia", *Quartz*, 19 February 2014, <http://qz.com/176354/how-hong-kong-maid-trade-is-making-life-worse-for-domestic-workers-throughout-asia/> [visited on 26 October 2015].

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* (Cammack, 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 acceding to pressure from employers who express the need for migrant labour, because of domestic labour shortages.

¹¹ W.R. Böhring, *Employing Foreign Workers: A Manual on Policies and Procedures of Special Interest to Middle-And Low-Income Countries* (Geneva: ILO, 1996), p 1.

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 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

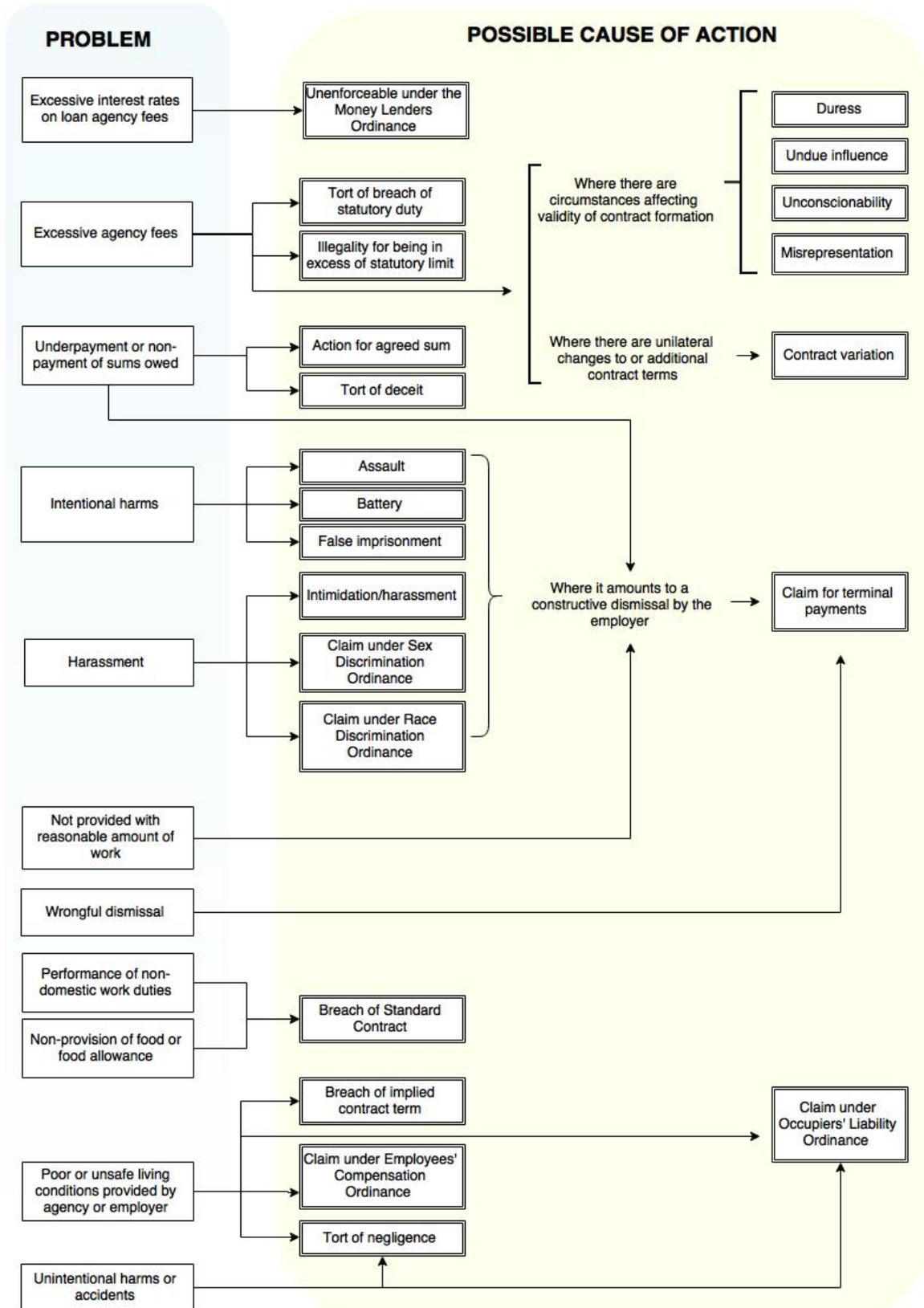


Chart 2-2: Voiding a Bad Contract - An overview of “vitiating factors” in a contract

