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DOING BUSINESS IN HONG KONG



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Introduction

Hong Kong enjoys a strong reputation as one of the leading regional business hubs in Asia. Hong Kong's geographical, linguistic and cultural proximity to Mainland China, combined with its international business connections, have made it a key launch pad for foreign investors looking to enter the Chinese market. It also stands as the gateway to regional and global markets for Mainland Chinese investors.

Ranked as the 'World's Freest Economy' for over two decades and fifth globally in terms of ease of doing business, Hong Kong is Asia's second largest, and the world's fourth largest, Foreign Direct Investment recipient.

Some of the key advantages Hong Kong enjoys include:

- ▶ an enviable location at the centre of Asia, providing easy access to all of the region's key markets. Hong Kong is served by its well-connected international airport, which stands as the world's busiest cargo gateway and one of the world's busiest passenger airports;
- ▶ a peerless relationship with Mainland China – geographically, culturally, politically, linguistically – on which Hong Kong has founded its unique position as the gateway both in and out of Mainland China. Although Hong Kong is a polyglot region, with many people communicating freely in English, Cantonese and Putonghua, English firmly remains the language of business;
- ▶ a government openly committed to foreign investment and content not to interfere excessively in the business world;
- ▶ immigration policies designed to support the multi-national businesses and diverse community based in Hong Kong, and ensure the city remains competitive internationally;
- ▶ a low and simple tax system and a free port which generally imposes no customs duties on imported goods; and
- ▶ excellent infrastructure maintained and refreshed by the government's liberal investment policy and active encouragement of inward investment.



Political Structure

Legal system

The rule of law is a key tenet of Hong Kong's success. The legal system of the Hong Kong Special Administrative Region (**HKSAR**) is based on the common law and is separate from that of Mainland China. Crucially, the judiciary is independent of the legislative and executive branches, and includes judges from several British Commonwealth jurisdictions as well as from Hong Kong itself. Cases can be heard in English, Cantonese, Putonghua or a mixture of all three to suit particular circumstances.

The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) was introduced when China re-established sovereignty over Hong Kong in mid-1997 after 156 years of British colonial rule. Under the Basic Law, the HKSAR enjoys a high degree of autonomy, with an agreement in place that life in Hong Kong should remain unchanged for 50 years.

Echoing the slogan 'One Country, Two Systems', the Basic Law has played a key role in maintaining the confidence of Hong Kong people, allowing stability and prosperity to be maintained post-1997.

Restrictions and regulations

Hong Kong's businesses continue relatively untroubled by governmental intervention. Direct foreign ownership of companies is permitted and there are notably few restrictions targeted specifically at foreign investors (the only notable exception being the restriction on foreign ownership of licensed broadcasters).

There are also no foreign exchange controls in Hong Kong; no restrictions on entry or repatriation of capital or remittance of profits from investments; and no limitations on funds being freely remitted outside Hong Kong.

Crucially, the government continues to fully embrace the free market and, outside the utilities and public transport sectors, does not have any direct control over prices.

Foreign Investment Policy

Hong Kong enjoys a unique relationship with Mainland China through the Closer Economic Partnership Arrangement (**CEPA**). Under CEPA, which came into effect on 1 January 2004, Mainland China has granted easier access to mainland markets for service suppliers based in, and products made in, Hong Kong. CEPA represents a continuing commitment from both parties to greater cooperation in trade and investment generation, with both sides regularly meeting to update and supplement the original agreement. Indeed, between 2004 and 2013, an additional ten supplements were signed, further liberalising various service sectors.

To complement the provisions of CEPA and further ease the cross-border business environment, professional bodies and regulatory authorities in Hong Kong and Mainland China have also signed several agreements on the mutual recognition of professional qualifications.

Overseas manufacturers can take advantage of CEPA by establishing a presence in Hong Kong itself, entering into a joint venture with a Hong Kong company or simply outsourcing production to such a local manufacturer. An overseas service company may also be covered by CEPA one year after merging with, or acquiring at least 50% of, a Hong Kong service company.

