

Guide to proceedings in the Competition Tribunal: Follow-on action

This leaflet is designed to provide you with a brief outline of the practice and procedure of follow-on proceedings in the Competition Tribunal (“the Tribunal”).

The principal governing legislation is the Competition Ordinance, Cap. 619 (“CO”). The practice and procedure of the Tribunal is mainly governed by the Competition Tribunal Rules (“CTR”) and the Competition Tribunal Practice Directions (“CTPD”) No.1 and No.2. Where the CO and CTR make no provision for a matter, the Rules of High Court (“RHC”) apply to all proceedings, so far as they may be applicable to that matter. Therefore, you should read CTR, CTPD as well as the relevant RHC for full details.

This leaflet is for general reference only and should not be treated as a complete or authoritative statement of law or the practice of the Tribunal. Whilst every effort has been made to ensure that the information provided in this leaflet is accurate, it does not constitute legal or other professional advice. The Judiciary cannot be held responsible for the content of this publication.

1. What should be considered before commencing follow-on action in the Tribunal?

If you are a litigant in person, it is advisable that you read this pamphlet carefully before you commence an action in the Tribunal.

Follow-on action

You should ask yourself the following questions before commencing follow-on action in the Tribunal:

1. Am I entitled to bring a follow-on action?
2. Am I within time to commence the action?
3. Can I settle the disputes without going to the Tribunal?
4. Will I get my money?
5. What are the expenses?
6. Can I afford the time?
7. Will I need a solicitor?

1.1 Am I entitled to bring a follow-on action?

You have to ascertain if you are a person who has suffered loss or damage as a result of any act that has been determined to be contravention of a conduct rule. If so, you have a right of action under the CO against

- (a) any person who has contravened or is contravening the rule; and
- (b) any person who is, or has been, involved in that contravention.

An act is taken to have been determined to be a contravention of a conduct rule if a person has made an admission, in a commitment that has been accepted by the Commission, that the person has contravened a conduct rule.

The fact that the Tribunal or another court has already found that the defendant has contravened a conduct rule does not mean that you need not prove your case. To do this, you have to find out the date and decision of the Tribunal / Court of First Instance / Court of Appeal / Court of Final Appeal or the admission in a commitment and the date of acceptance by the competition authority on which you rely to establish a contravention of a conduct rule.

1.2 Am I within time to commence the action?

Generally, you cannot bring a follow-on action within the appeal period of a determination. Section 111(1) of the CO provides that the periods during which proceedings for a follow-on action may not be brought are—

- (a) in the case of a decision of the Tribunal, the period during which an appeal may be made to the Court of Appeal under section 154;
- (b) in the case of a decision of the Court of First Instance, the period during which an appeal may be made to the Court of Appeal; and
- (c) in the case of a decision of the Court of Appeal, the period during which a further appeal may be made to the Court of Final Appeal,

and, where any such appeal or further appeal is made, the period specified in paragraph (a), (b) or (c) includes the period before the appeal is determined.

Despite that, you may apply for permission to bring a follow-on action within any period specified in section 111(1) of the CO.

However, you cannot bring a follow-on action more than 3 years after the earliest date on which the action could have been commenced following the expiry of a relevant period specified in section 111(1) of the CO.

1.3 Can I settle the disputes without going to the Tribunal?

Legal action should be your last resort. You should first consider other ways to settle the disputes. For example, you could write a demand letter to the putative defendant. In your letter, state the amount of damages or other reliefs that you are claiming with brief reasons, what steps you have already taken to recover it (if any) and give him the warning that if he does not accede to your demand by the date you designate, you will take out legal action against him. Sometimes this warning will encourage him to pay and you do not have to go to the Tribunal. Keep a copy of your letter and any reply. If you have to go to the Tribunal, you may have to use them as evidence.

You may also consider using other alternative ways such as mediation to resolve the dispute. If you want to know more about mediation, you can read the leaflet “What is Mediation” published by the Judiciary.