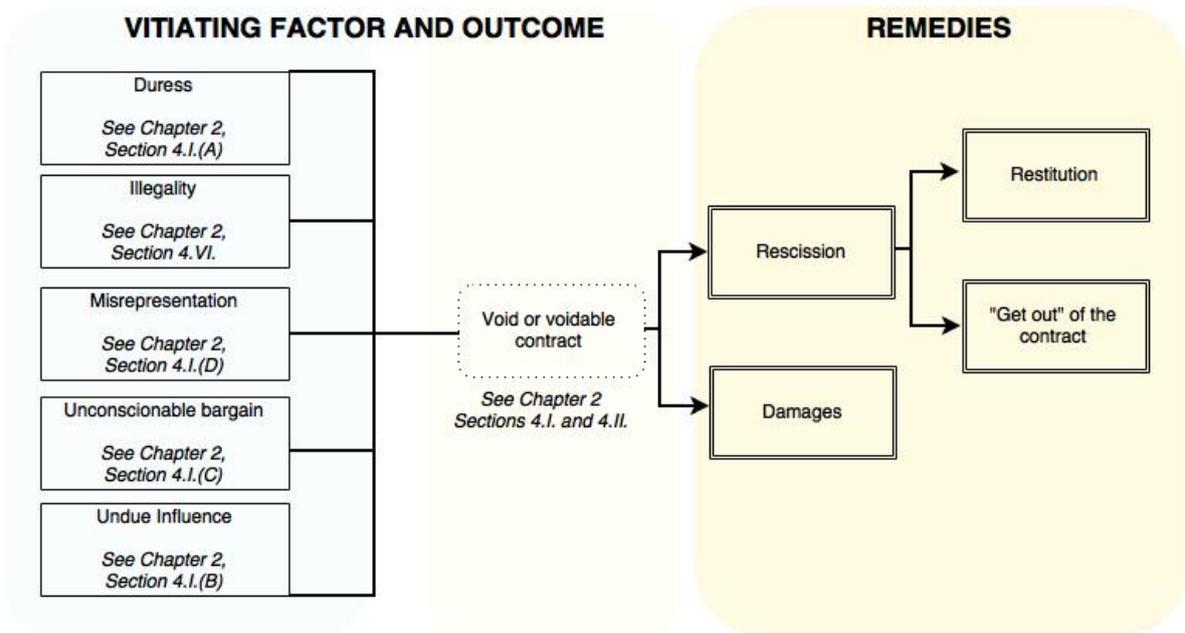
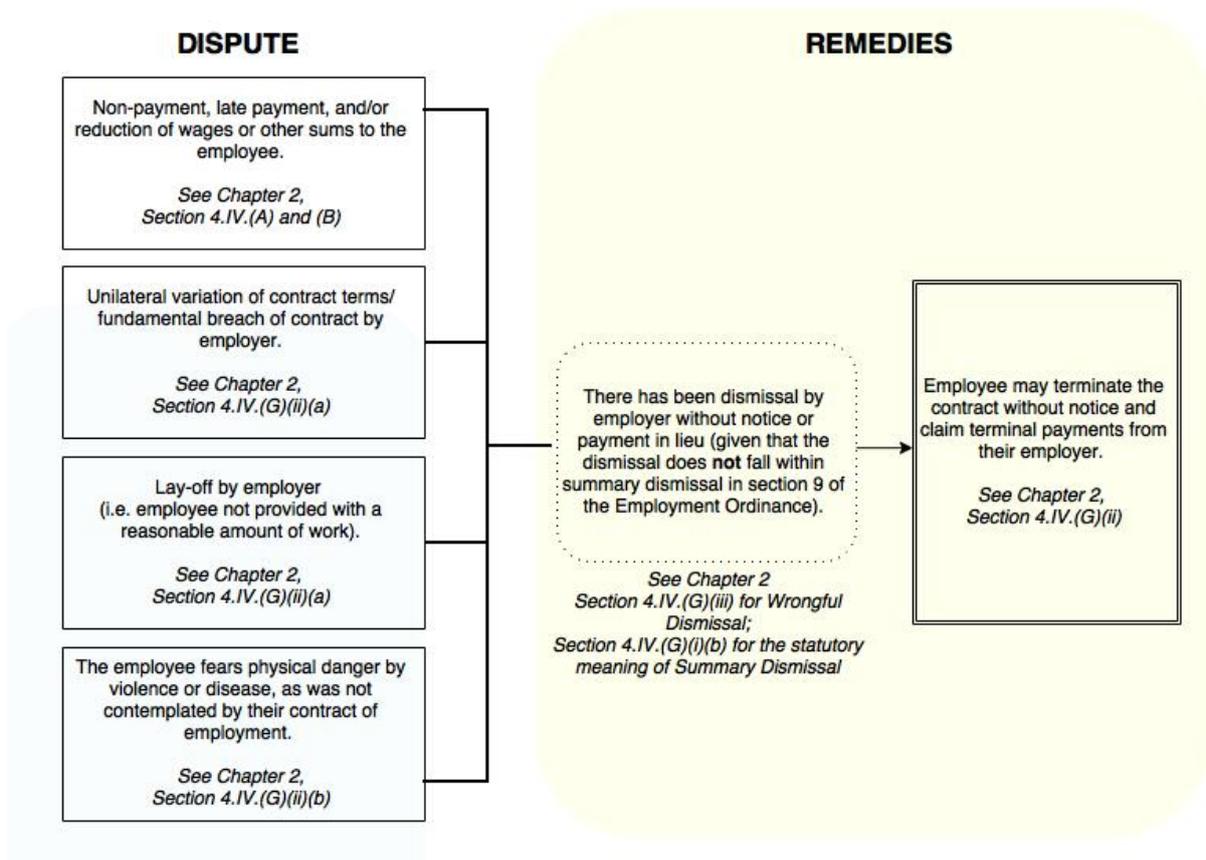


