

**For discussion
on 17 March 2015**

**Subcommittee to Study the Proposed Subsidiary Legislation on the
Procedures to be Adopted by the Competition Tribunal**

**Broad Comparison of the Key Procedures of the Competition
Tribunal, the Lands Tribunal and the Small Claims Tribunal**

PURPOSE

This paper sets out a broad comparison on the key procedural features proposed for the Competition Tribunal (“the CT”) and those adopted by the Lands Tribunal (“LT”) and the Small Claims Tribunal (“the SCT”).

BACKGROUND

2. At the meeting of the Panel on Administration of Justice and Legal Services on 16 February 2015 when discussing the draft procedural rules for the CT, Members requested that the Judiciary Administration provide, among others, a broad comparison of the key procedures among the above three tribunals.

OVERVIEW

3. The CT is a **superior court of record**¹ established under the Competition Ordinance (“CO”) (Cap. 619) having primary jurisdiction to hear and adjudicate competition-related cases. The CO has adopted a general approach such that the CT may generally follow the practice and procedure of the Court of First Instance (“CFI”) of the High Court in the exercise of its civil jurisdiction. The CT has the power to enforce its orders in the same way as the CFI; and has the power to grant orders that

¹ In common law jurisdictions, a court of record is a trial court in which a court clerk takes down a record of proceedings. This written record (and all other evidence) is preserved at least long enough for all appeals to be exhausted.

In Hong Kong, the superior courts of record are the Court of Final Appeal, the Court of Appeal, the Court of First Instance and the CT. The other courts and tribunals are courts of record.

the CFI is empowered to grant, unless specifically provided otherwise by the rules of the CT or the CO².

4. The LT mainly hears and adjudicates cases of possession of premises and rental valuation disputes under the Landlord and Tenant Ordinance (Cap. 7) or common law, building management cases, resumption and other compensation cases, compulsory sales cases and appeals concerning rate and Government rent. Similar to the CT, the LT also has the same jurisdiction to grant remedies and reliefs, equitable or legal, as the CFI³.

5. On the other hand, the SCT provides an expeditious, informal and inexpensive means of adjudication for civil disputes involving small amounts of money. Common claim categories include debts, service charges, damage to property, sale of goods and consumer claims. Legal representation is not allowed.

6. As explained in the paper on “Brief on the Proposed Competition Tribunal Rules and other Related Rules”, in preparing the draft Competition Tribunal Rules (“CTR”), the Judiciary has made reference not only to the Rules of the High Court (Cap. 4A), but also the rules and procedures of the other relevant courts and tribunals in the Judiciary using informal rules e.g. the Lands Tribunal Rules (Cap. 17A). As the nature of the SCT is very different from that of the CT, the Judiciary has not made reference to SCT’s procedures in designing the procedures of the CT.

COMPARISON OF KEY PROCEDURES

7. A broad comparison of the key procedural features among the three tribunals can broadly be grouped under the following areas :

- (a) financial jurisdictional limits;
- (b) general practice and procedures;
- (c) Judges and Judicial Officers (“JJOs”) involved;
- (d) rights of audience;

² Sections 142 to 144 of the CO refer.

³ Section 8(9) of the Lands Tribunal Ordinance (Cap.17) refers.

- (e) rules of evidence;
- (f) discovery and production of documents;
- (g) striking out proceedings.
- (h) assessors/lay members;
- (i) transfer of proceedings; and
- (j) rights of appeal.

We will set out the details in the ensuing paragraphs.

Financial Jurisdictional Limits

8. Both the CT and the LT do not have any financial jurisdictional limits. On the other hand, the SCT has a jurisdictional limit of \$50,000 for monetary claims founded in contract, quasi-contract or tort⁴.

General Practice and Procedures

9. While all the three tribunals adopt informal procedures to some extent, the flexibility for the three tribunals in deciding their own practice and procedures is not entirely the same.

10. For the CT, it may decide its own procedures⁵. For both the CT and LT, they may follow CFI's practice and procedure in the exercise of its civil jurisdiction⁶. For the SCT, it may determine its practice and procedure if no provision is made by the Small Claims Tribunal Ordinance (Cap. 338) or the rules made under that Ordinance⁷.

