

Hong Kong courts keeping calm and carrying on

11 November 2020

Introduction

Tropical Storm "Nangka" passed to the south-west of Hong Kong by about 500 km on 13 October 2020; the most distant tropical storm to trigger a No. 8 typhoon signal since at least 1960. While schools, businesses, public buildings, the courts and the like were closed for the day, it did not feel like much of a storm and, for many, it was not a "day off" given that most people are quite used to working from home by now.

Some eight months after the outbreak of the pandemic, the courts officially resumed normal business on 15 September 2020, while social distancing and crowd management measures in court buildings are likely to remain in place for a long time.

Autumn 2020

At the time of writing, the level of daily reported cases of COVID-19 infections has declined to single figures, most of which are so-called "imported" cases ie, residents returning to Hong Kong. The current situation appears to be a continuation of a "Wave-3" of infections and other jurisdictions could learn much from how Hong Kong has coped.

In truth, the virus never appears to have left the community. A widespread voluntary testing programme conducted for two weeks in September 2020 screened approximately a quarter of the city's 7.5 million population and uncovered approximately two cases of infection per 100,000 people tested. At the time of writing, there have been approximately 5,400 reported cases of infection and 107 related deaths. Relatively speaking, Hong Kong has coped well – while many attribute this success to a

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government which is experienced in dealing with coronavirus epidemics and a dedicated public health service, there is also the general resolve of the local community.

Some of the previously stringent social distancing rules have been relaxed (and are likely to be further relaxed at this rate), although the wearing of face masks in public is still mandatory; this last factor has probably done more than anything to combat the spread of the virus in Hong Kong, until an effective vaccine is approved and widespread vaccination undertaken.

Given Hong Kong's experiences with coronaviruses in the past (witness the "SARS" epidemic in 2003) there is unlikely to be any complacency. The local flu season has started and the seasonal flu vaccine is in short supply because of high local demand. Hong Kong has commitments from Mainland China for enough doses of a COVID-19 vaccine, the trials for which are well under way in the Mainland. On current estimates, those who want to receive a vaccine are likely to be able to do so by around the second quarter of 2021 (with priority being given first to doctors and nurses, hospital workers, residents with pre-existing health conditions and workers and residents in care facilities for the elderly).

Update

At the time of writing, the most recent related guidance from the judiciary administration was on 15 September 2020, with a "Notification for Stakeholders about the General Resumption of Court Business from Mid-September". This notified stakeholders and court users of a full resumption of court business "in an incremental and orderly manner ... as far as possible". Normal court registry services resumed from about 28 September 2020, together with the cessation of "ticketing arrangements", the continuation of enhanced social distancing and the introduction of special queuing arrangements for the registries and accounts offices of the High Court, the District Court, the Family Court and the Lands Tribunal.

The transition to "normal service" has been incremental. Some first instance courts sat on alternate days or for half-days for a while, in order to allow for deep cleaning of courtrooms. Given that some advocates prefer to speak in court with their face masks on (when addressing the court or a witness) some courts have exceptionally allowed handheld microphones and enhanced audio facilities (so-called "Karaoke Boxes") in courtrooms. As an experiment this appears to have gone down quite well and, given a local penchant for breaking out in song, court users have shown commendable restraint.

Inside courtrooms seating capacity for legal representatives, the press and the public has been reduced by approximately 50%, with alternate seats being left vacant. Sometimes legal representatives also sit in the press galleries. The courts have large plastic screens in front of the judges and in front of the legal representatives and sometimes between the parties' legal representatives themselves. Remote hearings by videoconferencing facilities are still used for some pre-trial hearings eg pre-trial reviews.

Although not a consequence of the virus, the suspension of certain mutual legal assistance arrangements between Hong Kong and several other jurisdictions, following the adoption of a national security law in Hong Kong, may represent a logistical challenge in some cases.

Other highlights include the following:

• Hong Kong and its top court (the Court of Final Appeal) gets a new Chief Justice in January 2021, when the present Chief Justice retires at the age of 65. Under his leadership, the Court of Final Appeal has gone from strength to strength and, despite some rumours to the contrary, it continues to attract overseas judges of the highest calibre. For example, on 5 October 2020, the judiciary welcomed the formal acceptance by the Chief Executive of the Government of the recommendation that the Deputy President of the UK Supreme Court (Lord Patrick Hodge) be appointed to the Court of Final Appeal.

- On 16 October 2020, the judiciary announced that the "Ceremonial Opening of the Legal Year 2021" on 11 January 2021 will be scaled down and take place at the Court of Final Appeal building, rather than the normal venue of the City Hall. The ceremony will be broadcast live on the judiciary's website from 16.00 (www.judiciary.hk).
- o It looks like several measures may be formally implemented in the courts to deal with cases arising out of the social unrest in 2019. These could include an extension of court hours and hearings on Saturdays (as needs be). According to one recent global index, it appears that the perception of law and order by some members of the public may have taken a marked turn for the worse following the events of last year. However, it is worth bearing in mind that the survey is historical, being based on the events of last year and, when it comes to general personal safety, Hong Kong has relatively low levels of crime. When one factors in how Hong Kong has handled COVID-19, there are not many safer places to be.
- In early October 2020 a form of "Glasnost" appears to have broken out among certain ranks of the judiciary, with an announcement concerning "Additional transparency measures to enhance understanding of court decisions and complaints" (8 October 2020). This followed some apparently uninformed comments in connection with several Magistrates' decisions dealing with cases arising out of the events of last year. The Chief Justice issued a strong and detailed statement on (among other things) the independence of the courts, supported by a judiciary announcement, the introduction to which reads: "In view of the number of commentaries, opinions and criticisms that have recently been made in relation to various decisions of the courts and judges, the Chief Justice of the Court of Final Appeal, Mr Geoffrey Ma Tao-li, today (23 September 2020) issued a Statement to explain some fundamental principles regarding the administration of justice in Hong Kong, with particular emphasis on criminal cases. It is crucial for these principles to be firmly borne in mind when commenting on the work of the courts and judges. These principles all originate from the Basic Law which guarantees the exercise of independent judicial power. The Basic Law states in express terms that judicial power is to be exercised independently, free from any interference."
- The Court Proceedings (Electronic Technology) Bill received its second and third readings in the legislature, between 15 and 17 July 2020, and the Ordinance was gazetted on 24 July 2020. The legislation provides for a phased implementation of an integrated court case management system and for the electronic filing of court documents. The legislation takes effect on a date to be announced in the government gazette, which is unlikely to be before the end of next year.

• It was not all forward momentum for the judiciary administration. The District Court recently announced a "Guidance Note for Case Settlement Conferences" in certain civil cases, excluding personal injury claims. The Guidance Note (among other things) extends a pilot scheme for a form of mandatory negotiation in that court, at the behest of certain judicial officials, and encroaches on the protection given to without prejudice communications between the parties in some cases. As most lawyers and their clients know, there are certain things they might consider telling a mediator that they would never tell (let alone be expected to tell) a judicial officer purporting to act as some form of intermediary. The Guidance Note is due to take effect in January 2021 and non-compliance with its "directions" could attract costs sanctions. Apparently, the local lawyers' union is keeping a watching brief.

Contact us

Please contact us if you have any queries regarding the issues raised in this article, or if you wish to consider any commercial dispute resolution matters in Hong Kong.

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Note

The judiciary announcements referred to in this article can be found in the "press releases" section of the judiciary's website www.judiciary.hk.