Chart 2-3 Common monetary and non-monetary disputes between migrant domestic workers and employers



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.
- 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.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.¹⁷ In the right circumstances, such pressure may amount to duress, which constitutes a legal defense to a binding contract coming into force.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.¹⁹ See Chapter 2, Section 4.II.(B), for barriers to setting aside contracts.

¹⁶ Fisher, Michael J. & Greenwood, Desmond G., *Contract Law in Hong Kong*, Hong Kong University Press, Second Ed., 2011. Para 8.5.1.1.

¹⁷ Hong Kong Helpers Campaign, *Our 3 Campaign Points*. Available at <http://hkhelperscampaign.com/en/illegal-agency-fees/>. (visited 25 September 2015); Lee, Peggy W.Y. & Petersen Carole J, *Forced Labour and Debt Bondage in Hong Kong: A Study of Indonesian and Filipina Migrant Domestic Workers*. (2006) Available at <https://www.law.hku.hk/ccpl/pub/Documents/16-LeePetersen.pdf>. (visited 26 September 2015).

¹⁸ *Estinah v Golden Hand Indonesian Employment Agency* [2001] 4 HKC 607. See Chapter 2, Section 7.II. for a brief summary of the case.

¹⁹ Chen-Wishart, M. (2015). *Contract Law*. Oxford: Oxford University Press, at 323.

