

APOLOGY LEGISLATION PASSED IN HONG KONG – WHAT DOES IT MEAN FOR YOU?

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On 13 July, Hong Kong's Legislative Council passed a law (the Apology Law) intended to facilitate the resolution of civil disputes in the territory. The Apology Law, which is expected to be gazetted and come into force shortly, reforms the legal consequences of making any sort of apology (written, oral or by conduct). An apology will not constitute an admission of fault or liability (even if it includes such an admission), nor may it be admissible in evidence to the detriment of the apology maker. This is the case unless the maker of the apology wishes it to be admitted or it falls to be admitted in the usual way through discovery, oral evidence or an equivalent tribunal process.

Hong Kong is the first jurisdiction in Asia to enact apology legislation and its Apology Law is the broadest enacted to date worldwide. The driver behind it is that apologies may in some circumstances 'unlock' disputes and lead to settlement without recourse to formal legal action. Since parties (and their lawyers and insurers) may be reluctant to do anything that may be construed as an admission of liability, apologies have to date been sparse. The Apology Law seeks to incentivise disputing parties to make apologies, whether in the direct aftermath of an accident or dispute, or further down the line, should the dispute escalate.

The law has far-reaching consequences for anyone involved in contentious civil disputes, whether before the courts or tribunals in Hong Kong. The Apology Law has the scope substantially to change the way insurance, evidence and settlement are approached in civil proceedings and regulatory and disciplinary matters. The scope for 'tactical' apologies by counterparties should be borne in mind as set out below.

Background

The law was formulated on the basis of recommendations by the Steering Committee
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on Mediation, and was subject to two rounds of consultation in 2015 and 2016. Hong Kong follows in the footsteps of over 50 common law jurisdictions, including the UK, US, Canada and Australia in enacting apology legislation. Like those jurisdictions, the Apology Law is short and focuses on defining an "apology" and the inadmissibility of it, the proceedings to which the legislation applies, and the effect of apologies on insurance contracts and limitation periods.

Key aspects of the Apology Law and their implications are set out below.

"Apology"

The definition of apology (clause 4) is broad and includes so called 'partial' apologies (those saying sorry or expressing regret) and 'full' apologies (those admitting fault as part of the apology). This widens significantly the ambit of inadmissible evidence under the Apology Law. Many jurisdictions, including the UK and the majority of US states, have enacted apology legislation to cover 'partial' apologies only. Hong Kong's legislature felt it vital for the definition to be broad and to include admissions of fault. Whether this prejudices a potential claimant, who is left to adduce



evidence of liability in other ways, is open to debate. However, the policy driver, namely to encourage settlement of disputes, was regarded as the more pressing priority, and the protection of partial apologies, too limited to have any tangible and positive effect.

Statements of fact also inadmissible in evidence

The Apology Law goes further than all other jurisdictions with apology legislation, in that statements of fact included in an apology will also be inadmissible in evidence against the apology maker (clause 8). The intention behind this is to encourage full and burden-free apologies to prompt amicable settlement. LegCo was keen to avoid situations where parts of an apology (eg the surrounding statements of fact) were admissible, but the accompanying apology/admission was not. Of course, a claimant may still separately obtain evidence related to a statement of liability or fact by other independent means, for example, during discovery or during cross-examination. But this may impose on a claimant an additional evidential burden. In response to this concern, a late amendment to the bill was introduced such that, in exceptional cases (the only example cited is where there is no other evidence available for determining an issue), a statement of fact contained in an apology may be admitted as evidence at the discretion of the decision maker. It may be admitted only if he/she is satisfied that it is “just and equitable” to do so, having regard to “the public interest or interests of administration of justice”. Whilst

these are well defined legal terms, the decision maker burdened with this call may not have a legal background in the case of certain tribunals/disciplinary boards.

The scope for satellite litigation on this point is possible, which would counter the intention of the law to reduce, not increase, recourse to the courts.