1.4 Will I get my money?

It is important to consider whether the person, firm or company you are claiming from is likely to be able to pay. If they

- are unemployed or bankrupt;
- have no money of their own; no personal property and nothing else of value belonging to them (such as a car, which is not hired or subject to a hire purchase or lease agreement);
- ceased to trade;
- have other substantial debts to pay; or
- **are already subject to claims by others, and has not paid,**

you may not be able to get your money. You may consider accepting instalments over a period of time. You may also negotiate with your debtor for payments by instalments without going to the Tribunal.

If the person is bankrupt or the company is wound up, you will probably not get your money. You can contact the Official Receiver’s Office at 10th Floor, Queensway Government Offices, 66 Queensway, Hong Kong (by telephone 2867 2448 or by fax 3105 1814). They will tell you if the person is bankrupt or the company in compulsory liquidation, which means that the company has stopped trading and probably has neither money nor other assets.

Remember, even if you win your case and obtain judgment, there is no guarantee that you will get the money you claim and the costs you incur for the case.

1.5 What are the expenses?

You will usually need to pay a filing fee to the Tribunal to start your claim.

You may also need to obtain a report from an expert and ask this expert to come to the Tribunal to give evidence on your behalf. You will have to pay expert's expenses and charges.

If you engage a solicitor or barrister, you will usually have to pay for fees and the expenses yourself. If you lose, you may have to bear the expenses of the defendant.

1.6 Can I afford the time?

You will need to take time to prepare your case. For example, you will have to put together copies of all relevant documents or spend time getting statements from witnesses. You will probably be required to attend hearings at the Tribunal.

1.7 Will I need a solicitor?

You may act by a solicitor or in person. You need evidence, for example, what loss or damage you have suffered as a result of any act that has

been determined to be a contravention of a conduct rule. You have to prepare witness statements. You will also need to make a realistic assessment of the amount of damages you are seeking. It may save time and money to first ask a solicitor if it is worth your making a claim and, if it is, how best to prepare it, what evidence you need and what amount of damages to ask for.

If you are claiming on behalf of a company, you will need a solicitor to represent you.

Please be reminded that legal aid is **not** available to proceedings before the Tribunal. You may be able to get free legal advice through the Free Legal Advice Scheme of the Duty Lawyer Service at some District Offices. For details, please refer to the website of the Duty Lawyer Service at <http://www.dutylawyer.org.hk>. The pro-bono scheme of the Bar Association may also give you some help. Its office is situated at LG2 Floor of the High Court Building.

Where the parties are limited companies

If any of the parties is a limited company, it has to be represented by a solicitor unless leave is granted by the registrar of the Tribunal (“the Registrar”) for a director to represent the company. The application has to be made to the Registrar. It has to be supported by affidavit or affirmation made by its director exhibiting a board resolution of the company authorizing the director to represent the company in the

proceedings. The reasons should be stated and the documents in support must be exhibited. Whether to grant the leave or not is purely the discretion of the Registrar. The applicant cannot appeal against this decision.

You may make enquiries about the application from our staff member at the Tribunal Registry.

If you have considered all the questions above and decide to take your matter to the Tribunal for resolution, you should pay attention to other things for hearings before the Tribunal. You can refer to the leaflets under the Guide published by Judiciary for the litigants in the Court of First Instance and District Court. However, you should bear in mind that they deal with proceedings in the High Court and District Court and thus certain matters referred to in those leaflets may not be applicable to the proceedings before the Tribunal. Further, the leaflets can only give you a general idea of what is likely to happen. They cannot explain everything about the Tribunal rules, costs and procedures, which may affect different types of claim in different ways.

2. Things you should pay attention to if you decide to commence follow-on action

Settlement

2.1 After the commencement of the action, you may consider using the procedures called “sanctioned offer” and “sanctioned payment” to settle the dispute with the other party in a follow-on action. If you want

to know more about such procedures, you can read Leaflet 8 of the Guide “How to shorten legal proceedings: Sanctioned offers and sanctioned payments”. You should also note that if the claim is only for payment of money, the defendant may make an admission of liability to pay and request for time to pay. If you want to know more about this procedure, you can read Leaflet 7 of the Guide “How to shorten legal proceedings: Order 13A admissions in monetary claims”.

Preparation for the proceedings

2.2 If you have to resort to the Tribunal to solve the disputes and you have to act in person, then you should get full preparation for the proceedings.