(i) General definition

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

4.9 **Table 2-6: Types of duress claims**

Type	Definition	MDW Examples
Duress to the person	Actual or threatened physical violence to a person, or the unlawful constraint of a person (or their family) in order to induce contractual relations.	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.
Duress to goods	Actual or threatened violence to, or the unlawful detention of, a person’s goods to induce contractual relations.	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.
Economic duress	The use of illegitimate economic, commercial, or financial pressure to induce contractual relations.	An MDW’s employer threatens to reduce the MDW’s wages unless they agree to vary certain terms of the employment contract. ²¹

(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.

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.”

²¹ *Estinah v Golden Hand Indonesian Employment Agency* [2001] 4 HKC 607. See Chapter 2, Section 7.II. for a brief summary of the case.

²² *R v Attorney General for England and Wales* [2003] UKPC 22.

²³ *Pao On v Lau Yiu Long* [1980] AC 614.

Table 2-7: Elements of duress

Element	Illustration
Causation	<ul style="list-style-type: none"> ● 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 them, the MDW would not have entered into the relevant contract.²⁵
Illegitimate pressure	<p>In establishing illegitimacy, relevant factors include:</p> <ul style="list-style-type: none"> ● 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 authorities²⁹); ● 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

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.

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.

Element	Illustration
Lack of a practical alternative	<ul style="list-style-type: none"> • 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 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.

³² Huyton SA v Peter Cremer GmbH [1999] 1 Lloyd's Rep. 620, 638.

³³ Hennessy v Craigmyle & Co Ltd [1986] I.C.R. 461, 468.

³⁴ Estinah v Golden Hand Indonesian Employment Agency [2001] 4 HKC 607, para 4. See Chapter 2, Section 7.II. for a brief summary of the case.

³⁵ M. J. Fisher and D. G. Greenwood, Contract Law in Hong-Kong, (Hong-Kong: Hong-Kong University Press, 2007), p 262; G. Treitel, The Law of Contract (London: Sweet & Maxwell, 2005), p 408.

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.

- the injury is a deliberate self-injury by the employee;³⁵¹
- the employee has misrepresented to the employer that he was not suffering, or had previously suffered, from a similar injury;³⁵² and
- 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.³⁵³

(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.³⁵⁴
- 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.³⁵⁵

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.

³⁵¹ Section 5(2)(b), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

³⁵² Section 5(2)(c), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

³⁵³ Section 5(2)(d), ECO (Cap 282). See Chapter 2, Section 7.I. for the text of the law.

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).

(iv) Types of compensation and maximum amount claimable**Table 2-13: Types of compensation and maximum amount claimable**

Type of Compensation	Amount Claimable
Medical expenses and cost of medicines	<ul style="list-style-type: none"> A maximum of \$200 or \$280 per day See Table 2-14 below
Permanent partial incapacity	<ul style="list-style-type: none"> [Amount of compensation due to permanent total incapacity] x [% of permanent loss of earning capacity]; OR A maximum of \$511,700 if, due to the injury, the MDW is unable to perform the essential actions of life without the assistance of another person. See Table 2-15 below
Permanent total incapacity	<ul style="list-style-type: none"> 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. See Table 2-16 below
Injury resulting in death	<ul style="list-style-type: none"> 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. See Table 2-17 below

5.83 **Payment of medical expenses and cost of medicines:**³⁵⁶ 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,³⁵⁷ a registered Chinese medicine practitioner, or a registered dentist, until they certify that no further treatment is required.³⁵⁸

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).