Types of Investment Vehicles

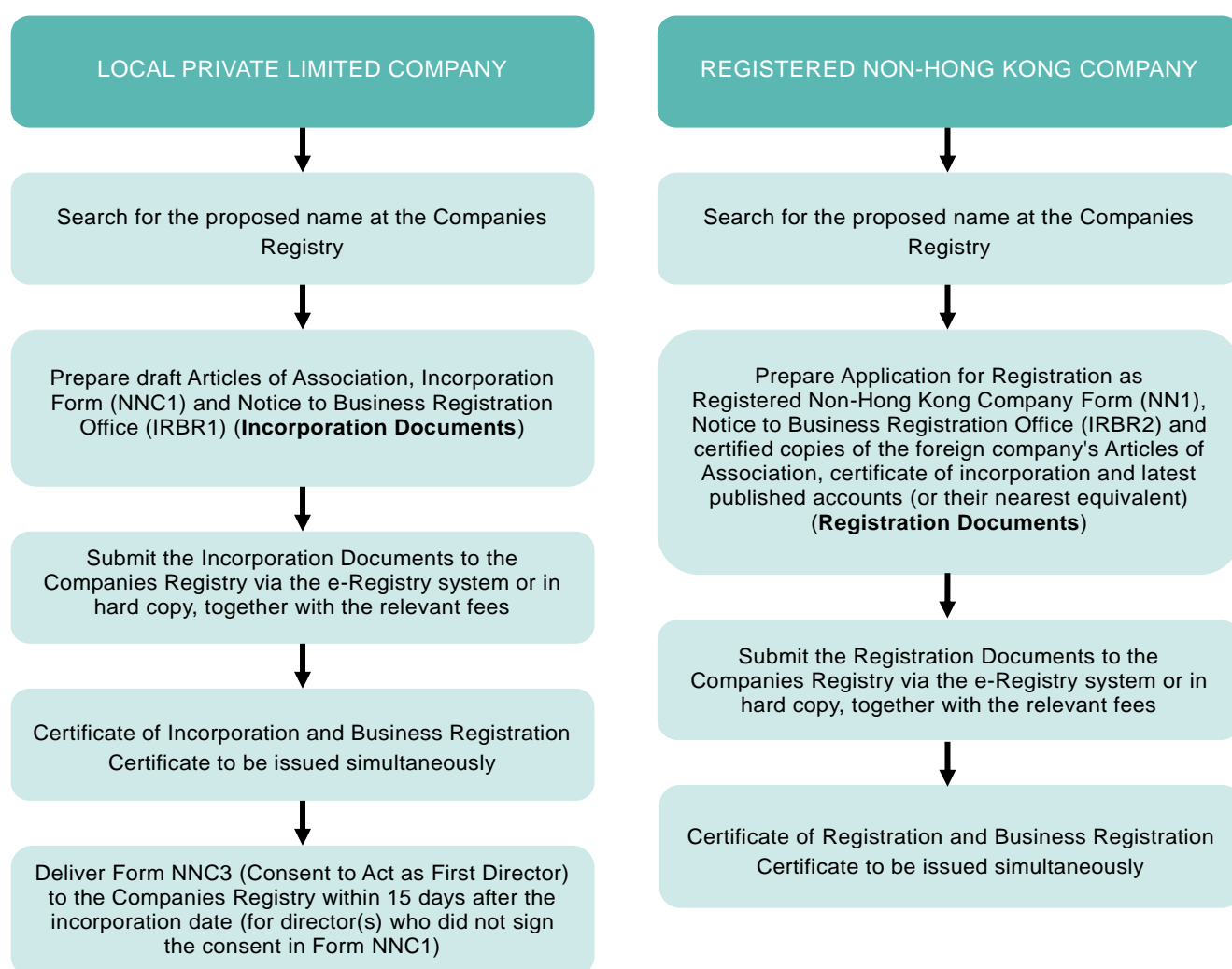
The principal forms through which a business can be conducted in Hong Kong are as follows:

- ▶ Company incorporated in Hong Kong (either private or public via listing on The Stock Exchange of Hong Kong)
- ▶ Registered non-Hong Kong company
- ▶ Representative or liaison office of a foreign company (with restrictions on the types of activities it can carry out)
- ▶ Joint venture (can be set up either as a company or partnership)
- ▶ Partnership
- ▶ Sole proprietorship.

Of the above, privately incorporated limited companies and registered non-Hong Kong companies are most commonly used by foreign investors.

Incorporating a private company or registering a non-Hong Kong company

With few formalities and transparent procedures, setting up a business in Hong Kong, whether through a newly incorporated private limited company or a registered non-Hong Kong company, is a comparatively straightforward process. In outline, the process is as follows:



Before incorporating or registering a company, the index of companies' names at the Companies Registry must be checked to confirm that the proposed name has not previously been registered. Certain potentially contentious names also require regulatory consent.

Once these procedural hurdles have been cleared, the duly signed Incorporation Documents/ Registration Documents can be submitted to the Registrar of Companies. For the incorporation of a local company, Form NNC1 must state the address of the company's registered office in Hong Kong and details of the founder members and company secretary. If the founder member who signs the Form is also acting as the company's director, that founder member must also sign the consent to act as a director in the Form. Directors who did not sign the consent in Form NNC1 should deliver Form NNC3 (Consent to Act as First Director) within 15 days after the date of incorporation. Neither the shareholders nor the directors of a Hong Kong company are required to be Hong Kong residents, but the secretary must be a Hong Kong resident or Hong Kong company. The application fee is HK\$1,720.

For a foreign corporation establishing a place of business in Hong Kong, it must register as a non-Hong Kong company with the Registrar of Companies within one month from the establishment of its place of business in Hong Kong. Form NN1 must state the address of the company's principal place of business in Hong Kong, details of its directors, company secretary and an authorised representative in Hong Kong to accept service of process and notices on behalf of the company. The application fee is HK\$1,720.

Since the establishment in 2011 of the 'One Stop Electronic Company Incorporation and Business Registration Service', application for the incorporation of a local company and registration as a non-Hong Kong company also include a simultaneous application for business registration. The company should elect a one or three year Business Registration Certificate, which costs HK\$2,250 or HK\$5,950 respectively.

Normally, for a local company, a Certificate of Incorporation and the Business Registration Certificate can be issued within one hour of online application or four working days of paper submission. For a non-Hong Kong company, a Certification of Registration will usually be issued within 13 working days from the date the required documents are filed. The Business Registration Certificate will also be issued if the non-Hong Kong company is not yet registered in Hong Kong.

A public company must file a prospectus before it allots any shares in addition to meeting the above requirements. Companies intending to list on The Hong Kong Stock Exchange have to fulfil certain requirements under the Companies Ordinance and the Listing Rules, including profit or market capitalisation as well as trading period thresholds.

To speed up the process, many businesses in Hong Kong offer pre-incorporated 'shelf' companies for purchase. Rather than incorporating and registering a business from scratch, such shelf companies are immediately ready to trade and enter contracts. The only procedural steps involve amending the company's registered address and details of its officers.



Employment

Employment in Hong Kong is less regulated than it is in many other jurisdictions, for example the European Union and the United States. The principle statutes which govern Hong Kong employment law are the Employment Ordinance, Mandatory Provident Fund (MPF) Schemes Ordinance, Employees' Compensation Ordinance, and several other ordinances covering equal opportunities and occupational health and safety.

The Employment Ordinance is the key piece of legislation in this context. Applying to every Hong Kong employee engaged under a contract of employment with only very limited exceptions, the Employment Ordinance prescribes the minimum rights, benefits and protections for both sides of the employment relationship. Specific rights guaranteed by the Employment Ordinance include termination rights, sickness and holiday allowance, maternity provisions, and union privileges.

Under the First Schedule of the Employment Ordinance, an employee is considered to have been continuously employed if he or she has been employed under a contract by the same employer for four weeks or more, with at least 18 hours worked in each week. This period is not broken by certain breaks such as maternity leave or sickness day. An employment contract can exist even if it is not in writing. However, as a matter of good practice, it should be in writing.

Continuous employment gives rise to a number of statutory entitlements, including rest days, statutory holidays, sickness allowance, paid annual leave, severance payment and long service payment. Employees who are not in continuous employment are still entitled to basic protection under the Employment Ordinance such as statutory holidays and restrictions on wages deductions.

Statutory minimum wage and working hours

Since 1 May 2011, employers have been required to pay their employees a minimum wage. The average hourly wage for an employee in respect of any wage period should not be less than the statutory minimum rate, which currently stands at HK\$34.50 per hour. The minimum wage rate is reviewed (although not necessarily revised) every two years.

All employees to whom the Employment Ordinance applies are entitled to the minimum wage (student interns, for example, are not so entitled). The calculation of minimum wage excludes the hours not worked (such as rest day pay, holiday pay, annual leave pay, maternity leave pay, sickness allowance).

Under Hong Kong's employment legislation, save for persons under 18 years of age, there is no statutory limit on an employee's maximum number of working hours. The Legislative Council is looking into this issue, although no decision has yet been made.

Employee benefits

While the Employment Ordinance dictates the minimum entitlements for employees, it is up to the discretion of employers to provide additional benefits such as overtime payment, medical plans and life insurance.

Mandatory Provident Fund (MPF)

Unless an employee is exempt, the employee and its employer are required to contribute 5% of the employee's monthly relevant income into a mandatory provident fund scheme, up to a maximum mandatory monthly contribution level (currently HK\$1,500 by each party). An employee is exempt if, for example, the employee is covered by an overseas retirement scheme.

An employee whose monthly relevant income is below a specified level (currently HK\$7,100) is not required to make a mandatory contribution; only their employer is required to do so.

Additional voluntary contributions by either the employer or the employee are also permitted.

Employee Compensation Insurance

The Employees' Compensation Ordinance establishes a no-fault, non-contributory compensation system under which individual employers are liable to pay compensation for work-related injuries or fatalities, and maintain valid insurance policies to cover such liabilities.

Permitted absences

Rest days

Employees employed under a continuous contract must be given at least one rest day in every seven day period.

Statutory holidays and paid annual leave

All employees are entitled to 12 days of statutory holidays, irrespective of the length or continuity of their employment contract.

Once an employee has been employed under a continuous contract for 12 months, they are entitled to paid annual leave of seven days. The amount of annual leave an employee is entitled to each year increases progressively the longer they continually work at a company, to a maximum of 14 days.

Sick leave

Once employed under a continuous contract, employees can accumulate paid sickness days, up to a maximum of 120 days. Employees are entitled to sickness allowance if:

- ▶ the employee has accumulated the required number of paid sickness days
- ▶ the sick leave taken is for four consecutive days or more
- ▶ the employee possesses an appropriate medical certificate.

Maternity leave

A female employee employed under a continuous contract immediately before the commencement of her maternity leave is entitled to a continuous period of 10 weeks maternity leave. Such an employee is entitled to pay during her maternity leave provided she has been employed under a continuous contract for not less than 40 weeks prior to the commencement of her maternity leave.

Recruitment of staff

With the unemployment rate in Hong Kong remaining low (2.9% in Q4 2017), the employment market remains firmly weighted in favour of the employees as companies compete for the best talent. Consequently, salaries are comparatively high and recruiters move quickly.

Foreign employees

Non-Hong Kong resident graduates who possess a degree or higher qualification in a full-time and locally accredited programme in Hong Kong may apply to stay, or return, and work in Hong Kong under the Immigration Arrangements for Non-local Graduates (**IANG**).

Other non-Hong Kong residents who possess special skills, knowledge or experience of value to, and not readily available in, Hong Kong may apply for permission to work in Hong Kong under the General Employment Policy (**GEP**).

When approving an employment visa, the Hong Kong Immigration Department will take into account:

- ▶ whether the business being undertaken is beneficial to the economy, industry and trade of Hong Kong
- ▶ whether the employment of the applicant is essential to the business
- ▶ whether the position could easily be filled by a local individual.

Admission scheme for mainland China talents and professionals

Chinese residents of Mainland China who are not non-local graduates but possess special skills, knowledge or experience of value to and not readily available in Hong Kong may apply to come to work under the Admission Scheme for Mainland Talents and Professionals (**ASMP**).

Working conditions

Role of unions/collective bargaining etc

The Employment Ordinance provides that every employee has the rights:

- ▶ to be a member/an officer of a trade union registered under the Trade Unions Ordinance
- ▶ to take part in activities of that trade union outside working hours or during working hours with the consent of the employer
- ▶ to associate with others in forming or applying for the registration of a trade union.

Despite these basic protections, trade union participation levels among Hong Kong employees remain comparatively low.

Termination of employment

Upon termination of employment, the employee will be entitled to a termination payment as soon as is practicable and in any case not later than seven days of the termination date. Such payment includes:

- ▶ outstanding wages
- ▶ wages in lieu of notice, if any
- ▶ payment in lieu of any outstanding annual leave entitlement
- ▶ end of year payment, if any
- ▶ long-service payment or severance payment (if applicable)
- ▶ other payments under the employment contract such as gratuity or provident fund.

An employee who has been continuously employed for not less than 24 months and whose employment is terminated because of redundancy will be entitled to a statutory severance payment. Currently, the employer can offset such severance payment against any accrued benefits derived from the employer's contributions to the employee's mandatory provident fund scheme, though this is under review and likely to change in coming months.

Taxation

Hong Kong taxes are famously among the lowest in the world, facilitated by a straightforward and streamlined taxation regime. Notably, although hydrocarbons, tobacco and liquor are subject to taxes, Hong Kong does not impose any payroll, turnover, sales, value added, gift or capital gains taxes or any estate duty or inheritance tax.

In general, income is only taxed if it arises in, or is derived from, Hong Kong through a trade, business or profession carried on in Hong Kong. Complementing this approach, Hong Kong has entered into various double taxation agreements (**DTAs**) with a broad range of other countries and territories. To date, comprehensive DTAs had been signed with Austria, Belgium, Brunei, Canada, the Czech Republic, France, Guernsey, Hungary, Indonesia, Ireland, Italy, Japan, Jersey, Kuwait, Liechtenstein, Luxembourg, Mainland China, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Portugal, Qatar, Spain, Switzerland, Thailand, the United Kingdom and Vietnam. Notably, the agreement with Mainland China provides for certain benefits for Hong Kong companies investing in Mainland China, including reduced withholding tax rates on dividends and exemption treatment for certain capital gains.

Principal taxes and tax rates

The principal taxes in Hong Kong are:

- ▶ Salaries tax
- ▶ Profits tax
- ▶ Property tax
- ▶ Stamp duty
- ▶ Special stamp duty.

Salaries tax

The salaries tax is assessed on a yearly basis and paid at a maximum standard rate of 15% of total liable income.

An individual is subject to salaries tax on income derived from his or her employment, office or pension, provided it was based in or sourced from Hong Kong. In respect of an individual's employment, if it is centred in Hong Kong, then all income derived from it will, generally speaking, be subject to salaries tax even if part of the work is performed outside Hong Kong. Where the employment is not centred in Hong Kong, only that income that is derived from services rendered in Hong Kong will be taxed. In determining whether or not a particular employment is centred in Hong Kong, the Inland Revenue Department will consider all relevant facts, although it will focus in particular on where the contract was negotiated and entered into, where it is enforceable, where the employer is resident and where the employee's remuneration is paid.

Profits tax

The profits tax rate is 16.5% for both foreign and local companies and businesses, although the actual tax bill can often be reduced through the numerous deductions and allowances.

A person, whether legal or natural, who carries on a trade, profession or business in Hong Kong will be liable to pay profits tax on all profits stemming from the business which arise in, or derive from, Hong Kong. In determining whether profits are sourced in Hong Kong, the courts will generally analyse where the operations of the taxpayer took place, although there are certain categories of profit which are automatically deemed to be taxable in Hong Kong, such as Hong Kong property rentals and royalties for the use of intellectual property rights in Hong Kong.

There is no capital gains tax, withholding tax on dividends and interest, or collection of social security benefits.

Property tax

The property tax is charged at the rate of 15% of the net assessable value of any land or buildings in Hong, being the rent receivable less irrecoverable rent and rates paid. There is also a fixed allowance of 20% to cover the costs of repairs and maintenance.

A provisional assessment of the taxable amount will be based on the previous year's filings. This will be credited against the final tax, which will be assessed on the filing of the tax return for the relevant year.

Stamp Duty and Special Stamp Duty

Stamp duty is charged on various documents, including property conveyances, property leases, transfers of Hong Kong stock, and Hong Kong bearer instruments. There is a general exemption for transfers of property or shares between associated companies, being those companies with a 90% shareholding link.

Special stamp duty is charged (in addition to any other stamp duty) on agreements for sale of residential property which is disposed of within a period of 24 months from the day on which the vendor acquired such property.

Transfer pricing

For transactions between a Hong Kong company and a closely connected non-resident, where the transactions result in no profit or less than the ordinary profit for the Hong Kong company, the non-resident is deemed to carry on business in Hong Kong through the Hong Kong company. There are also general anti-avoidance provisions utilised by the tax authority to challenge non-arm's length transactions.

Dispute Resolution

Litigation

Based as it is on an adversarial common law system, the process of litigation through the Hong Kong courts remains similar to that in England and the Commonwealth. Civil cases valued between HK\$50,000 and HK\$1 million will be heard before the District Court, with others appearing before the Court of First Instance. There is also a Small Claims Tribunal, in which legal representation is prohibited, for certain types of dispute up to a value of HK\$50,000. Appeals can be made to the Court of Appeal and, finally, the Hong Kong Court of Final Appeal, which is presided over by a combination of local judges and eminent judges from other common law jurisdictions. The Hong Kong courts also have specialist judges hearing, for example, admiralty, arbitration, competition, commercial, company and construction related matters, as well as specialist tribunals and courts detail with specific matters. The judiciary has retained its long-standing reputation as a bastion of independence and efficiency.

Monetary judgments obtained in various other jurisdictions (including certain Commonwealth and Western European countries, but notably excluding the United States) can be registered and enforced in Hong Kong. The decision on whether a foreign judgement is registrable usually turns on whether the relevant country from which the judgment stems has a reciprocal judgment enforcement agreement with Hong Kong; the merits of the underlying case are usually irrelevant. If the foreign judgment cannot be registrable, the beneficiary of it may nonetheless sue upon it as a debt at common law.

Arbitration

Since the establishment of the Hong Kong International Arbitration Centre (HKIAC) in 1985, Hong Kong has become one of the world's leading arbitration centres, with particular expertise in finance, shipping, commerce and construction.

Hong Kong arbitrations are governed primarily by the amended Arbitration Ordinance, which came into effect on 1 June 2011 and which mirrors the structure and provisions of the UNCITRAL Model Law, the example legal framework propagated by the United Nations Commission on International Trade Law.

For international arbitrations conducted at the HKIAC, the HKIAC Administered Arbitration Rules or the UNCITRAL Arbitration Rules are usually applied. For domestic arbitrations conducted at the HKIAC, the HKIAC Domestic Arbitration Rules are normally used. If no rules have been agreed upon, the Arbitration Ordinance provides a procedural framework for the parties and the arbitrator to select appropriate rules for their dispute. To the extent neither the Arbitration Ordinance nor the rules selected by the parties have relevant provisions, the arbitrator has discretion to adopt appropriate procedures to facilitate a fair and efficient arbitral process.

Mediation

Mediation procedures are becoming increasingly popular in Hong Kong, fuelled by the duty of the Hong Kong courts to encourage the use of alternative dispute resolution (ADR), which includes both arbitration and mediation. The Hong Kong government, in particular, inserts mediation clauses in many of its contracts, while the HKIAC actively promotes mediation, maintains a list of accredited mediators and provides training for current and aspiring mediators.

Although the court is obliged to encourage the use of ADR, it cannot compel parties to do so. However, should one party unreasonably refuse to pursue such alternatives, the court may take such refusal into account when determining costs.

Competition

The Competition Ordinance, Hong Kong's first, came into force in December 2015.

Purpose, prohibited conduct and merger rules

The Competition Ordinance prohibits conduct that prevents, restricts or distorts competition in Hong Kong. To this end, the Competition Ordinance prohibits 'undertakings' (being entities that engage in economic activity) from engaging in the following practices:

- ▶ entering restrictive agreements, concerted practices or decisions that have the object or effect of preventing, restricting or distorting competition in Hong Kong (**First Conduct Rule**);
- ▶ abusing a substantial degree of market power in a market (**Second Conduct Rule**).

The Ordinance also prohibits anticompetitive mergers or acquisitions in the telecommunications sector and introduces a judicial enforcement model under which sanctions can only be imposed by a Competition Tribunal.

By including the phrase "concerted practices", anti-competitive co-operation arrangements or non-contractual agreements will still be caught by the First Conduct Rule. The Ordinance distinguishes between serious anti-competitive conduct (including price-fixing, market sharing or bid rigging) and other infringements (such as restrictions of advertising or standardisation of agreement), with the former attracting more serious penalties, reflecting the expected focus on serious cartel activity amongst competitors. Other infringements are likely to be dealt with through warning notices unless the conduct is repeated or continued.

The Second Conduct Rule is intended to tackle abuse by an undertaking with substantial market power of its dominant position. Undertakings with a turnover of no more than HKD40 million are, however, exempt from the Second Conduct Rule. The Competition Commission has published guidance on the identification of dominant companies and the conduct that may be considered abusive.

Exclusions and exemptions

Various exclusions and exemptions are provided for in the Competition Ordinance, including:

- ▶ potential exclusion from the conduct rules for an agreement or conduct that actually enhances or promotes economic efficiency or technical progress;
- ▶ an exemption for governmental or statutory bodies;
- ▶ potential immunity for categories of conduct for which the Chief Executive in Council considers there are exceptional or compelling public policy grounds;
- ▶ a partial de minimis exception for small and medium undertakings.

Investigative powers and enforcement

An independent statutory Competition Commission has extensive powers to investigate suspected breaches of the Competition Ordinance, including powers to require the disclosure of documents and information, to oblige individuals to attend interviews, and to conduct unannounced dawn raids.

The Commission may only conduct an investigation if it has reasonable grounds to suspect that a breach of the Competition Rules has taken place, is taking place or is about to take place. Any person may lodge a complaint with the Commission alleging that an undertaking has contravened, is contravening or is about to contravene the Competition Rules, although the Commission is not required to investigate all such complaints. The Commission may also launch investigations of its own volition or at the prompting of the Court of First Instance, the Tribunal or the government.

The Competition Tribunal adjudicates on competition cases brought by the Competition Commission.

Sanctions and remedies

The Competition Commission has a range of pre-prosecution tools available to it when investigating anti-competitive behaviour. These include warning notices, infringement notices and powers to enter into legally binding commitments or leniency agreements with persons alleged to be in breach.

A business or any person who is found to be in contravention of the Competition Ordinance may face many penalties. These include:

- ▶ a pecuniary penalty of up to 10% of the annual turnover "obtained in Hong Kong" (based on the gross turnover of the undertaking(s) concerned) for each year of infringement, up to a maximum of three years;
- ▶ disqualification for up to 5 years from acting as a director or being directly or indirectly involved in the management of a company.

A broad range of other relief may also be imposed, including orders:

- ▶ forcing divestiture of business operations, assets or shares;
- ▶ appointing a third party to take control of property;
- ▶ striking down or declaring agreements void in whole or in part;

- ▶ prohibiting the withholding of goods or services;
- ▶ striking down conditions attached to contracts of sale or purchase;
- ▶ prohibiting the exercise of voting rights attached to shares, stock or securities;
- ▶ compelling access by third parties to a business's goods, services or facilities;
- ▶ for disgorgement of profits to the Government;
- ▶ for damages to be paid to persons suffering loss as a result of the anticompetitive conduct.

In addition to the above, interim injunctions may be imposed, stopping commercial conduct during investigations and pending prosecution.

The Competition Ordinance also provides for criminal fines (including imprisonment) for obstructing enforcement of the law. This includes destroying documents or concealing them from the Competition Commission, obstructing searches/dawn raids, or providing false or misleading information in an investigation. It is also a criminal offence to terminate the employment of employees or to discriminate against them where they have provided material to the Commission or agreed to give evidence for them. Businesses should be aware that there are restrictions on the ability to indemnify officers and employees against offences and pecuniary penalties, and penalties may be imposed for attempts to do so.

Intellectual Property

Hong Kong maintains a separate intellectual property regime from Mainland China. Articles 139 and 140 of the Basic Law specifically state that intellectual property rights must receive protection in Hong Kong, while other provisions guarantee the retention of autonomy and legislative protection even after reunification with Mainland China.

The Hong Kong Intellectual Property Department serves as the focal point for intellectual property law and policy in Hong Kong. It operates the registries of trade marks, patents and designs, and also provides expert policy advice to the Commerce, Industry and Technology Bureau and legal advice to other government departments on intellectual property related matter.

Patents

The patent system in Hong Kong is independent of Mainland China. Therefore, a patent granted for Hong Kong is only effective in Hong Kong and does not extend to Mainland China, and vice versa.

There are two types of patents available in Hong Kong: the “standard patent” and the “short-term patent”.

- ▶ A standard patent in Hong Kong is based on the registration of a patent in Mainland China or the UK, or a European patent designating to the UK. It can be made by filing a request to record within six months of its publication, and subsequently a request for registration and grant. A standard patent is renewable annually after the end of the third year, and has a maximum term of 20 years from the date of filing the original patent application to its corresponding designated patent office; and
- ▶ The grant of a short-term patent is based on a search report from an international searching authority or one of the three designated patent offices in the EU, the UK and Mainland China. A short-term patent is renewable after four years from its filing date, and has a maximum term of eight years. A short-term patent is subject to a formality examination only, but not to a substantive examination on the patentability of the invention.

Trademarks

The trade mark law of Hong Kong is based on the Trade Marks Ordinance, which shares many similarities with the relevant trademark legislation in the UK. The similarities are also facilitated by The Agreement on Trade Related Aspects of Intellectual Property Rights, of which Hong Kong is a signatory through the PRC as a member of the WTO.

To register a trade mark in Hong Kong, it is necessary to file an application at the Trade Mark Registry of the Hong Kong Intellectual Property Department. An application for trade mark may cover one or more classes of products and/or services. After the application is submitted, it will first be assessed by the examiners for the formalities of the application, then it will go through the substantive examination, where the main grounds of objection (absolute and relative grounds for refusal) can be raised. If there is no objection or all objections are eventually overcome, the application will be accepted and published for a period of 5 months. During this period, third parties are allowed to object to the registration of the mark on certain grounds.

If there is no third party objection during this period, a certificate of registration will be issued. The standard timeframe to registration for an application which encounters few if any problems or difficulties is 12 months. Upon registration, and subject to the applicant, a trade mark in Hong Kong is valid for period of 10 years, and renewable for a further 10 years within the 6 months before expiry.

Registered and unregistered designs

Similarly, the design registration system in Hong Kong is also independent of Mainland China. Registering your design in Hong Kong will give you protection in Hong Kong only. However, your application for design registration in Hong Kong can give you priority, within six months, for a subsequent application to register your design in other countries and territories which are signatories of The Paris Convention for the Protection of Industrial Property.

Registered designs

For a design to be registrable, it must be new at the filing date or a priority date based on a first application in a Paris Convention country or territory. The registration of a design may be invalid if its novelty is destroyed by premature disclosure. Therefore a design owner should apply for registration before marketing the designed product in Hong Kong or anywhere else in the world.

After an application is submitted to the Design Registry it will go through formality examination. There is no substantive examination and the Design Registry does not search records of prior registered designs. More than one design can be included in an application provided that the designs relate to the same class of articles (as classified under the Locarno Classification) or to the same set of articles.

Registered design protection is renewable for periods of five years beginning from the filing date, and up to a maximum of 25 years.

Unregistered designs

There is no relevant provision for the protection of unregistered designs in Hong Kong. However, if you do not register your design in Hong Kong, you may still have protection under the copyright law for articles produced from your original design drawings.

Nonetheless, protection under copyright law has limitations. It is generally easier to defend your right if the design is registered. For example, you cannot take legal action for copyright infringement where another person has independently produced an identical or similar design. But if a design is registered, you may enforce your right even if it was independently created.

Copyright

The copyright law in Hong Kong follows the English model to a great extent. As one of the parties to the Berne Convention for the Protection of Literary and Artistic Works, Hong Kong has broad copyright protection and there are no formalities required to obtain copyright protection for a piece of work in Hong Kong. There are also no requirements of nationality or other status of the author for a work to be eligible for protection. Works broadcast over the internet, radio, and television are all protected.

In order to successfully claim for copyright protection, three criteria must be satisfied:

- ▶ the subject matter must be a 'work'
- ▶ the work must fall within one of the following categories:
 - ▶ literary works;
 - ▶ dramatic works;
 - ▶ musical works;
 - ▶ artistic works;
 - ▶ sound recordings;
 - ▶ films;
 - ▶ broadcasts;
 - ▶ cable programmes;
 - ▶ typographical arrangement of published editions.
- ▶ the work must be original if the subject matter is a literary, dramatic, musical or artistic work.

The duration of copyright of literary, dramatic, musical and artistic works is the life of the author plus 50 years or, if the author unknown, 50 years from the year in which the work was first created or made available to the public. The duration of copyright in typographical arrangement of published editions is 25 years from the year of its first publication. The duration of copyright in other works is also 50 years from certain events specified in the Copyright Ordinance.

Marketing Agreements

Agency

As a common law jurisdiction, the law of agency in Hong Kong and the rights and liabilities of principals and their agents are governed by the common law principles of equity and contract. Agency contracts can be oral or written, or even inferred by conduct. But even if it is not legally required, it is always a good idea to put the terms in writing to evidence the terms of their relationship, such as commissions and scope of authority.

On top of the contractual terms, the Factors Ordinance also provides for some statutory rights and protection for mercantile agents.

Distribution

Similarly, there is no requirement for the agreement to be in writing for appointing distributors. As opposed to agents who contract with third parties on behalf of the suppliers, distributors contract with third parties in their own right. They purchase the goods and obtain good titles from their suppliers first, and then sell the goods to a subsequent purchaser. The distributor is remunerated by way of a mark-up on sales. The distributor in this situation will not be considered as an agent but as a purchaser of the supplier's goods.

Franchising

Franchising provides an opportunity for a business to expand by linking it with the franchisee who has the capital and manpower to do so.

There is no specific legislation governing franchising operations in Hong Kong. There are no exchange controls, antitrust laws, foreign equity participation or local management participation regulations. Disputes arising from the franchise agreement will be subject to the common law and to the legislation relating to the registration, licensing and protection of intellectual property rights.

E-Commerce

Hong Kong is sometimes termed as one of the most 'wired' cities in the world due to its extensive and fast broadband network. The Electronic Transactions Ordinance dictates the legal framework for the conduct of e-business in the Hong Kong, authorising the use of digital signatures and electronic records, as well as governing the rules on the retention of electronic records and their admissibility in legal proceeding.

The government is also promoting the development of electronic commerce with the implementation of its Electronic Services Delivery Scheme. This scheme aims to improve the efficiency and accessibility of public services by making various public services available online and through other electronic means.

Moreover, the Hong Kong Monetary Authority regularly issues circulars clarifying its regulatory approach on e-banking services and making recommendations on managing the risks associated with such activities.

Data Protection

In general, the data protection law in Hong Kong was relatively under-developed until recent years. The Personal Data (Privacy) (Amendment) Ordinance was passed in June 2012. It set out a number of changes and introduced an important new regime for companies that collect personal information in Hong Kong. Some of these new changes included:

- ▶ prohibiting the use of personal information for direct marketing purposes except with informed consent;
- ▶ prohibiting the disclosure or sale of personal data to third parties for direct marketing purposes except with informed consent;
- ▶ imposing an obligation on companies that outsource data processing to adopt means to prevent breach of personal information;
- ▶ strengthening the investigative and enforcement powers of the Privacy Commissioner.

Product Liability

Hong Kong has a well-established product liability regulatory system. As a common law jurisdiction, its product liability regime consists of both statutes and common law.

Civil liability for defective products

Civil liability for defective products may arise in contract, tort or breach of a statutory duty. In contract law, a consumer may claim for damages if the seller has breached an express or implied term of the sale contract. The Sale of Goods Ordinance also inserts an implied term that all consumer goods must meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price and all other relevant circumstances. Alternatively, a consumer can bring a tort action for negligence against the supplier of defective products if its conduct falls below the reasonable standard of care.

However, there is no class action system in Hong Kong; all product liability claims are private individual actions. Nonetheless, interested parties can apply to have similar product liability actions consolidated.

Criminal liability for unsafe products

There are a number of statutes that impose criminal liability for unsafe products on manufacturers, suppliers or retailers. One such statute is the Consumer Goods Safety Ordinance which imposes a general safety standard for all products. In addition, there are also safety standards imposed on various consumer products. The manufacturers, importers and suppliers will be liable for criminal penalties if they breach any of the safety requirements.

The Commissioner of Customs and Excise has the power to serve a recall notice, requiring the immediate withdrawal of any consumer goods or products which he reasonably believes to be unsafe and may cause serious injury.

Bribery and Corporate Crime

Anti-corruption law

Hong Kong has a relatively bribery-free environment and clean image compared to other countries in the region. The Independent Commission against Corruption (ICAC), established by Independent Commission Against Corruption Ordinance, specialises in tackling corruption. To do so, it has a broad range of law enforcement powers that include the power to investigate, arrest, and/or detain individuals suspected of offences.

The ICAC is empowered by the Prevention of Bribery Ordinance, which criminalises bribery and corrupt transactions in both the public and private sectors. It also provides a wide range of legal powers to the ICAC in investigating bribery offences.

Anti-money laundering

There are several legislation dealing with money laundering in Hong Kong. The Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance imposes on financial institutions, and designated non-financial businesses and professions when they engage in specified transactions, requirements regarding customer due diligence and record-keeping. The Drug Trafficking (Recovery of Proceeds) Ordinance (**DTROP**) and the Organized and Serious Crimes Ordinance (**OSCO**) also require reporting of suspicious transactions regarding money laundering or terrorist financing.

Real Estate

Hong Kong is one of the most expensive place to rent offices. Moreover, land transactions in Hong Kong have been operating in a very complex and costly deeds registration system governed by the Land Registration Ordinance. Under this regime, a solicitor has to review historic title documents to establish good title to the land. In light of this, the Land Titles Ordinance was enacted in 2004 to simplify the conveyancing process. However, the new Land Titles Ordinance has not been implemented yet.

The high stamp duty tax rates in Hong Kong create another barrier for buying and transferring ownership of properties in Hong Kong. In an effort to curb the booming property price, double stamp duty tax is imposed on both residential and commercial properties held by companies and non-first time property owners. The stamp duty tax rate is on a sliding scale depending on the value of the property, and may in the normal course go up to 8.5%. However, high rates may apply if property was acquired after 20 November 2010 and resold within 3 years.

Further information

Useful contacts

Business Services

- ▶ The Hong Kong General Chamber of Commerce www.hkgcc.org.hk
- ▶ Support and Consultation Centre For SMEs www.success.tid.gov.hk
- ▶ Hong Kong Trade Development Council www.hktdc.com
- ▶ InvestHK www.investhk.gov.hk
- ▶ Addleshaw Goddard www.aglaw.com

Hong Kong SAR Government

- ▶ HKSAR Government Portal www.gov.hk
- ▶ Business Registration Office www.ird.gov.hk/eng/tax/bre.htm
- ▶ Companies Registry www.cr.gov.hk
- ▶ Customs And Excise Department www.customs.gov.hk
- ▶ Education Bureau www.edb.gov.hk
- ▶ Immigration Department www.immd.gov.hk
- ▶ Inland Revenue Department www.ird.gov.hk
- ▶ Labour Department www.labour.gov.hk
- ▶ Mandatory Provident Fund Schemes Authority (**MPFA**) www.mpfa.org.hk
- ▶ Transport Department www.td.gov.hk

Financial

- ▶ Hong Kong Exchanges And Clearing Limited www.hkex.com.hk
- ▶ The Securities And Futures Commission www.sfc.hk
- ▶ Hong Kong Monetary Authority www.info.gov.hk/hkma

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