

Case Bulletin: 2019/07

Submission to Jurisdiction & Waiver

In a series of *China Medical* related proceedings¹, the courts examined a number of important civil procedure principles. In this article, we look at the rules governing defendant's submission to jurisdiction and waiver to contest irregularity. For background and the defined terms used in this article, please see our publication "Extension of Validity of a Writ".

It was an old English practice, which is now reflected under Order 10, rule 1(5) of the Rules of the High Court (Cap. 4A) ("**RHC**"), allowing a defendant at any time after service of a writ to waive service and enter an unconditional appearance, even after the validity of the writ of service has expired. The date of service will be deemed to be the date of receipt of the acknowledgment in the Registry. However, this rule is expressed as being subject to Order 12, rule 7 of the RHC, which provided that mere acknowledgment of service shall not be treated as a waiver by the defendant of the irregularities affecting jurisdiction. Furthermore, a defendant must raise any dispute as to jurisdiction before filing a defence. The policy reason behind these rules is that a defendant should not be regarded as having submitted to the jurisdiction of the court by reason only of contesting the jurisdiction of the court.

I. Background

1. In *China Medical v BEA*, P alleged that BEA has lost the right to challenge the Extension Order (i.e., extending the validity of the Writ) as it had taken "*substantive steps*" in the proceedings and had thereby submitted to the

¹ *China Medical Technologies, Inc (in liquidation) v Bank of China (Hong Kong) Limited* [2018] HKCFI 1395, [2019] HKCA 402 & [2019] HKCA 735, and *China Medical Technologies, Inc (in liquidation) v Bank of East Asia, Limited* [2019] HKCFI 2143.

court's jurisdiction or waived any objection to the validity of the Writ or its service.

2. P relied broadly on four matters in support:
 - (1) BEA agreed to P's request for an extension of time to file its statement of claim and was paid costs of the application;
 - (2) BEA sought an extension of time for filing of its defence;
 - (3) BEA by correspondence proposed to consolidate the action with P's action against BOC, and BEA sought security for costs;
 - (4) What BEA said in resisting P's Examination Application made under section 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

II. Key Points

1. Acceptance of service of a writ, and the mere filing of an acknowledgment of service do not amount to submission or waiver.
2. Seeking a time extension for filing a defence does not amount to a submission to jurisdiction or waiver.
3. A defendant demanding a statement of claim would not amount to a step in proceedings.
4. Any steps short of an express abandonment of the right to challenge jurisdiction or the service of the writ, or a mere indication in correspondence of an intention to file a defence is not sufficient to constitute a waiver.

III. Findings

Given that the time to file a defence, hence, the time for making an application to contest jurisdiction has not expired, BEA's agreement to extend the time for P to file its statement of claim and getting paid costs were not inconsistent with BEA's

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later making of an application to contest jurisdiction or irregularity. A correspondence giving an impression that the defendant intended to file a defence does not amount to a step in the proceedings or submission to jurisdiction. Whatever BEA said in the Examination Application should not be taken out of context. All-in-all, P's alleged matters do not amount to a "*substantive step*" in the proceedings between P and BEA. The court held that there was no basis to suggest that BEA has waived its right to challenge the Extension Order.

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