You need to:

1. Gather the evidence to support your case.
2. Prepare the originating notice of claim (Form 8 in the schedule to the CTR) and other necessary documents as required by the CTR or as directed by the Tribunal if you are the plaintiff. Prepare the defence if you are the defendant.
3. Attend the Tribunal from time to time for the proceedings before trial.
4. Comply with the Tribunal orders. If you fail to do so without good reason, the Tribunal may enter judgment against you without a trial.
5. Complete the case management questionnaires in accordance with the CTR or CTPD.
6. Prepare documents including witness statements and expert reports, if any, in accordance with the procedures and directions of the Tribunal.
7. Before trial, you have to put all relevant documents into bundles for the trial.

8. Lodge your bundles of documents with the Tribunal before trial.
9. If necessary, you may apply for witness summons to make sure your witnesses attend. You should do so at least 3 weeks before the trial, otherwise there may not be sufficient time to serve the witness summons on your witnesses.
10. You must be punctual for the trial. If you are absent, the trial will proceed in your absence.
11. At the trial, you have to follow the guidance of the Tribunal.
12. Whether or not you are legally represented or acting in person, you should explore the possibility of settling the disputes without going to the Tribunal. You may make proposals to the other side for settlement. This does not mean that you admit that your case is weak. It is only proposing a practical solution to solve the disputes.
13. If you have settled your dispute, you should inform the Tribunal immediately, particularly when your case has been set down for trial.

The practice to be observed

2.3 You should also observe the following practice:

1. You have to pay the prescribed fee for filing documents.
2. Whilst the Tribunal staff will give you assistance in the filing of documents, they would not give legal advice to you. If you wish to have legal advice, you have to consult your own lawyer. Tribunal staff can help you on the usual procedures, give you the forms you need and assist you to fill them in. But they cannot give you legal advice. For example, they cannot tell you if you have a good case.

3. The parties are entitled to use Chinese or English in their pleadings or other documents. The Tribunal may, on a party's application or on its own motion, order that all the proceedings be in Chinese or in English. Alternatively, the Tribunal may order a party to provide translation of the documents for the other party. The costs for the translation of the documents will be in the cause unless the Tribunal directs otherwise.
4. You should NEVER unilaterally contact the judge by any means in the course of the proceedings or relating to the matter. You should address your letters to the clerk to the judge or Registrar. You should also send a copy of the letter to the other party as well.
5. You should read the explanatory notes of the forms carefully before you complete them.
6. You should also remember that when you file a document with the Tribunal, you have to send a copy of that document to the other party or parties as well in order to give him or them notice. For the same reason, you should check your mailbox to see if the other party or parties have sent you documents. This is your own duty. You have no excuse for not doing this and tell the Tribunal that you have no notice of a document at the hearing.
7. You will only be required to attend the Tribunal upon notice or by summons.
8. You may make inquiries at the Tribunal Registry.
9. You have to observe the deadlines set by the Tribunal about the various steps in the preparation of the case. You may lose the case or suffer other serious consequences if you fail to observe these

deadlines. Unless there are very good reasons, the Tribunal will not change the date of the trial.

10. Be punctual for the hearing or trial. You do not have to bring your witness to the Tribunal for the hearings before trial unless the Tribunal has made an order. For the trial, you have to come to the Tribunal with your witnesses. You should also bring along the bundles of documents and the original documents for the inspection of the Tribunal or the other party. If you fail to arrange your witnesses to attend trial, the trial may proceed in the absence of your witnesses.
11. At the hearing or trial, you should act according to the direction of the judge. The parties will take turns to make speeches. When the other party is making a speech, you should not interrupt even if you disagree. You may take notes of your disagreement and put forward your arguments when your turn comes. The judge may also set a time limit for you to make a speech or to ask questions of a witness.
12. You should behave properly in the Tribunal. You must not use abusive language or remarks. Although the atmosphere during the argument will sometimes become heated or even emotional, you should bear in mind that the best way to put forward your arguments is to speak in a calm, cool and polite manner.
13. After the hearing or trial, if the judge delivers the judgment and the reasons orally, you should not interrupt even if you do not agree with the judge. You may seek leave to appeal or appeal against the judge's decision depending on the nature of the order made by the judge.