⁴ Section 5 of and paragraph 1 of the Schedule to the Small Claims Tribunal Ordinance (Cap.338) refer. Please see also section 2 of the Schedule regarding recovery of any penalty, expenses, contribution declared recoverable by any enactment as a civil debt up to the same limit.

⁵ Section 144 of the CO refers.

⁶ Section 144 of the CO and section 10(1) of Cap. 17 refer.

⁷ Section 37 of Cap.338 refers.

JJOs Involved

11. The level of Judges involved in the three tribunals is different. CFI Judges handle CT cases. On the other hand, District Judges are involved in LT cases and adjudicators (at the magistrate rank) deal with SCT cases.

12. Besides, while both the CT and the LT may have more than one JJO to handle a case⁸, all proceedings in the SCT are required to be heard and determined by an adjudicator or a deputy adjudicator sitting alone⁹.

Rights of Audience

13. In general, the Judiciary proposes that the rights of audience in the CT be co-extensive with those in the CFI, i.e. barristers and solicitors may appear before the Tribunal in chambers and before the Registrar of the Tribunal sitting in chambers or in open court, but only barristers or solicitors having a higher right of audience before the CFI in its civil jurisdiction may appear before the Tribunal sitting in open court (e.g. trials).

14. The main consideration is that there must be the highest standards of advocacy before the superior courts, including the CT. This is essential to the administration of justice in an adversarial system. Cases to be handled by the CT are likely to be similar in nature, scale and complexity to complex commercial cases in the CFI. It is considered essential that only practitioners with the necessary experience and expertise in advocacy be granted full rights of audience before the CT.

15. With the above considerations, pursuant to the proposed rule 30 of the CTR, legal representation is allowed in the CT, though parties may also choose to act in person as they do in the CFI. Besides, with CT's leave, a corporate litigant (i.e. a company) may be represented by its director(s). The CTR also provides for a reserve power for the CT to allow any other person to appear on a party's behalf. These proposed arrangements seek to balance between the need to maintain the standards of advocacy and the possible need for minimizing legal costs as appropriate.

⁸ Section 145 of the CO and section 9 of Cap. 17 refer.

⁹ Section 3 of Cap. 338 refers.

16. In LT proceedings, the arrangements are similar in that a party may appear and be heard personally, or be represented by counsel, solicitor or any other person allowed by leave of the LT to appear instead of that party¹⁰. But, the LT is different from the CT in that solicitors can appear in both trials and interlocutory hearings in the LT.

17. For the SCT, given the small amount of the claims involved and its objective of providing a simple and inexpensive way to handle these claims, its procedures are less strict than in most other courts. Legal representatives are not allowed. The right of audience is only restricted to the parties and non-legal representative(s)¹¹.

Rules of Evidence

18. For the CT, section 147 of the CO provides that other than in certain proceedings¹², the CT is not bound by the rules of evidence and may receive and take into account any relevant evidence (including hearsay evidence) or information, whether or not it would be otherwise admissible in a court of law. According to the Government, this enables the CT to consider evidence collected from diverse sources. The Judiciary has further suggested in rule 35 of the CTR that the evidence of witnesses at the hearing of any proceedings *may* be taken orally on oath or affirmation, or by affidavit, declaration or otherwise as the CT thinks fit. This rule has in fact been proposed on the basis of a similar rule for the LT¹³.

¹⁰ Rule 26 of Cap.17A refers.

¹¹ According to section 19 of Cap. 338, the following persons shall have rights of audience before the SCT :

- (a) any party;
- (b) an officer or servant of a corporation, if the corporation is a party;
- (c) a member of a partnership, if the persons comprising the partnership are parties;
- (d) with the leave of the tribunal, any person, other than counsel or a solicitor, who is authorized in writing by a party to appear as his representative;
- (e) a public officer, not being a barrister or solicitor, who appears on behalf of the Secretary for Justice, if the Secretary for Justice is a party.

¹² The exceptional proceedings are those in which the Commission applies for an order for (a) a pecuniary penalty order under section 93; and (b) a financial penalty order under section 169.

¹³ Rule 19 of Cap. 17A refers.

19. Similarly, the rules of evidence do not apply to proceedings in the SCT, which may receive any evidence which it considers relevant¹⁴.

Discovery and Production of Documents

20. For the CT, there is no automatic discovery and production of documents. Parties need to apply to the CT for discovery and production of documents (rule 24 of the CTR). This helps save the costs and efforts of the parties concerned, and ensures that discovery takes place only insofar as it is necessary for the fair disposal of the case and is proportionate. Further, this will enable the Tribunal to consider whether confidential and sensitive information, which may be fairly common for competition cases, should be required to be disclosed. The LT adopts a similar approach¹⁵.

21. On the other hand, there is no specific provision that regulates the discovery and production of documents for the SCT. There is only a general provision that empowers the SCT to determine the practice and the procedure generally or in any particular proceeding¹⁶.

Striking out Proceedings

22. Pursuant to the proposed rule 40 of the CTR, the CT may strike out frivolous or vexatious proceedings. The CT may also rely on other provisions to strike out proceedings. For example, it may, in appropriate cases, make “unless orders” with specified consequences under rule 50 of the CTR. For example, if a party fails to file a certain document within 14 days, the defence may be struck out.

23. As regards the LT, there is no specific provision on the striking out of proceedings. The LT relies on a general provision to follow the practice and the procedure of the CFI in this regard¹⁷.

24. The SCT adopts an approach similar to that of the CT. It may at any time dismiss a claim which it considers to be frivolous or

¹⁴ Section 23(2) of Cap.338 refers.

¹⁵ Section 10(2) of Cap. 17 and rule 13 of Cap. 17A refer.

¹⁶ Section 37 of Cap. 338 refers.

¹⁷ Section 10(1) of Cap. 17 refers.

vexatious on such terms as to payment of costs as it may think fit¹⁸. Also, when a party fails to comply with an order directed by the SCT within a specified time, the SCT may dismiss the claim or counterclaim filed by the party as it thinks fit.¹⁹

Assessors / Lay members

25. Similar to CFI proceedings, the CT may appoint one or more specially qualified assessors to assist in its proceedings. Assessors are likely to be persons in possession of relevant expertise, such as economists and industry experts. Unlike expert witnesses, assessors are engaged by the court, rather than the parties. But, the decision of the CT is that of the members (or Judges) of the CT only²⁰.

26. In the LT, there are two lay Members who are qualified surveyors. They may sit with the President or a Presiding Officer in hearing compensation cases and compulsory sale cases under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545P). The lay member may even sit alone to deal with cases not involving question of law. Further, a member of the LT may appoint any person who has specialized knowledge or experience of a particular subject to sit and assist him in any proceedings, but the decision of the member shall be the decision of the LT²¹.

27. No assessors are allowed for SCT proceedings.

Transfer of Proceedings

28. In general, there are provisions in the respective ordinances enabling the three tribunals to transfer proceedings to another court/tribunal that are within the jurisdiction of the latter.

29. The arrangements for the CT are however more refined than those for the LT and the SCT. The CT is a specialized court with close affinity with the CFI. Sections 113 to 116 of the CO provide for the possibility of the transfer of proceedings between the CFI and the CT

¹⁸ Section 25 of Cap. 338 refers.

¹⁹ Section 26A of Cap. 338 refers.

²⁰ Section 141 of the CO refers.

²¹ Section 9(4) of Cap 17 refers.

under certain circumstances, including such considerations as interests of justice and whether the issues concerned arise out of the same or substantially the same facts.

30. On the other hand, the LT may transfer proceedings to the CFI or the District Court²² which are not within its jurisdiction or it considers should be transferred in the interests of justice. As regards the SCT, it may transfer proceedings to the Minor Employment Claims Adjudication Board or a few other courts/tribunals (i.e. the Labour Tribunal, the LT, the District Court or the CFI)²³.

Rights of Appeal

31. For the CT, in general, while appeals against interlocutory matters to the Court of Appeal require leave of the court, other appeals lie to the Court of Appeal as of right²⁴. But, for the LT, appeals to the Court of Appeal require leave²⁵.

32. As regards the SCT, appeals may be made to the CFI and from there, in a case involving a question of law of general public importance, to the Court of Appeal. Leave is required for all these appeals²⁶.

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²² Section 8A of Cap.17 refers.

²³ Section 7 of Cap.338 refers.

²⁴ Sections 154 and 155 of the CO refer.

²⁵ Sections 11 and 11AA of Cap. 17 refer.

²⁶ Sections 28, 29 and 29A of Cap. 338 refer.