Table 2-14: Daily maximum medical expenses payable by an employer³⁵⁹

The medical expenses for each day an employee stays in the hospital and is given medical treatment as an in-patient.	\$200
The medical expenses for each day an employee is given medical treatment other than as an in-patient in a hospital.	\$200
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-patient in a hospital.	\$280

- 5.84 **Compensation for temporary incapacity:**³⁶⁰ 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.³⁶¹ However, given that an MDW is only entitled to work for one employer, this is likely to be the full amount.³⁶²
- 5.85 The periodic payment shall be payable on the same days as wages would have been payable.³⁶³
- 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.³⁶⁴
- 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.³⁶⁵

Table 2-15: Calculation of compensation for permanent partial incapacity

Amount of compensation due to permanent total incapacity	X	% of permanent loss of earning capacity
---	---	--

- 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.³⁶⁶ The Court may award:
- an amount up to HK\$511,700 that it considers necessary;³⁶⁷ or

³⁵⁹ Schedule 3, ECO (Cap 282). See Chapter 2, Section 7.1. for the text of the law.

³⁶⁰ Section 10, ECO (Cap 282). See Chapter 2, Section 7.1. for the text of the law.

³⁶¹ Section 10(1), ECO (Cap 282). See Chapter 2, Section 7.1. for the text of the law.

³⁶² Standard Employment Contract (ID 407) Clause 4(b); see Chapter 2, Section 7.XV.

³⁶³ Section 10(3), ECO (Cap 282). See Chapter 2, Section 7.1. for the text of the law.

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.

- 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.³⁶⁸

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

Table 2-16: Calculation of compensation for permanent total incapacity

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

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.³⁷⁰

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

Age of Deceased Employee	Amount of Compensation	
Under 40	84 months' earnings, OR	Minimum amount of compensation, whichever is higher - For injuries suffered or prescribed occupational
40 to under 56	60 months' earnings, OR	

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.

³⁶⁹ Section 7, ECO (Cap 282); see *A Concise Guide to the Employees' Compensation Ordinance* (n. 183 above) p 10.

³⁷⁰ Section 6 (1)&(2), ECO (Cap 282); Labour Department, *A Concise Guide to the Employees' Compensation Ordinance* (n. 191 above) p.16.

Chapter 3

PROCEDURES
FOR
PURSUING REMEDIES



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 favour 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 fulfil 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.