3. The Forms in the Schedule to the CTR

3.1 There are several forms in the Schedule to the CTR. You have to use the appropriate form as prescribed by the CTR to commence or conduct proceedings in the Tribunal. For example, you have to use Form 8 to commence a follow-on action. For making an interlocutory application, you have to use Form 2. The relevant forms can be obtained from the staff members of the Tribunal Registry. Alternatively, you may download the forms from the Tribunal website.

3.2 You should read the explanatory notes to the forms carefully before you complete a form. They give you the guidelines for completing the forms. If you have any doubt, you should consult your own lawyer.

4. What are “sample forms”?

4.1 To help you prepare the documents to be filed or used, there is a “sample forms” file which you may obtain from the staff members of the Tribunal Registry. You may select the appropriate sample form for your case. Please return the file to the staff member of the Tribunal Registry after use. You should note the following when you use the sample forms.

4.2 The samples are just examples designed for your reference only. They are not meant to be the samples that suit your case. You should make adjustments or variations to them to suit your own case. If you have any doubt, you should consult your own lawyer. If you cannot find the appropriate sample for your case, you have to seek independent legal advice.

4.3 Before you consider the sample forms, you should first read the explanatory notes carefully. They give you the guidelines for completing the forms.

4.4 You may find the following sample forms together with the explanatory notes on the file:

1. statements of truth
2. case management questionnaires
3. list of documents
4. witness statement
5. affidavit or affirmation
6. affidavit or affirmation of service of an originating document
7. affidavit or affirmation of service of documents other than an originating document

5. Commencing a follow-on action

5.1 A follow-on action must be brought by filing an originating notice of claim in Form 8 in the Schedule to the CTR and, at the same time, the statement of claim if it is not already endorsed on Form 8.

5.2 The one who sues is called the plaintiff and the other party being sued is called the defendant.

5.3 The originating notice of claim must specify the decision of the specified court or admission in a commitment on which the plaintiff relies to establish a contravention of a conduct rule.

5.4 The statement of claim must specify the particular part of the decision or commitment which determines or admits that a relevant act is a contravention of a conduct rule.

5.5 Please also read paragraphs 95 to 108 of the CTPD No.1.

5.6 Before commencement of an action, the plaintiff should ascertain the name of the defendant and his last known address. If the defendant is a limited company, the plaintiff should make a company search to obtain updated information about its name and its registered office. If the defendant is a business, the plaintiff should make the business registration search at the Inland Revenue Department to ascertain the trade name and the principal place of business.

6. Service of the originating notice of claim

6.1 Rule 13 of the CTR governs service of an originating document including the originating notice of claim.

6.2 An originating document required to be served on a person under the CTR is duly served if—

(a) a copy of the document is served personally on the person;

(b) where the person is within the jurisdiction—

(i) a copy of the document is sent by registered post addressed to the person at the person's usual or last known address; or

(ii) if there is a letter box for that address, a copy of the document enclosed in a sealed envelope addressed to the person is inserted through the letter box; or

(c) a copy of the document is served by such method as directed by the Tribunal under rule 13(8) of the CTR.

6.3 Where the defendant is a limited company, you can serve the document by posting it or leaving it at its registered office.

6.4 Where the defendant is an individual or a business run by a sole proprietor or partnership, you can adopt any one of the three ways of service. However, for service on a partnership business, you can also serve the document on any one of the partners or on the person having control or management of the business at the principal place of business of the partnership, or you can mail it to that address by registered post.

6.5 You have to prove by affidavit the service of the originating notice of claim. In the affidavit, you have to state that the sealed copy of the originating notice of claim has been served on a date (including the day of the week) by you personally on the defendant. If the service was by post or by insertion through the letter box, the affidavit will have to state that the document has not been returned through the post and that it will come to the defendant's knowledge within 7 days from the date of posting. If you have an agent to serve the document, your agent has to make such an affidavit.

6.6 The plaintiff should pay attention to the notes in the originating notice of claim. In particular, the plaintiff should state the address for service in Hong Kong.

