

SEAFARER SUBJECT GUIDE

USING LAWYERS IN HONG KONG

This Guide deals in general terms with using lawyers in Hong Kong. It aims to help a seafarer understand the legal profession in Hong Kong, and how to select, engage and if need be, change his lawyer. This Guide does not however constitute specific legal advice in relation to the use of any particular lawyer. If a seafarer is dissatisfied with his lawyer, he is strongly advised to consult another lawyer qualified to practice in Hong Kong.

1. What is the structure of the legal profession?

- 1.1 In Hong Kong, the legal profession is split between Solicitors and Barristers, and lawyers can only hold one of these titles at one time. Solicitors usually work as part of a firm, although there are a relatively small number who work as sole practitioners. Barristers work as individuals (although usually as part of a set, known as "Chambers") and are self-employed.
- 1.2 Barristers carry out advocacy work in court whereas Solicitors deal directly with clients. Solicitors can deal with any legal matter, including conducting criminal or civil proceedings in court, as well as advising and preparing documents in non-contentious matters, such as company and commercial, conveyancing and probate. Solicitors can appear as advocates in the Magistrates' Courts (where minor criminal cases are tried and all serious criminal cases start) and in the District Courts (where lower value civil cases are tried).
- 1.3 Serious criminal cases and higher value or more complex civil cases are tried in the High Court, where Solicitors generally cannot appear as advocates unless they are qualified Solicitor Advocates. Barristers usually are engaged on behalf of the client by their Solicitor to present the client's case and to appear as advocates in the higher courts.
- 1.4 Barristers are specialists in court procedures and evidence, and in conducting advocacy in court. Barristers can appear as advocates in all levels of court, including the Court of Appeal and the Court of Final Appeal. Barristers can only act on instructions from Solicitors or the Director of Legal Aid or the Government.
- 1.5 In practice, most seafarers requiring legal advice or assistance are likely to find that their needs are best served by engaging a Solicitor who, will instruct a Barrister on their behalf if necessary or appropriate.

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2. How is the legal profession regulated?

- 2.1 Solicitors are regulated by The Law Society of Hong Kong (www.hklawsoc.org.hk (website in English)), an independent regulatory body. Every Solicitor in private practice must hold a valid Practising Certificate issued by the Law Society. All firms of Solicitors and individual Solicitors within a firm or practising on their own must comply with The Hong Kong Solicitors' Guide to Professional Conduct (The "Solicitors' Guide") issued by the Law Society for the protection of clients and for the protection of money held by Solicitors on clients' behalf. Failure to comply with these rules may result in disciplinary proceedings against the firm and/or individual concerned.
- 2.2 Barristers are regulated by the Hong Kong Bar Association (www.hkba.org (website in English)). In addition, the Bar Association deals with complaints from clients about the behaviour of, and adequacy of representation by, Barristers, and conducts disciplinary proceedings in respect of non-compliance with the rules and standards in the Association's own Code of Conduct.

3. How can a seafarer find a lawyer?

- 3.1 In the first instance, you should approach your trade union who may be able to recommend a suitable solicitor, or, if your membership terms include legal protection, may appoint one on your behalf. In relation to an incident occurring in connection with the operation of the vessel, the ship owner's Solicitor may be able to represent you, provided there is no conflict between your interests and those of the owners.
- 3.2 If you have to find a Solicitor yourself, a good deal of help and information is available on the internet. A full list of Solicitors' firms and Solicitors with a Practising Certificate are available on the Law Society's website (www.hklawsoc.org.hk (website in English)).

4. On what terms can a seafarer engage a lawyer?

- 4.1 When accepting instructions from every client, solicitors must first carry out a conflict search to ensure that they have no conflict of interest in accepting instructions. They must also set out their terms of engagement in a formal engagement letter, which may be accompanied by a set of standard conditions. The engagement letter and standard conditions will together form the Terms of Business and should include the following important information:
 - .1 Details of the agreed scope of the work to be undertaken and the procedures for keeping you informed of progress;

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- .2 The name(s) and status (e.g. a partner in the firm or an associate) of the Solicitor(s) assigned to your case;
- .3 Quality assurance and the procedures for handling any complaints should you be dissatisfied with the standard of service provided;
- .4 The basis on which you will be charged for the work to be undertaken and (where practicable) an estimate of the overall cost of the matter;
- .5 Details of any advance payment required from you, arrangements for rendering bills and payment terms; and
- .6 The firm's responsibility and professional liability to you, as the client.

5. How will a seafarer be charged fees by his lawyer?

- 5.1 Usually, solicitors charge by the hour for the time they spend on a case at the rates specified in the Terms of Business. The rates charged will depend on a number of factors, such as the seniority of the Solicitor(s) working for you, the type and location of the firm you are instructing and the complexity and value of the dispute or claim. In addition, Solicitors will charge for any disbursements they incur on behalf of the client, such as Barristers' fees, court fees and the fees of any other professional advisors they may instruct on your behalf (such as medical experts in personal injury claims). Unlike in some countries (such as the United States) Solicitors are not allowed to charge on a conditional or a contingency fee basis (i.e. where they are only paid on the basis of the outcome (i.e. "no win no fee") or where they take a percentage of any settlement or money awarded at the end of the case).

6. Can a seafarer get legal aid in a criminal case?

- 6.1 In Hong Kong, everyone (whether or not a seafarer and whether or not a Hong Kong resident) has the right to legal aid. However each person and case must meet a "means test" and a "merits test":
- 6.2 Means test: If a person's financial resources are below certain prescribed limits, he is entitled to legal aid. The current limits set out in the Legal Aid Ordinance (Chapter 91 of laws of Hong Kong) are HK\$260,000 for the Ordinary Legal Aid Scheme and HK\$1,300,000 for the Supplementary Legal Aid Scheme. An applicant's disposable income (money left after paying allowable living expenses) and disposable capital (money, investments or property that could be used or sold to pay for legal advice) will be taken into account when assessing whether they are eligible for legal aid. Such limits may be amended by the Legislative Council from time to time.

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6.3 Merits Test: This is to determine whether an applicant has a defence or whether the grant of legal aid to an applicant is justified. The legally aided person will receive the services of a solicitor and, if necessary, a Barrister to represent him, in committal proceedings in the Magistrates' Court, cases tried in the District Court and the Court of First Instance and all criminal appeals.

6.4 It is worth noting that legal aid is not available in the Magistrates' Courts for cases other than committal proceedings. Those charged with an offence in the Magistrates' Courts could contact the liaison officer of the Duty Lawyer Service for assistance (see below).

7. Can a seafarer get legal aid in civil case?

7.1 Legal aid is available for certain types of civil disputes. To receive civil legal aid, a person must also satisfy the means test.

7.2 Legal aid is not available for representation at certain tribunals, including Labour Tribunals.

7.3 Civil legal aid is not available for the types of case listed under Part II of Schedule 2 of the Legal Aid Ordinance, such as defamation actions, relator actions, election petitions, proceedings involving money claims in derivatives of securities, or futures contracts, proceedings involving disputes amongst shareholders in a company or partners in a partnership, etc.

7.4 Other types of cases: Legal aid may be available in relation to difficulties with benefit claims and in family disputes (e.g. mediation and obtaining court orders).

7.5 In relation to foreign nationals, legal aid is available in criminal and civil matters to anyone who qualifies, provided their case concerns the courts of Hong Kong and the case is within the scope of the legal aid scheme. Applications for funding are considered without reference to the applicant's nationality, residency or citizenship.

7.6 Detailed information about the availability of legal aid can be found on the website of Legal Aid Department at www.lad.gov.hk (website in English).

8. Can a seafarer get any other free legal advice?

8.1 There are many Solicitors and Barristers carry out a limited amount of work on a "pro bono" (free of charge) basis.

8.2 The Law Society of Hong Kong offers free legal advice under various schemes such as the Duty Lawyer Scheme and the Free Legal Advice Scheme. The Duty Lawyer Scheme

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is aimed to provide legal representation to persons brought before the Magistrates Courts, Juvenile Courts and Coroners Courts. The service has its Court Liaison Office in each and every Magistrates Court in Hong Kong. To be eligible for the Duty Lawyer representation, one has to pass the merits test and means test and pay a fixed handling charge. The Free Legal Advice Scheme aims to provide members of the public who have genuine legal problems with preliminary advice as to their legal position. Details of the free legal service schemes can be found on the Law Society's website at www.hklawsoc.org.hk/pub_e/probono/public/pbs_dls.asp (website in English).

- 8.3 The Hong Kong Bar Association also offers free legal service through The Bar Free Legal Service Scheme to provide free legal advice and representation in cases where Legal Aid is not available or where the applicant is unable to afford legal assistance and the case is thought to be one where assistance should be given. Details of the scheme can be found on the Bar Association's website at www.hkba.org/the-bar/free-legal-service/free-legal-service1.html (website in English).

9. Can a seafarer sue his lawyer?

- 9.1 A client can sue his solicitor at any point, whether during the engagement or after the engagement has come to an end, if the client considers that he has suffered a loss as a result of negligence in the handling of this case. Solicitors are obliged to have adequate insurance to cover negligence claims. If you sue your lawyer and obtain judgment in your favour, you may expect the sum awarded to be paid by the solicitors' insurers.

10. How can a seafarer complain about his lawyer?

- 10.1 Your Solicitor's Terms of Business will provide details of what you should do if you are dissatisfied with the progress of your case or with the service you are receiving from them. The Solicitors' Guide requires all Solicitors' firms to have a procedure dealing with complaints promptly, fairly, openly and effectively. If you remain dissatisfied after going through your Solicitor's complaints procedure, you may lodge your complaint the Law Society and the Law Society will then investigate into the alleged professional misconduct and refer the case to disciplinary proceedings if necessary. Likewise, the Bar Association will handle and investigate complaints in relation to barristers.

11. How can a seafarer change his lawyer?

- 11.1 You may terminate your contract with your Solicitors at any time, normally by giving notice in writing (full details will be contained in your Solicitors' Terms of Business), and appoint other Solicitors in their place. However, your previous Solicitors will be entitled to keep all your papers and documents while there is still money owed to them for their

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fees and disbursements. You should bear in mind that changing lawyers could involve delay and additional expense, particularly if your case is at an advanced stage by this time, as your new lawyers will need time to read the documents and familiarise themselves with the facts of the case and the issues.

12. Is a foreign seafarer treated differently?

- 12.1 Foreign nationals who pursue claims in the Hong Kong Courts are treated no differently to Hong Kong residents. However, a foreign claimant may, in certain circumstances, have to provide security for the other side's costs of defending the claim.