Jurisdiction

Clause 6 states that the Apology Law applies to all civil (not criminal) disputes subject to litigation, arbitration, and almost all disciplinary and regulatory proceedings. Only proceedings under the Commissions of Inquiry Ordinance (Cap 86), the Control of Obscene and Indecent Articles Ordinance (Cap 390) and the Coroners Ordinance (Cap 504) are specifically exempted further to consultation requests by interested parties. There is scope for the Chief Executive to exempt other proceedings over time and it will be interesting to see whether this happens. Given the wide number of authorities and industry organisations, including the Hong Kong Monetary Authority and the Hong Kong Federation of Insurers, who participated in the consultation process, it is unlikely that a significant number of proceedings will be added to the exemption list.

The Apology Law expressly applies to proceedings involving the government (clause 13).

Effect of apologies on insurance cover

Insurance policies often contain clauses prohibiting the admission of fault by an insured without the insurer's consent. In practice, to date, insurers in Hong Kong tend to agree apologies only in limited circumstances (for example where there has been a clear breach). In complex claims in particular, insurers are likely to counsel against (early) "without prejudice" apologies. The fear that making an apology would adversely affect the apology maker's insurance cover was identified by the Steering Committee as a real and significant barrier to apologies in Hong Kong. Clause 10 of the Apology Law removes this barrier by providing that an apology will not void or affect insurance cover, compensation or other benefit for any person in connection with the insurance. It matters not if the policy in question is governed by another law: if Hong Kong is the place of the litigation, tribunal or regulatory proceedings, the apology will be protected and insurance cover will not be affected. This again highlights the desire of the legislature to make Hong Kong a popular venue for dispute resolution. Insurance companies, regardless of the substantive law covering their contracts of insurance/indemnity, should take clause 10 on board.

Effect of apologies on limitation periods

Under the Limitation Ordinance (Cap 347), certain rights of action relating to land, personal property, and debts are deemed to accrue on the date of acknowledgment. Clause 9 of the Apology Law states that apologies will not constitute acknowledgements of rights of action for tolling purposes under the Limitation Ordinance (Cap 347).

Again, parties and lawyers should be cognisant of this development. In keeping with other provisions, it focuses on reducing perceived disincentives to offering apologies, by extending time for limitation purposes. In Canada, detailed legislation was required to address tolling for the purposes of its apology

laws and it will be interesting to see whether this light touch amendment causes any issues in practice or results in satellite litigation.

Interplay with mediation and without prejudice negotiation

The Apology Law forms part of the government's policy to encourage the wider use of mediation to resolve disputes. The law does not directly impact mediation, where apologies, admissions and all other statements are already protected from admissibility in other proceedings by confidentiality provisions under the Mediation Ordinance (Cap 620). This is reinforced by the common law doctrine of without prejudice privilege, which protects mediation and without prejudice negotiations.

The Apology Law is really of most relevance outside of the mediation/without prejudice negotiation context in that it makes otherwise open and admissible statements automatically inadmissible. It is possible that, in making such an apology, the parties proceed on a more conciliatory footing rendering them amenable to mediation. It will certainly be interesting to see whether there is an uptick in mediation in light of the Apology Law.

Conclusion

In becoming the first jurisdiction in Asia to enact apology legislation, the law may help to further enhance Hong Kong's position as a centre for international dispute resolution in the Asia Pacific region. Apologies certainly can enhance the chances of settlement, when made in the right circumstances and at an appropriate time.

Research showing the efficacy of apologies in reducing subsequent legal suits is most prevalent in healthcare and personal injury disputes. The challenge for Hong Kong will be to ensure that this potentially powerful law (particularly for defendants) is adequately promoted and understood by all stakeholders to the dispute resolution community. The government is planning certain education activities in this regard.

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At worst, the legislation could lead to 'hollow' or tactical apologies that seek to pressurise complainants to settle on less advantageous terms. A (potential) defendant is safe in the knowledge that there will be no legal downsides in admitting fault. A complainant/plaintiff, on the other hand, armed with an open admission of fault by his or her counterparty, cannot use this to their advantage should the dispute not settle. This issue highlights the complexities of apology legislation and the potential scope for misuse.

It is hoped that the drafting of the Apology Law, which has been subject to thorough scrutiny and careful drafting, strikes the right balance and prompts genuine apologies and attempts to settle.

If you would like to discuss the implications of the Apology Law to your organisation and its disputes portfolio, please contact the authors.



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