6.7 If the only remedy that the plaintiff is seeking is payment of money, whether the amount is liquidated or not, the originating notice of claim must be accompanied with a copy of Form 16 (for liquidated claims) or Form 16C (for unliquidated claims) of the RHC.

6.8 You cannot serve the originating document outside Hong Kong unless you have obtained the permission of the Tribunal. You should apply for permission before you serve the originating document. For this application, you should consult your own legal advisor. You may refer to rule 16 of the CTR and Order 11 of RHC.

7. Filing of Defence, etc

7.1 The defendant must, within 28 days after the day on which the originating notice of claim is served, file and serve a defence.

7.2 The plaintiff may within 28 days after the defence is served, file and serve a reply.

7.3 After close of pleadings, the parties have to file case management questionnaire and attend case management hearing where further directions as to the conduct of the proceedings would be given.

8. The evidence and burden of proof

8.1 Each party to the proceedings must collect evidence to support his case. Generally speaking, the burden of proof is on the party who makes

the allegation. Evidence can be in various forms, including testimony from witnesses, documents, photographs, objects, audio or video tapes or discs or electronic data contained in any tapes or discs etc. It is usually adduced by way of affidavits.

9. Interlocutory proceedings

9.1 Before the matter goes to trial, you may have to go through interlocutory proceedings. They are designed to ensure that preparations are properly done and evidence is put in place for the matter to be tried by the Tribunal. They include case management hearings or interlocutory applications.

Case management hearing

9.2 In case management hearing, the Tribunal would give a timetable for preparation of the case. The Tribunal would set various deadlines for the parties to comply with directions before the trial, including the filing of witness statements and lists of documents relevant to the case. The Tribunal can also fix the trial date in such a hearing.

Interlocutory applications

9.3 Particular applications may be taken out by a party before the trial. The usual applications for these proceedings include:

- (1) application for extension of time for complying with certain directions under the rules or the order of the Tribunal;
- (2) application for an order that unless the other party complies with the rules or the directions of the Tribunal, judgment may be entered against him;

- (3) application to set aside judgment obtained by the plaintiff because the defendant has failed to comply with rules or court order;
- (4) application for amendment to the pleadings;
- (5) application for summary judgment (judgment without a full trial) by the plaintiff because the defendant has no defence;
- (6) application for further and better particulars of the pleadings of the other;
- (7) application for striking out the pleadings or part of the pleadings of the other party (for reason that they are bad pleadings i.e. they show no good reason for the claims or defence);
- (8) application for documents to be disclosed (discovery of documents) from the other party; and
- (9) injunction.

9.4 You should think carefully before taking out interlocutory applications as they may cause delay in getting to trial or wasting costs.

9.5 Interlocutory application is made by summons in Form 2, supported by affidavits or affirmations, to be filed with the Tribunal and served on the other party.

9.6 The Tribunal may give directions for the filing of affidavit or affirmation to oppose the application, and for the applicant to file an affidavit or affirmation in reply.

9.7 The summons will be heard by a judge or the Registrar on a date fixed by the Tribunal. At the hearing, no witness should be called to give evidence unless the Tribunal has specifically ordered it.

9.8 At the end of the hearing, the judge or Registrar will make an order or give a judgment. The judge or Registrar may order costs against the party who fails at the hearing. The costs may be ordered to be paid at the end of the main hearing or to be paid forthwith.

10. Assistance that you can get from this leaflet

10.1 The purpose of this leaflet is to introduce to litigants in person the broad outlines of a follow-on action in the Tribunal. It is designed to give information about the proper procedures of the proceedings, the manner the parties should present their case, evidence and other materials to the Tribunal. This will also assist the Tribunal hearing the matter so that the judge does not have to explain the procedures described here again to the litigant in person in the course of the proceedings.

10.2 The leaflet is not intended to be a summary of the practice, the CTR or the RHC. They only give guidelines on the procedures generally. For details and further information, you should refer to the rules themselves. The CTR can be found in Chapter 619D of the Laws of Hong Kong. You should also refer to the CTPD as well. The English and Chinese versions of these documents can be found at

the Tribunal website. You may make enquiry with the staff member at the Tribunal Registry.

10.3 The leaflet does not purport to state any views on substantive law.

Judiciary

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