Chart 3-1 Overview of civil claim options in Hong Kong

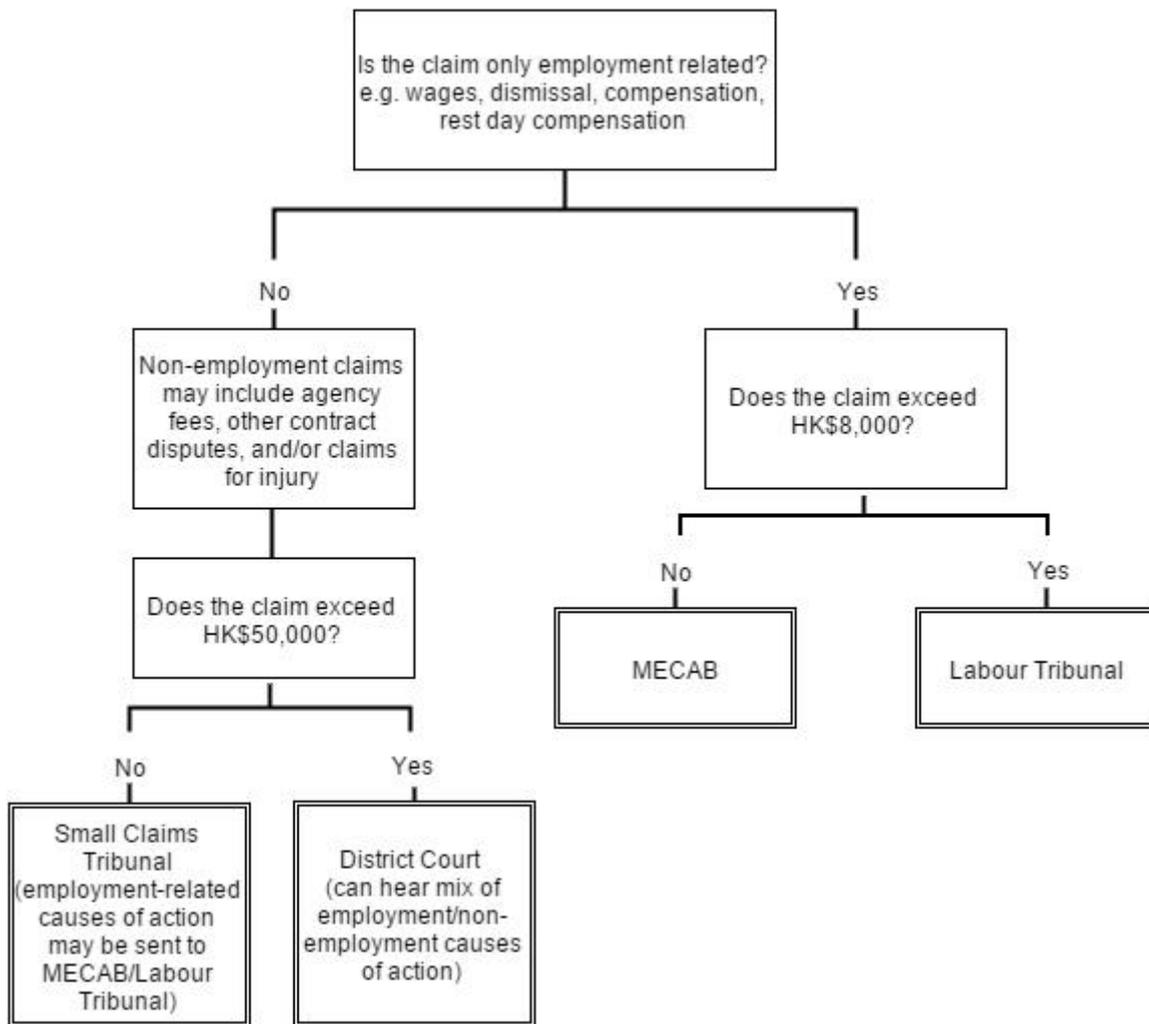
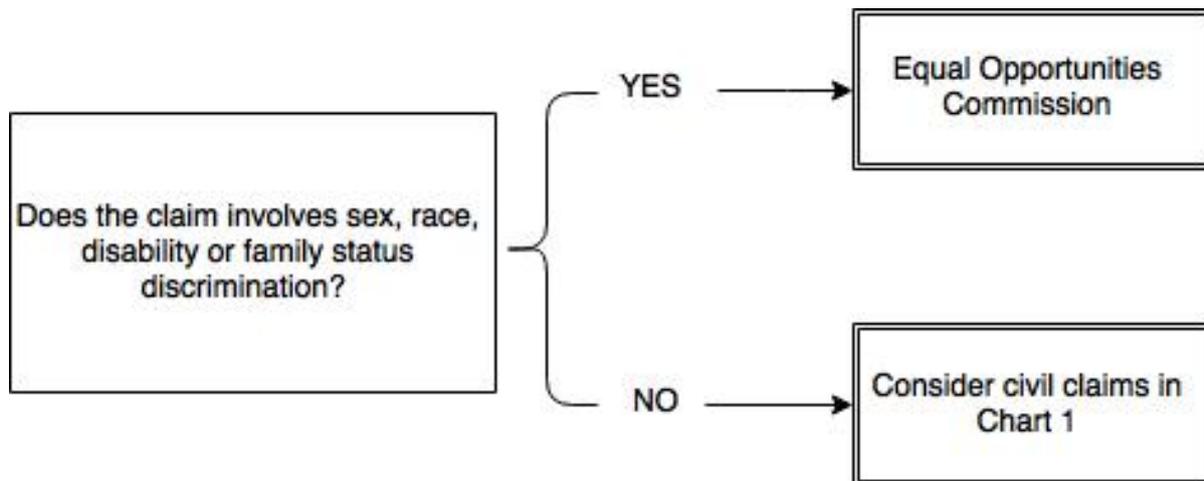


Chart 3-2: Filing a complaint with the EOC



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: