

MAYER | BROWN

# A Guide to Doing Business in Hong Kong



# Contents

## HONG KONG AT A GLANCE

Political System .....	3
Legal System .....	3
Economic System .....	3
Investment Incentives .....	4
Financial System .....	4
International Relationships .....	4
Relationship with the PRC .....	4
Belt and Road Initiative .....	4
General Data Protection Regulation .....	5

## BUSINESS VEHICLES

Types of Business Vehicle .....	7
Business Registration .....	7
Special Types of Business .....	7
Hong Kong Companies .....	8
Incorporation of a Private Limited Company .....	8
Branch Operations .....	10
Reasons for Choosing a Branch or Subsidiary .....	10
Representative Offices .....	11
Sole Proprietorships/General Partnerships/Limited Partnerships .....	11
Purchase of a Business in Hong Kong .....	12
Joint Ventures .....	12
Representatives - Agents, Distributors and Franchisees .....	12

## LABOUR

General .....	15
Trade Unions .....	15
Foreign Workers .....	15
Summary of General Regulations .....	16

## ANTITRUST AND COMPETITION

General .....	19
---------------	----

## INTELLECTUAL PROPERTY

General .....	23
Trade Marks .....	23
Patents .....	24
Registered Designs .....	24
Copyright .....	24
Confidential Information .....	25
Remedies for Infringement .....	25

## INSOLVENCY

General Consequences of Corporate Insolvency .....	27
Voluntary Winding up .....	27
Compulsory Winding up .....	28
Liquidators and Receivers .....	28
Bankruptcy Laws (Personal Insolvency) .....	28
Reorganisation of Business .....	29

## DISPUTE RESOLUTION

Litigation .....	33
Arbitration .....	34
Mediation .....	34
Special Situations .....	34

## APPENDIX –

USEFUL CONTACTS IN HONG KONG	36
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*The information in this publication is current to August 2021.*



# Hong Kong at a Glance





## Political System

The People's Republic of China (**PRC**) resumed its sovereignty over Hong Kong when the Hong Kong Special Administrative Region of the PRC was established on 1 July 1997 under the principle of "one country, two systems".

The Basic Law, the constitution of Hong Kong, was adopted on 4 April 1990 by the National People's Congress of the PRC and is now applicable to Hong Kong. It provides that, for a period of 50 years from 1 July 1997, Hong Kong will enjoy a high degree of autonomy and will be allowed to retain its current political, social, commercial and legal systems including the capitalist economic and trade systems that have made it an international financial and business centre.

## Legal System

The Hong Kong legal system is based on English common law and rules of equity. It is characterised by its strict adherence to the principles of the rule of law and independence of the judiciary. The laws in force immediately prior to the resumption of sovereignty by the PRC have been maintained, with some exceptions, as specified in the Basic Law. Under the "one country, two systems" principle, the PRC national laws will be applied to Hong Kong, only if they are listed in Annex III to the Basic Law. The Standing Committee of the National People's Congress of the PRC may add specified matters to that list in Annex III, after consultation with the Hong Kong Basic Law Committee. For example, the PRC Law on Safeguarding National Security in Hong Kong was added to the list of laws in Annex III in June 2020.

## Economic System

Hong Kong operates a free enterprise, free trade economic system with minimal government interference in all sections of the economy. This is illustrated by the small number of duties and tariffs on imported goods.

Companies and individuals may import or export capital at their own discretion, and profits and dividends derived from a business in Hong Kong can be freely converted and remitted.

There is no Hong Kong taxation on dividends. Also, there are no exchange controls or foreign currency

regulations in Hong Kong (except those that relate to suspected terrorist financing and money laundering).

## Investment Incentives

There are no general restrictions on investment in Hong Kong where foreign exchange control policies are not applicable. There are few specified incentives to encourage investment as the low rate of taxation and favourable investment climate are considered to be sufficient to stimulate investor interest in Hong Kong. However, from time to time the government does launch special schemes to encourage investment in certain areas.

## Financial System

In the absence of a central government bank in Hong Kong, note issuing privileges have been granted to HSBC, Standard Chartered Bank and Bank of China.

The Hong Kong dollar has been pegged at HK\$7.80 to US\$1 since 1983 and has traded at an average of HK\$7.799 to US\$1.

The various sectors of the financial and securities community are regulated by The Stock Exchange of Hong Kong Limited, the Securities and Futures Commission, and the Hong Kong Monetary Authority.

## International Relationships

Hong Kong enjoys almost full autonomy in the conduct of its external commercial relations and may conclude, and implement, bilateral or multilateral trade agreements with states, regions and international organisations.

Hong Kong is a founding member of the World Trade Organisation.

Hong Kong is also a member of the Asia-Pacific Economic Co-operation (**APEC**) forum which aims to achieve sustained growth and development in the Asia-Pacific region through the promotion of economic interdependence and the reduction of trade barriers.

## Relationship with the PRC

Hong Kong's proximity to, and unique relationship with, the PRC have made it an important gateway for conducting business in the PRC. Hong Kong has intensive and extensive business influence across the PRC and contributes a significant part of the PRC's inbound investment. The PRC is one of Hong Kong's largest trading partners.

There are many important instances of business co-operation and integration between Hong Kong and the PRC which have provided great business opportunities to the PRC, Hong Kong and foreign investors. One example is the Closer Economic Partnership Arrangement (**CEPA**), the main text of which was signed in June 2003. CEPA was the first free trade agreement ever entered into by the PRC and Hong Kong. It opened up huge opportunities for Hong Kong businesses, allowing Hong Kong goods and services to gain greater access to the PRC market. CEPA is also beneficial to the PRC because Hong Kong serves as a perfect "springboard" for PRC enterprises to step out into the global market, facilitating the PRC's integration with the global economy. Foreign investors can also establish businesses in Hong Kong to leverage the CEPA benefits, accessing the vast opportunities that the PRC market offers.

Besides CEPA, Hong Kong is also the pioneer in offshore renminbi (**RMB**) businesses. Hong Kong was the first offshore market to launch RMB businesses in 2004. The market for RMB businesses is growing rapidly and various offshore RMB products and services have been launched in Hong Kong to cope with the business demands of both local and foreign enterprises and financial institutions. It is believed that the positive development of the offshore RMB market will generate more business opportunities for investors and market participants in Hong Kong.

## Belt and Road Initiative

The "Belt and Road" Initiative (**B&R**) was first raised by President Xi Jinping in 2013 to promote international co-operation and connectivity along the ancient land-based "silk road economic belt" and

the “21<sup>st</sup> century maritime silk road”. As of January 2020, the PRC government has signed more than 200 cooperation agreements with 140 countries and 32 international organisations. The main areas for B&R co-operation include policy coordination, infrastructure connectivity, trade and investment, financial integration and cultural exchange.

As the gateway to the PRC and the economic centre of Asia, Hong Kong offers a unique platform for investors, intermediaries and project owners to take advantage of the B&R, and continues to play a pivotal role in cross-border investment, infrastructure and shipping, financial collaboration, sustainable investment, people-to-people bond, project interfacing and dispute resolution services.

## General Data Protection Regulation

The European Union (EU) General Data Protection Regulation 2016 (GDPR) came into force on 25 May 2018.

A Hong Kong organisation may need to comply with the GDPR if it:

- has an establishment in the EU, where personal data is processed in the context of the activities of the establishment, regardless of whether the data is actually processed in the EU, or
- does not have an establishment in the EU, but offers goods or services to, or monitors the behaviour of, individuals in the EU.

As some requirements in the GDPR are not found in Hong Kong’s existing Personal Data (Privacy) Ordinance<sup>1</sup>, the Privacy Commissioner for Personal Data has issued a booklet outlining the possible impact of the new regulatory framework on organisations or businesses in Hong Kong.

<sup>1</sup> Personal Data (Privacy) Ordinance (Chapter 486 of The Laws of Hong Kong).

“ Hong Kong enjoys almost full autonomy in the conduct of its external commercial relations and may conclude, and implement, bilateral or multilateral trade agreements with states, regions and international organisations.

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# Business Vehicles





## Types of Business Vehicle

The most common types of business vehicle for foreign corporations wishing to carry on business in Hong Kong are:

- a company incorporated in Hong Kong;
- a branch office of the foreign corporation; or
- the establishment of a representative office in Hong Kong.

Also possible, but less common, are sole proprietorships, partnerships and limited partnerships.

Certain businesses may, for tax purposes or others, opt for specific vehicles such as an open-ended fund company (for engaging in a collective investment scheme) or a limited partnership fund (for managing investors' investments). Details of such vehicles are yet beyond the scope of this guide.

## Business Registration

Every business in Hong Kong is required by the Business Registration Ordinance<sup>2</sup> to obtain a Business Registration Certificate within one month of commencing business for its principal office address and also for any other business address in Hong Kong. If a company carries on a business using one or more business or trade names, a Business Registration Certificate is required for each such name. Business registration serves to notify the Inland Revenue Department of the establishment of a business in Hong Kong which may be subject to profits tax.

The One-stop Company and Business Registration Service was jointly launched by the Companies Registry and the Inland Revenue Department in February 2011. Any person who applies for incorporation of a Hong Kong company or for registration of a non-Hong Kong company at the Companies Registry is deemed to have made an application for business registration simultaneously. Accordingly, companies are only required to lodge one single application for both company incorporation/ registration and business registration.

## Special Types of Business

Certain businesses may not be carried on in Hong Kong without a specific licence or other consent of

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<sup>2</sup> Business Registration Ordinance (Chapter 310).

the relevant regulatory authority, in addition to the other requirements set out in this guide. These businesses include various financial institutions, financial market intermediaries, telecommunication and broadcasting companies, restaurants, travel agencies and employment agencies.

## Hong Kong Companies

Companies incorporated in Hong Kong<sup>3</sup> can be public or private and can be limited by shares or by guarantee. Companies limited by guarantee are generally set up by non-profit organisations. Under the Companies Ordinance, a company which is not a private company or a company limited by guarantee is a public company. Many public companies are listed on The Stock Exchange of Hong Kong Limited and are subject to additional regulations, such as the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited and The Codes on Takeovers and Mergers and Share Buy-backs (a discussion of which is beyond the scope of this guide).

The most common form of company in Hong Kong is a private limited company. This is a company which, by its constitution:

- restricts the right to transfer its shares;
- limits the number of shareholders to 50 (not including employees and former employees); and
- prohibits any invitation to the public to subscribe for any shares or debentures of the company.

The liability of each shareholder is limited to the amount (if any) unpaid on the shares held by that shareholder.

## Incorporation of a Private Limited Company

### INCORPORATION

A company may be incorporated in Hong Kong by submitting to the Companies Registry in Hong Kong the following:

- a copy of its Articles of Association (which contain its internal regulations constituting a contract between the shareholders and the company);

- a completed incorporation form (containing information on particulars of first directors, first secretary, founder members, share capital on formation, as well as the address of the registered office of the company);
- a completed Notice to Business Registration Office; and
- the prescribed fees and levy.

Since February 2011, any person who applies for incorporation of a Hong Kong company under the Companies Ordinance is deemed to have made a simultaneous application for business registration. The Notice to Business Registration Office must be submitted together with the incorporation documents.

Upon approval of an application for company incorporation, the Companies Registry issues the Certificate of Incorporation certifying the name and date of incorporation of the company together with the Business Registration Certificate. The legal existence of the company commences from the date of incorporation.

An applicant may make an electronic application for incorporation of a Hong Kong company via the e-Registry. This is a 24-hour portal developed by the Companies Registry to facilitate electronic submission of application for company incorporation.

### NAME

A company name is not permitted if it is identical to that of an existing company. There are also restrictions on the use of certain words. A free company name search may be conducted on the Companies Registry's website or at its Public Search Centre to check whether or not a name is already being used. It is not possible to reserve a name in advance. A company may be incorporated with either an English name, a Chinese name or both. Where a company is incorporated with an English and Chinese name, both names together constitute the full name of the company and should be used together.

### SHARE CAPITAL

There is no prescribed minimum or maximum share capital for any type of company. Share capital may be divided into different types or classes of shares such as ordinary, preference or deferred shares with

<sup>3</sup> The Companies Ordinance (Chapter 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) are the primary statutes regulating companies in Hong Kong.

special rights attached to them as prescribed by the company's Articles of Association. The requirement of having par value ascribed to shares was abolished since March 2014 and the Companies Ordinance adopts a mandatory system of no-par for all Hong Kong incorporated companies.

## SHAREHOLDERS

Every company must have at least one registered shareholder whose name, address and shareholding are filed on public record at the Companies Registry. Shareholders can be individuals or corporations of any nationality, domicile or residence.

## BENEFICIAL OWNERS

With effect from March 2018, every Hong Kong incorporated company must maintain a register of significant controllers<sup>4</sup> to be accessible by Hong Kong law enforcement officers.

## DIRECTORS

A private company is required to have at least one natural person as director and there is no legal maximum for the number of directors. Directors can be individuals (over 18 years old) or corporations of any nationality, domicile and residence, except that no corporate director is allowed in the case of a private company which is a member of a group of companies of which a listed company is a member. The director's name, the number of his or her identity card (if any) or the number and issuing country of any passport held, and his or her residential address must be filed on public record at the Companies Registry. There are no restrictions as to the place at which board meetings are held.

Most modern Articles of Association provide for written resolutions by the directors as well as meetings to be held by telephone or via video conference facilities.

## COMPANY SECRETARY

A Hong Kong company must have a company secretary which is either another company with its registered office or place of business in Hong Kong or an individual ordinarily resident in Hong Kong. The sole director of a company or a body

corporate, of which the sole director is the sole director of the company, cannot be the secretary of the company. The company secretary's particulars must be filed on public record at the Companies Registry. The company secretary's function is to maintain the company's statutory books including registers of directors and shareholders, the minute book of directors' and shareholders' meetings and the share certificate book, and to prepare the documents which have to be filed on public record.

## REGISTERED OFFICE

A company must have a registered office address in Hong Kong which serves as the company's legal address for the service of notices and proceedings.

This can be the same as, or different from, the company's business address.

## AUDITORS AND ACCOUNTS

A company must keep proper books of accounts, and the financial statements must give a true and fair view of the financial position and financial performance of the company unless the company is entitled to reporting exemption. Its accounts must be audited every year and submitted to the Hong Kong Inland Revenue Department. The accounts of a private company are not published or filed on any public record in Hong Kong. The accounts of a public company must, however, be filed at the Companies Registry.

## ANNUAL FILING REQUIREMENTS

Apart from the obligation to update the Companies Registry within a prescribed period after certain changes are made (such as alteration of Articles of Association or change of company name), a company is required to file an Annual Return which shows updated particulars of the company's share capital, shareholders, directors and registered encumbrances (e.g., charges over its assets).

## BUSINESS REGISTRATION

A company is required to obtain a Business Registration Certificate under the Business Registration Ordinance.

<sup>4</sup> Under the Companies (Amendment) Ordinance 2018, a company incorporated in Hong Kong is required to identify persons who have significant control over the company (including, amongst others, natural person(s) holding, directly or indirectly, more than 25% of the shares /voting rights of the company or having the right to exercise significant influence or control of the company) and keep a register of them. Such register needs not be filed on public record at the Companies Registry, but must be made available to law enforcement officers upon demand.

## Branch Operations

### GENERAL

Foreign corporations are permitted to establish branch offices in Hong Kong and, in general, such offices are subject to the same legal and tax consequences as companies incorporated in Hong Kong. As a matter of Hong Kong law, there is no distinction between the foreign corporation itself and its branch, and the branch is only an address at which the corporation itself carries on business.

### REGISTRATION

A foreign corporation wishing to establish a Hong Kong branch office must register with the Companies Registry as a non-Hong Kong company which has established a place of business in Hong Kong under Part 16 of the Companies Ordinance. This must be done within one month of establishment of the place of business in Hong Kong.

Registration is effected by submitting to the Companies Registry a completed application form, a certified copy of the instrument defining the company's constitution, a certified copy of the Certificate of Incorporation (or its equivalent), a certified copy of the latest published accounts, a completed Notice to Business Registration Office and the prescribed fees and levy. A branch office is also required to obtain a Business Registration Certificate under the Business Registration Ordinance.

Since 2011, any person who applies for registration of a non-Hong Kong company under the Companies Ordinance is deemed to have made a simultaneous application for business registration. The Notice to Business Registration Office must be submitted together with the registration documents.

Upon approval of an application for company registration, the Companies Registry issues the Certificate of Registration of the non-Hong Kong Company and the Business Registration Certificate in one go.

### ACCOUNTS

A foreign corporation needs to file a copy of its annual accounts on public record at the Companies Registry if it is required to publish its accounts or make them available for inspection on public record a) under the laws of the place where it is

incorporated, or b) under the laws or rules of any stock exchange or similar regulatory bodies in any other jurisdiction where the foreign corporation is registered as a company. If required, the corporation should file a certified copy of its latest published accounts with the Companies Registry on an annual basis together with an annual return.

### ANNUAL FILING REQUIREMENTS

Apart from the regular filing requirements to update the particulars of a foreign corporation on public record at the Companies Registry, a foreign corporation is required to file an Annual Return showing updated particulars of the corporation's share capital, directors and registered charges over its assets in Hong Kong, etc.

## Reasons for Choosing a Branch or Subsidiary

The business activities that can be carried on in Hong Kong are not dependent upon whether the company is locally incorporated or whether it is a branch of a foreign corporation. The tax rate applied to profits is the same for local and foreign corporations.

The main reason for preferring a subsidiary over a branch is that a subsidiary is an entity which is completely separate from its parent - the parent is not liable for the debts of its subsidiary. The time taken for incorporating a Hong Kong subsidiary is less than for registering a branch operation of a foreign corporation. A Hong Kong subsidiary (while being a private company) does not need to file its accounts on the public record, whereas a branch of a foreign corporation may be required to do so (if the condition for having to file its accounts is met).

On the other hand, preferring a branch over a subsidiary also offers certain advantages. There may be tax advantages under the home jurisdiction of the parent company, for example, in relation to treatment of any losses which the Hong Kong branch operation may incur. A branch operation is required to comply with limited provisions under the Companies Ordinance of Hong Kong. Subject to exceptions, no Hong Kong stamp duty is payable on the transfer of the shares of the foreign corporation which operates a branch in Hong Kong. Stamp duty is, however, payable on any transfer of shares in a Hong Kong subsidiary company.

Furthermore, a separate audit of a branch operation is not required. The business operation of a branch can be terminated easily by notifying the Companies Registry that it ceases to have a place of business in Hong Kong, whereas a Hong Kong subsidiary company can only be terminated by way of liquidation or deregistration, either of which entails a rather lengthy process.

## Representative Offices

### GENERAL

As in the case of a branch office, there is no distinction between the foreign corporation itself and its representative office. The representative office would not have separate legal identity under Hong Kong law. The main reason for preferring a representative office over a branch is always tax driven as the Hong Kong Inland Revenue Department by concession does not tax a 'genuine' representative office for tax purposes.<sup>5</sup>

### REGISTRATION

A foreign corporation which establishes a representative office in Hong Kong will need to register and obtain a Business Registration Certificate under the Business Registration Ordinance within one month of commencing business. However, if at any time the foreign corporation 'establishes a place of business' in Hong Kong<sup>6</sup> then it will become subject to the registration requirement under Part 16 of the Companies Ordinance and must register within one month of establishing its place of business. Once the Companies Ordinance registration requirement is triggered, the representative office must follow the same procedures which a branch office needs to do (above).

On the basis that it will not conduct any activities beyond the permitted scope of a genuine representative office for tax purposes in Hong Kong, a representative office (even if it has established a place of business and registered itself under the Companies Ordinance) should not generate any

profits within the scope of Hong Kong taxation. The representative office may apply to the Inland Revenue Department for an exemption from filing profit tax returns on the basis that it does not carry on business in Hong Kong. Otherwise, it may file annual profit tax returns on a "NIL" basis.

## Sole Proprietorships/General Partnerships/Limited Partnerships

### SOLE PROPRIETORSHIPS

A sole proprietorship is not a separate legal entity so all its debts and liabilities are the personal responsibility of the sole proprietor.

The only procedural step in establishing a sole proprietorship is to obtain a Business Registration Certificate.

### GENERAL PARTNERSHIPS

A partnership is not a separate legal entity nor does it have continual existence. The partners are personally liable for all of its debts, and all of its property rights are vested in all of the partners.

A partnership agreement usually governs a partnership. There is also the Partnership Ordinance<sup>7</sup> which codifies the law relating to partnerships. This contains provisions regulating the rights and obligations of partners, and is deemed to apply when there is no partnership agreement.

As with a sole proprietorship, the only procedural step in establishing a partnership is to obtain a Business Registration Certificate.

### LIMITED PARTNERSHIPS

A limited partnership consists of one or more general partners, who are responsible for the management of the partnership, and who are liable for all of its debts and obligations. A limited partnership also consists of one or more limited partners, who are liable for the debts or obligations

5 The Hong Kong Inland Revenue Department by concession will treat a genuine representative office as not being subject to profits tax so long as it stays within the scope of permissible activities such as those only of a preparatory or auxiliary character which do not themselves directly produce profits.

6 "A place of business" is defined under part 16 of the Companies Ordinance to include a share transfer or share registration office but exclude a local representative office of a bank approved by the Hong Kong Monetary Authority. The previous exception of "a place not used to transact any business which creates legal obligations" was removed from the definition effective 2007.

7 The Partnership Ordinance (Chapter 38).

of the partnership only up to the amount that they contribute to the capital of the partnership. In order for a limited partner to have the benefit of limited liability, the limited partner must not take part in the management or control of the business of the limited partnership and must have no power to bind the limited partnership as its agent.

A limited partnership must be registered with the Companies Registry, otherwise it is deemed to be a general partnership. A limited partnership also requires a Business Registration Certificate for each place at which it conducts business in Hong Kong.

## Purchase of a Business in Hong Kong

There are two ways for acquiring a business in Hong Kong. One is to buy the shares of the company that owns the target business or its assets. The other is simply to buy the assets that make up the business.

The purchase of shares in a Hong Kong company involves the purchaser acquiring the company with all of its assets and liabilities at the time of purchase. The “buyer beware” principle applies to a share purchase and therefore the purchaser usually seeks to minimise its risk by conducting a due diligence exercise in relation to the target company and by seeking appropriate warranty and indemnity protection in the sale and purchase documentation.

In an asset acquisition, it is possible, subject to the filing of certain statutorily prescribed notices, to protect the purchaser from hidden or unwanted liabilities of the target business. However, structuring a business purchase as an acquisition of assets, rather than a purchase of shares, is usually more complicated because it may involve obtaining third-party consents, novating contracts and transferring employees. The purchase of shares in a Hong Kong company involves the payment of stamp duty at a rate of 0.26%<sup>8</sup> on the purchase price paid for the shares or the underlying net asset value of those shares, whichever is the higher. The acquisition of assets owned by a Hong Kong

company does not involve the payment of any stamp duty, unless the acquisition involves the transfer of an interest in real property, i.e. land, in which case stamp duty could be chargeable up to a maximum rate of 15%<sup>9</sup> of the purchase consideration or the value of the real property, whichever is the higher (which does not take into consideration the Buyer’s Stamp Duty and Special Stamp Duty which may impose extra stamp duty on residential property).

## Joint Ventures

A joint venture is a commercial enterprise between two or more joint venture partners who agree to undertake a business together. Generally, each joint venture partner contributes certain resources in return for a share of the ownership and profits of the business. The most common legal structure for a joint venture is where a private limited company is established to conduct the joint venture business, in which the joint venture partners each take a shareholding. The joint venture partners normally enter into a shareholders’ agreement, which regulates the business of the joint venture company and the rights and obligations of the joint venture partners.

## Representatives - Agents, Distributors and Franchisees

Apart from pyramid schemes (which are prohibited under the Pyramid Schemes Prohibition Ordinance<sup>10</sup>) and certain types of business, there are generally no statutory laws or administrative procedures that regulate the appointment or activities of representatives such as agents, distributors or franchisees in Hong Kong. There are generally no regulations, for example, relating to commission rates or payment of compensation to representatives on termination. Relevant agreements are simply governed by common law principles of contract and agency, and the parties are theoretically free to negotiate their own terms.

8 Under the Revenue (Stamp Duty) Ordinance 2021 which came into effect on 1 August 2021, the rate of Stamp Duty payable on contract notes for the sale or purchase of Hong Kong stocks (not being jobbing business) will be increased from 0.1% to 0.13% per side, as a percentage of transaction value.

9 Under the Stamp Duty (Amendment) Ordinance 2018, a maximum rate of 15% was imposed on instruments of transfer of residential property executed on or after 5 November 2016.

10 Pyramid Schemes Prohibition Ordinance (Chapter 617).

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Companies incorporated in Hong Kong can be public or private and can be limited by shares or by guarantee. Companies limited by guarantee are generally set up by non-profit organisations.

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# | Labour



## General

Employment in Hong Kong is less regulated than in many other jurisdictions, such as those in the European Union. The Employment Ordinance<sup>11</sup> prescribes certain minimum rights and protection for employers and employees. The Employment Ordinance applies to every employee engaged under a contract of employment in Hong Kong with only a few limited exceptions; for example, in relation to family members employed in family businesses, and to certain merchant seamen. The Employment Ordinance applies equally to locals and foreign nationals working in Hong Kong. A term of the contract of employment that seeks to extinguish or reduce any right, benefit or protection conferred on the employee by the Employment Ordinance will be void.

## Trade Unions

There are a number of labour organisations/trade unions in Hong Kong but no closed shops. Some of the larger corporations with substantial numbers of employees have labour unions particular to that corporation. Membership of trade unions in Hong Kong is relatively low compared to membership levels in Europe or America. There is no law providing for collective bargaining in Hong Kong.

## Foreign Workers

There is no statutory requirement that a percentage of employees must be local nationals or that a percentage of payroll be paid to local national employees. All non-local nationals are subject to immigration controls and require appropriate visas before entering Hong Kong to work. For an employment visa, a local sponsor is required (normally the employing company) to support the application. The sponsor is required to assume responsibility for repatriation of the employee at the expiration of his or her permitted stay in Hong Kong. The application should be completed and returned to the Chinese Embassy in the country of residence, which will forward it to the Immigration Department in Hong Kong for processing. Alternatively, the local sponsor may submit the employee's application to the Hong Kong Immigration Department. In considering an

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<sup>11</sup> Employment Ordinance (Chapter 57).

application, the Immigration Department must be satisfied (among other things) that there is no suitable local candidate for the position. Where the post involves a special skill or is of a senior nature, this is not normally a problem.

## Summary of General Regulations

### WAGES

The statutory minimum wage for non-domestic workers came into force in May 2011. The current statutory minimum wage rate is HK\$37.50 per hour.<sup>12</sup> Various industry-specific reference guidelines have also been published to address the characteristics and particular modes of operation of different industries for calculating the statutory minimum wage.

### HOURS

Except in relation to employment of young persons employed in industrial undertakings, where special regulations apply, there are no statutory provisions which prescribe maximum working hours. The Employment Ordinance does, however, provide that in addition to paid statutory (public) holidays, an employee is entitled to not less than one rest day in every period of seven days.

### BENEFITS – ANNUAL LEAVE

Employees are entitled under the Employment Ordinance to a minimum of between seven and 14 days annual leave for each period of 12 months employment, calculated on the basis of length of service. There is a prescribed rate of annual leave pay for annual leave under the Employment Ordinance.

### BENEFITS – RETIREMENT SCHEME

The Mandatory Provident Fund Schemes Ordinance<sup>13</sup> requires that every employer in Hong Kong contributes an amount equal to at least 5% of an employee's relevant income (up to a maximum of HK\$30,000 per month) to a retirement scheme that is registered as an MPF scheme. Every employee is also required to contribute at least 5%

of their relevant income (subject to a minimum relevant income of HK\$7,100 per month and up to a maximum of HK\$30,000 per month) to the scheme. As such, the maximum mandatory contribution amount is currently HK\$1,500 per month. There are certain exceptions to this general rule.

### BENEFITS – WORKER'S COMPENSATION

Employers must maintain insurance coverage under the Employees Compensation Ordinance<sup>14</sup> in case of work-related injuries but, otherwise, there is no statutory requirement to provide medical benefits.

### SOCIAL SECURITY

Hong Kong has a non-contributory social security system to provide a basic social safety net. No deductions are made from salaries in respect of social security contributions.

### MATERNITY AND PATERNITY LEAVE

Subject to the qualifying requirements, female employees are entitled to paid maternity leave of 14 weeks or as provided by the terms of the employer, whichever is more favourable. Maternity leave pay is paid at the rate of four-fifths of the employee's average "wages" over the preceding 12 months. There is cap of HK\$80,000 in respect of the statutory maternity leave after the first 10 weeks.

With effect from 18 January 2019, an eligible male employee is entitled to five working days paternity leave at four-fifths of the employee's average wages for each confinement of their spouse/partner.

### SICK LEAVE

Employees are entitled to paid sick leave at the rate of four-fifths of the employees daily average wages. Entitlement to sick leave may be accumulated at the rate of two paid sickness days for each completed month of continuous employment during the first 12 months of employment and at the rate of four paid sickness days for each month after that, up to a maximum of 120 paid sickness days. The entitlement to sickness pay, with the exception of maternity related sickness and attendance at medical examination for pregnancy, only applies, however, to periods of absence due to sickness of

<sup>12</sup> With effect from 1 May 2019.

<sup>13</sup> Mandatory Provident Fund Schemes Ordinance (Chapter 485).

<sup>14</sup> Employees Compensation Ordinance (Chapter 282).

more than four consecutive days.

### SEVERANCE PAY

An employee who has been continuously employed for not less than 24 months is entitled to statutory severance pay if he or she is dismissed by reason of redundancy or if the employee is laid off (i.e., where the remuneration of an employee depends on him or her being provided with a particular kind of work and he or she is no longer provided with a sufficient amount of that work). The amount of severance pay is two-thirds of a month's pay for each year of employment or two-thirds of HK\$22,500 (i.e. HK\$15,000), whichever is less, up to a maximum payment of HK\$390,000. The amount of any contractual gratuity based on length of service covering the same period is deductible from the amount of severance pay due to an employee. In addition, the part of a retirement scheme benefit which is paid to or held in trust for the employee and which is due to the employer's contributions may be set-off against an employee's entitlement to the severance pay.

### LONG SERVICE PAY

Certain employees, who have been employed under a continuous contract for not less than five years, are entitled to statutory long service pay on dismissal (other than summary dismissal for misconduct). The right to severance pay and the right to long service pay are mutually exclusive. The amount of long service pay is calculated in the same way as for statutory severance pay. The amount of any contractual gratuity based on length of service covering the same period is deductible from the amount of long service pay due to an employee. In addition, the part of a retirement scheme benefit which is paid to or held in trust for the employee and which is due to the employer's contributions

may be set-off against an employee's entitlement to long service payment.

### FORM OF CONTRACT

There is no requirement in Hong Kong for a contract of employment to be in writing. However, upon written request by the employee before commencement of the employment, the employer is required to give written particulars of certain conditions of employment. Where the contract of employment is in writing, the employer must provide a copy of it to the employee immediately after it is signed. The basic conditions which are required to be stated are the wages and wage period, the amount of end-of-year payment or the proportional entitlement and the length of notice required to terminate the employment.

### TERMINATION

The services of an employee on probation may be terminated by the employer or the employee without notice during the first month of the probation period, and with not less than seven days of notice after the first month of the probation period. After the probation period or if there is no probation period and where the contract is agreed in writing and signed by the parties, the employee is entitled to the agreed period of notice with the employer but not less than seven days unless there are grounds to summarily dismiss the employee without notice.

The length of notice for the termination of an employment contract excludes annual leave and parental leave.

Alternatively, a contract of employment can be terminated by payment of wages in lieu of notice. There is a statutory formula for calculating the wages in lieu of notice.



Employment in Hong Kong is less regulated than in many other jurisdictions, such as those in the European Union. The Employment Ordinance prescribes certain minimum rights and protection for employers and employees.





# Antitrust and Competition



## General

The Competition Ordinance (**CO**)<sup>15</sup> came into effect in December 2015, providing three competition (or antitrust) rules that prohibit:

- Anti-competitive agreements<sup>16</sup>;
- Abuse of market power<sup>17</sup>; and
- Anti-competitive mergers and acquisitions<sup>18</sup>.

The rationale behind the CO is to promote economic growth by providing lower prices, more choices and better quality goods and services. It brings Hong Kong in line with other Asian countries which have long established antitrust or competition laws. The CO also provides extra-territorial effect, in that it covers both agreements and conduct outside Hong Kong, if either has the effect of preventing, restricting or distorting competition in Hong Kong.

The penalties for contravention of the CO mainly target businesses and include fines of up to 10% of a company's local turnover, along with injunctive relief and other orders. The CO also contains an accessory liability regime under which pecuniary penalties may also be imposed on directors and officers, and several recent cases have been pursued against individuals, with directors disqualification for up to five years another option. In recent years Hong Kong businesses have restructured agreements, and individuals have changed established practices to avoid incurring

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15 Competition Ordinance (Chapter 619).

16 The First Conduct Rule applies to all sectors of Hong Kong business and prohibits agreements and concerted practices which have the effect of restricting competition by: price-fixing, market sharing, bid-rigging, output restriction. In May 2019, the Competition Tribunal made its first contravention findings.

17 The Second Conduct Rule also applies to all sectors of Hong Kong business prohibiting a business with substantial market power from abusing that power by engaging in conduct that has the object or effect of restricting competition in Hong Kong. The Commission has indicated that the Second Conduct Rule will only apply to a single entity with substantial market power, but not collective dominance. A de minimus defence applies to businesses with turnover of less than HK\$40 million in the preceding calendar year. In December 2020, the Competition Tribunal handed its first decision relating to abuse of substantial market power.

18 The Merger Rule, prohibiting anti-competitive mergers, only applies to those mergers involving a change of control concerning carrier licence holders within the meaning of the Telecommunications Ordinance (Chapter 106).

such penalties.<sup>19</sup>

The CO is enforced by the Competition Commission<sup>20</sup> and the Competition Tribunal<sup>21</sup>. Guidelines have also been published by the Commission.<sup>22</sup>

There are various exclusions and exemptions where, for example, an agreement or conduct (complying with a legal requirement) both enhances economic efficiency (prescribed criteria must be satisfied) and where an undertaking provides services of general economic interest. Public policy considerations will also be taken into account. With a few stated exceptions, the Ordinance does not apply to statutory bodies unless they engage in economic activity of a private nature.<sup>23</sup>

The legislation does not currently provide an indication of the level of market share which would lead to a finding of substantial market power. This provides the Commission some flexibility in enforcement with evolving market circumstances and differing market structures. In the EU, and many other jurisdictions, 40% or more of a relevant market is considered market dominance.

With some recent decisions handed down by the Competition Tribunal, prior uncertainty for businesses has been clarified to a limited extent. Further precedent case law will provide much needed guidance on the Antitrust and Competition regime in Hong Kong.

19 In April 2020 the Competition Tribunal handed down its first decision on pecuniary penalties, imposing a fine of HK\$3.97 million for both market sharing and price fixing arrangements. In June 2020, The Competition Commission published a policy on recommended Pecuniary Penalties for anti-competitive conduct. In October 2020, the Competition Tribunal handed down its first non-pecuniary order by way of director disqualification.

20 The Competition Commission provides the dual functions of a promoter of competition and investigative body.

21 The Competition Tribunal is the superior court of record established under the Ordinance and has primary jurisdiction to hear and adjudicate competition-related cases as well as reviews of certain determinations of the Commission. Cases may be brought before the Tribunal by the Commission as well as by private parties based upon an admission of liability, a decision of the Tribunal or a higher court. The Tribunal in the exercise of its jurisdiction has the same jurisdiction to grant remedies and relief, equitable or legal, as the Court of First Instance of the High Court. The Ordinance also provides parties with rights to apply for a review and appeal decisions of the Tribunal.

22 Various Guidelines have been issued by the Competition Commission in recent years.

23 Statutory bodies where the Ordinance applies: the Federation of Hong Kong Industries, Federation of Hong Kong Industries, Ocean Park, Matilda Hospital, War Hospitals.



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The rationale behind the Competition Ordinance is to promote economic growth by providing lower prices, more choice and better quality goods and services. It brings Hong Kong into line with other Asian countries, which have long established antitrust or competition laws.

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# Intellectual Property





## General

Hong Kong has a strong framework of intellectual property laws comprising of legislation, common law and various international agreements/treaties.

## Trade Marks

A sign may be registered as a trade mark under the provisions of the Trade Marks Ordinance<sup>24</sup> if it is capable of graphical representation and distinguishing the goods and services of the applicant from those of other undertakings. Registration of trade marks which lack distinctiveness (e.g., marks which are descriptive of the goods and services which they designate) are likely to be refused unless the trade mark has acquired a distinctive character as a result of extensive prior use.

Infringement of a registered trade mark occurs if a confusingly similar or identical mark is used in respect of goods or services confusingly similar or identical to those registered under the trade mark. Trade mark registration is territorial, which means that protection only covers the territory in which the mark is registered. However, a trade mark which is entitled to protection under the Paris Convention<sup>25</sup> may be protected as a well-known trade mark in Hong Kong even if the owner does not carry on business locally.

Trade marks may be licensed or assigned. Such transactions should be registered with the Trade Marks Registry of the Hong Kong Intellectual Property Department (**HKIPD**) or it may render the transaction ineffective against parties acquiring a subsequent interest in the trade mark who were unaware of the transaction. It may also prejudice the licensee or assignee's right to any damages or accounts of profit in infringement actions.

Unregistered trade-marks may be protected under the common law tort of passing-off where a trader misrepresents through the use of the unregistered mark that his or her goods or services belong to or are associated with those of the mark owner. It is necessary to establish that the owner of the unregistered mark enjoys sufficient goodwill for the unregistered right in Hong Kong. After establishing goodwill, the owner has to prove that the infringer's

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<sup>24</sup> Trade Marks Ordinance (Chapter 599).

<sup>25</sup> Paris Convention for the Protection of Industrial Property (1883), as amended in September 1979.

misrepresentation leads to (or will likely lead to) confusion in the minds of the relevant section of the public who acquire or make use of such goods or services. It must then be proven that there is a likelihood of damage to the owner.

## Patents

To qualify for protection, an invention must be new, i.e. it does not form part of the state of the art as at the application date. The invention must be inventive, meaning that it is not obvious to a person skilled in the art. It must also be capable of industrial application. There are certain categories of subject matter which are not patentable, e.g., discoveries, scientific theories, mathematical methods, aesthetic creations, etc. The Patents Ordinance<sup>26</sup> provides for standard patents which can last for up to 20 years, and short-term patents which can last for up to eight years.

A Hong Kong standard patent may be obtained through two alternative application routes – (i) by re-registration of a pre-existing parent UK, Chinese or European (designating the UK) patent or (ii) by direct filing of a new patent application through the original grant patent system. Applications for both routes are filed with the Patents Registry of the HKIPD.

In particular, once a pre-existing patent is registered by re-registration with the Patents Registry, the resulting Hong Kong standard patent is wholly independent of its parent and renewal fees are payable to the Hong Kong Patents Registry.

In addition, a short-term patent is obtainable by applying directly to the Patents Registry and is not dependent on a prior application elsewhere.

Unless done with the consent of the patent owner, it is an act of infringement to, among other things, make, use or sell a patented product; use a patented process; or sell, use or import a product obtained directly by means of a patented process. Supplying a person with the essential means to put the invention into effect is also an act of infringement.

Patents may be licensed or assigned. Such transactions should be registered with the Patents Registry

or they may be ineffective against parties acquiring a subsequent interest in the patent who were unaware of the transaction. The licensee or assignee's right to any damages or accounts of profit in infringement actions may also be prejudiced.

## Registered Designs

The Registered Designs Ordinance<sup>27</sup> provides protection for designs in relation to the external appearance of objects. A registrable design is defined as features of shape, configuration, pattern or ornament applied to an article by any industrial process, which in the finished article appeal to and are judged by the eye.

An article is any article of manufacture, and includes any part of an article if that part is made and sold separately. In order to be registered, the design must be new.

The initial period of registration for an industrial design is five years from the filing date and is renewable for five-year periods. The total period of registration may not exceed 25 years.

Infringement occurs if articles identical or not substantially different from the design are, among other things, sold, manufactured, hired or imported without the owner's consent.

Registered designs may be licensed and assigned. The assignment or licence should be registered with the Designs Registry of the HKIPD. Failure to do so may render the transaction ineffective against parties acquiring a subsequent interest in the design who were unaware of the transaction. It may also prejudice the licensee or assignee's right to any damages or accounts of profit in infringement actions.

## Copyright

Copyright protection arises automatically in Hong Kong for works falling within one of the prescribed categories of copyrightable subject matter set out in the Copyright Ordinance<sup>28</sup> (e.g., literary, artistic, dramatic, musical works, etc.). The works must be original and also recorded, for example, in writing or another form.

<sup>26</sup> Patents Ordinance (Chapter 514).

<sup>27</sup> Registered Designs Ordinance (Chapter 522).

<sup>28</sup> Copyright Ordinance (Chapter 528).

Copyright in literary, dramatic, artistic and musical works generally lasts for 50 years from the end of the calendar year in which the author dies. Sound recordings, broadcasts, and cable programmes generally enjoy copyright for 50 years from the end of the calendar year in which they are made.

Ownership of copyright first vests in the author of the work unless made by employees in the course of their employment, in which case copyright vests in the employer in the absence of an agreement to the contrary. For commissioned works, unless the contract provides otherwise, the person commissioned (i.e. the author) remains the copyright owner. The person who commissioned the work enjoys the exclusive rights to use the work for all purposes that could have been reasonably contemplated by the parties. Copyright in works can be assigned in writing or licensed provided that the work in question is sufficiently identified.

Primary infringement occurs if a substantial part of a copyright work is, among other things, copied, made available to the public, performed or adapted without the owner's consent. Commercial dealings with infringing copies, including importing, selling and hiring, may also constitute secondary infringement. Certain acts of copyright infringement may result in criminal sanctions such as a fine and/or imprisonment.

The Layout-Design (Topography) Of Integrated Circuits Ordinance<sup>29</sup> provides protection for the layout of integrated circuits along similar lines to copyright protection. The period of protection for a layout-design (Topography) which has not been commercially exploited anywhere in the world, is generally up to 15 years.

## Confidential Information

Confidential information may be protected contractually, for example, by using confidentiality and non-disclosure agreements, and under common law rules and equity. Confidential information may be assigned or licensed. The misuse or unauthorised disclosure of confidential information is actionable under the tort of breach of confidence. For this cause of action, it must be shown that the information possesses a quality of confidence, that it was conveyed under circumstances that create a duty of confidentiality, and that its unauthorised use or disclosure will cause detriment to the owner.

## Remedies for Infringement

The relief available for infringement of intellectual property rights includes damages, injunctions, delivery up for destruction or forfeiture, and/or an account of profits. The Hong Kong Customs and Excise Department has powers of search, seizure and arrest to enforce trade marks and copyright. The courts may grant orders to search premises and seize infringing goods and evidence without prior notice to the infringer.

In recent years, the Arbitration Ordinance<sup>30</sup> was amended to clarify that it is not contrary to public policy to enforce arbitral awards involving intellectual property rights in Hong Kong. A wide variety of intellectual property disputes are arbitrable, including disputes as to the infringement, validity or ownership of any intellectual property right. However, a decision of an arbitrator cannot be binding on third parties, for example, the Intellectual Property Department. Mediation is also an option to help parties resolve intellectual property disputes.



Hong Kong has a strong framework of intellectual property laws comprising of legislation, common law and various international agreements/treaties.



<sup>29</sup> Layout-Design (Topography) Of Integrated Circuits Ordinance (Chapter 445).

<sup>30</sup> Arbitration Ordinance (Chapter 609).



# Insolvency



## General Consequences of Corporate Insolvency

The statutory provisions governing the winding up of Hong Kong companies (and also the operations of foreign corporations registered in Hong Kong) are contained in the Companies (Winding up and Miscellaneous Provisions) Ordinance<sup>31</sup> and subsidiary legislation.

Insolvency of a Hong Kong company usually results in the company being placed into liquidation either by way of voluntary liquidation or by way of compulsory liquidation pursuant to court order on a winding-up petition presented against the company. Additional statutory provisions are applicable in the case of certain regulated industries, such as banking and insurance, and there is also power for the government to petition for the winding up of a company, if considered expedient in the public interest.

If a company becomes insolvent, the directors may be held personally liable if they have knowingly been party to the carrying on of business for, among other things, a fraudulent purpose or with intent to defraud creditors.

## Voluntary Winding up

Voluntary liquidation may occur when the company is solvent (known as a members' voluntary winding up) or when the company is insolvent (known as a creditors' voluntary winding up).

A winding up will proceed as a members' voluntary winding up where the majority of the company's directors have signed a certificate of solvency to the effect that the company will be able to pay its debts in full within a period not exceeding 12 months from the commencement of the winding up specified in the certificate of solvency.

A creditors' voluntary winding up is commenced by a shareholders' resolution and shortly thereafter a meeting of creditors is convened for the principal purpose of nominating a liquidator. In a creditors' voluntary winding up, the liquidator is commonly a partner (or more than one partner) of an accounting firm. The creditors are also entitled to appoint a committee of inspection, the function of which is to liaise with the liquidator but which also has certain supervisory powers.

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<sup>31</sup> n 3.

An expedited procedure is also available to the directors of a company where they have formed the opinion that the company cannot by reason of its liabilities continue its business and no other form of liquidation is appropriate.

## Compulsory Winding up

Involuntary liquidation pursuant to court order (known as a compulsory winding up) is based on a petition presented usually by a creditor, although a shareholder and even the company itself may also petition in certain circumstances. The Companies (Winding up and Miscellaneous Provisions)

Ordinance specifies various grounds upon which a petition can be presented, the most common of which is an inability to pay debts; another of which is that it is just and equitable that the company should be wound up.

Compulsory liquidation is effective upon the court's granting of the winding up order, and the winding up is deemed to have commenced at the time the petition was presented. Initially, the Official Receiver (head of the Official Receiver's Office, a government department) is appointed as provisional liquidator pending the holding of the first creditors' meeting, at which (as with a creditors' voluntary liquidation) creditors have the opportunity to appoint an alternative liquidator and nominate a committee of inspection.

If the Official Receiver or the provisional liquidators of a company view that (i) the company in liquidation has a large number of creditors or contributories, or (ii) there are some other reasons in the interest of the creditors, they may apply to the court to have the winding up order to be regulated specifically by the court. The court may order the first meeting of creditors to be dispensed with and appoint appropriate persons as the liquidators of the company.

The court also has the discretion to appoint a provisional liquidator to take control of the company's affairs during the period between presentation of a petition and the hearing of the petition if considered appropriate to protect the assets of the company during this period.

## Liquidators and Receivers

Once the liquidation has commenced, whether by way of creditors' voluntary or compulsory winding up, the liquidator takes charge of the affairs of the company and the powers of the directors are suspended. The liquidator proceeds to realise the assets, adjudicate claims and effect distributions to creditors who have proved their debts. Special rules apply to secured creditors' rights to claim in the liquidation but, as a matter of general law, there are no restrictions on the rights of a secured creditor to realise its security. In the event of any surplus in the liquidation, it is paid to the company's shareholders.

Where the company has granted a floating charge debenture (normally in favour of its bankers) comprising a general charge over its undertaking, property and assets, the usual method of enforcement of the security is through the appointment of a receiver. The powers granted to a receiver in the debenture usually include the power to carry on the business and to sell individual assets or the business as a going concern with a view, in each case, to repaying the amount due to the debenture holder. A receiver may be appointed outside of liquidation but receivership is usually indicative of insolvency. The receiver is under a duty to terminate the receivership once the debenture holder has been fully repaid and to account to the company or its liquidator for any surplus generated from the receivership.

If a floating charge has been created within 24 months in favour of a person connected with the company, or otherwise 12 months prior to the company's winding up, the liquidator may challenge its validity.

## Bankruptcy Laws (Personal Insolvency)

The statutory provisions applicable to individual bankruptcy as opposed to corporate insolvency are contained in the Bankruptcy Ordinance<sup>32</sup>.

Unlike corporate liquidation, individual bankruptcy can only be commenced through petition to the court, but a voluntary petition may be presented by the debtor in person. The Bankruptcy Ordinance

<sup>32</sup> Bankruptcy Ordinance (Chapter 6).

again specifies various grounds upon which a bankruptcy petition can be based.

The procedures in bankruptcy are essentially the same as those for compulsory winding-up of a company. Under the Bankruptcy Ordinance, petition for the bankruptcy may be made on various grounds, among which the debtor's inability to pay debts is the most common.

When the bankruptcy petition is being processed, the court may appoint the Official Receiver as the interim receiver of the debtor's property until the bankruptcy order is made. After the court has made the bankruptcy order, the Official Receiver is appointed as the receiver of the bankrupt's property. The Official Receiver, within 12 weeks (beginning with the day on which the order was made), decides whether to hold a creditors' meeting; at any such meeting, a trustee is appointed to manage the bankrupt's estate.

If a debtor is adjudged bankrupt, he or she is automatically discharged four years after the date on which the bankruptcy order was made (or five years after, in cases where the person has previously been adjudged bankrupt).

Debtors can also seek to avoid bankruptcy by entering into an arrangement with their creditors to reschedule their debts. This is called an Individual Voluntary Arrangement (IVA). The terms of the IVA may be agreed between the debtor and his or her creditors. If the IVA becomes effective, it represents a compromise of creditors' claims debarring them from initiating bankruptcy proceedings.

The provisions of the Bankruptcy Ordinance extend to the bankruptcy of firms as well as individuals.

A criminal bankruptcy order may also be made on petition by the Official Petitioner (the Hong Kong Secretary for Justice) where the Official Petitioner considers it to be in the public interest for a criminal bankruptcy petition to be presented.

## Reorganisation of Business

Under the Companies Ordinance<sup>33</sup>, compromises or arrangements between a company and its creditors (and indeed between a company and its members) may be made under a court order through a scheme of arrangement. Separate class meetings of creditors (or shareholders) are required to approve the scheme, and if the requisite majorities and court sanction are obtained, the scheme is binding upon all creditors (or shareholders).<sup>34</sup>

Due to the complexity of the procedures to be followed and the fact that, until the scheme has been approved and sanctioned, creditors remain entitled to pursue their remedies in accordance with the general law, schemes of arrangement affecting the businesses of insolvent or potentially insolvent companies seldom occur outside a liquidation. Contractual schemes for reorganisation between a company and its creditors, or major creditors, are therefore more commonplace but have the disadvantage of binding only those persons party to the arrangements.

The absence of a statutory rehabilitation regime in Hong Kong can make it difficult to reorganise the affairs of a struggling business, though the use of provisional liquidation or liquidation has been used successfully for this purpose in Hong Kong, despite certain limitations. Additionally, common law recognition procedures may allow successful Hong Kong restructurings involving provisional liquidators or liquidators appointed elsewhere including in the debtor company's place of incorporation.

The Hong Kong government and relevant stakeholders have been deliberating on enactment of a corporate rescue regime in Hong Kong. The proposals include the company (through its members or directors, or provisional liquidators or liquidators if it is under winding up proceedings) could appoint an independent provisional supervisor for the restructuring of the company, and there would be a moratorium on civil proceedings against the company so that the provisional supervisor and

33 n 3.

34 For takeover and privatisation members' schemes, votes cast against the scheme must not exceed 10% of the total voting rights attached to all disinterested shares. Other shareholder schemes not involving a takeover or general offer still require satisfaction of the 'headcount test' (that is, approval by a majority in number of the relevant persons present and voting) in addition to the threshold requiring 75% of the voting rights of the members present and voting, in person or by proxy agreeing to the schemes unless the court exercises its discretion to order otherwise (for example, perhaps in circumstances where there is evidence that the result of the vote has been unfairly influenced by share splitting). For implementation of creditors' schemes, the test is a majority in number representing at least 75% in value of each class of creditors present and voting in person or by proxy.

the company would have the breathing space to form a corporate rescue plan to be approved by the creditors of the company within a prescribed period. However, as at the date of printing, it would appear that such measures are unlikely to come into force in the near or medium term.

In May 2021, the Supreme People's Court of the PRC and the Hong Kong government announced the Pilot Measures in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region. The new measures apply to insolvency proceedings in which the debtor company's centre of main interest is in Hong Kong. Hong Kong liquidators or provisional liquidators could apply for recognition and assistance to Hong Kong insolvency proceedings (including compulsory winding up, creditors' voluntary winding up and scheme of arrangement) in the municipality law courts of Shanghai, Xiamen and Shenzhen, provided that the debtor's assets or place of business in the PRC are located in one of the pilot areas.



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Insolvency of a Hong Kong company usually results in the company being placed into liquidation either by way of voluntary liquidation or by way of compulsory liquidation pursuant to court order on a winding-up petition presented against the company.

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# Dispute Resolution



## Litigation

Litigation in the courts in Hong Kong is similar to that in England and the Commonwealth. It is an adversarial common law system with the legal representatives of the parties appearing before the District Court (for monetary claims, the claim amount should be more than HK\$75,000, up to a maximum of HK\$3 million) or the Court of First Instance (for monetary claims, the claim amount should be more than HK\$75,000). Mechanisms exist for appeals to the Court of Appeal, and then to the Hong Kong Court of Final Appeal. Eminent judges from other common law jurisdictions, together with local judges, sit on the Court of Final Appeal. The judiciary is generally recognised as efficient, independent and free from government interference.

There is a Small Claims Tribunal for certain types of dispute involving small sums of money, where legal representation is not allowed. This tribunal has exclusive jurisdiction over specified monetary claims involving a maximum claim amount of HK\$75,000.

Provisions exist for obtaining a) a default judgment without a trial where the defendant does not give notice of intention to defend or file a defence within the prescribed time; and b) a summary judgment without a trial where there is no bona fide defence to a claim.

Hong Kong courts have specialist judges hearing, for example: admiralty; arbitration; constitutional and administrative law; commercial; company and construction related matters.

Foreign monetary judgment obtained in the superior courts of some jurisdictions which afford reciprocal treatment to judgments of the Hong Kong Courts (largely certain Commonwealth and Western European countries but excluding the United States and the United Kingdom) may be registered and enforced in Hong Kong. If it is not registrable, a foreign judgment (in appropriate cases) may be sued upon as a debt at common law, and judgment – including summary judgment – may be given.

Similar to the courts in other jurisdiction, the Hong Kong Courts have in recent years focused on improving efficiency of the Hong Kong Court systems through the use of technology. In particular, remote hearings conducted through video

conferencing facilities or by telephone and an e-Lodgment Platform have been introduced to facilitate the continuous operation of court hearings and the filing of court documents at the time of the coronavirus (COVID-19) pandemic. Other initiatives such as electronic submission and service of documents are also gradually being introduced.

## Arbitration

Arbitration, as a means of dispute resolution, has been actively pursued in Hong Kong for many years, in particular by the Hong Kong government, which inserts arbitration clauses in all its major building and civil engineering contracts. There is an arbitration centre, the Hong Kong International Arbitration Centre (**HKIAC**), which operates panels of international and local arbitrators of experience and distinction. There is also an East Asia Branch of the Chartered Institute of Arbitrators of London, which is heavily involved in the training of arbitrators. A local institute, the Hong Kong Institute of Arbitrators, has also been setup. Commercial, shipping and construction arbitrations, some very substantial, frequently take place in Hong Kong.

The major governing legislation for Hong Kong arbitrations is the Arbitration Ordinance, which stipulates the relevant basic legal framework. The structure of the Arbitration Ordinance in general mirrors that of the UNCITRAL Model Law, which was promulgated by the United Nations Commission on International Trade Law for the purpose of setting up a role model for an effective and comprehensive arbitration regime with limited scope for local courts to intervene in international commercial arbitration.

The revised Arbitration Ordinance (2011) unifies its dual-track system for domestic and international arbitrations. Previously, different procedures applied to 'international' or "domestic" arbitrations respectively. Under the revised Arbitration Ordinance, there is no longer such a distinction and the UNCITRAL Model Law in effect applies to all arbitrations in Hong Kong subject to such modifications and supplements as expressly provided for in the revised Arbitration Ordinance. The amended legislation also incorporates detailed provisions drawn from the 2006 additions to the UNCITRAL Model Law regarding interim measures and preliminary orders. It also contains opt-in provisions on appeals of points of law, consolidation of arbitra-

tions, and the challenging of arbitral awards.

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.

The detailed arbitration procedures are governed by the arbitration rules selected by the parties (usually according to the terms of the arbitration agreement). In cases where the Arbitration Ordinance and the selected arbitration rules do not have the relevant provisions, the arbitrator has the discretion to adopt appropriate procedures to ensure fair and efficient conduct of the arbitration.

## Mediation

As an alternative to litigation or arbitration, disputants are becoming increasingly interested in mediation procedures. Indeed, the Hong Kong courts are under a duty to encourage the use of alternative dispute resolution (**ADR**), which includes mediation. The government, in particular, inserts mediation clauses in many contracts. The HKIAC is active in promoting mediation and training mediators. It also maintains lists of accredited mediators. As part of the civil procedure in the Hong Kong courts, litigants are generally expected to attempt mediation in the early stages in a litigation. Although the courts can only encourage, not compel, the use of ADR, the courts can take into account a party's unreasonable refusal to mediate or follow other ADR procedures when deciding the issue of costs.

## Special Situations

As is the case in many comparable jurisdictions, there is a wide range of specialist tribunals and courts in Hong Kong dealing with rating, land resumption, building management, family, tenancy, competition, compulsory sale of land for redevelopment, labour, licensing, professional disciplinary and other matters.

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Litigation in the courts in Hong Kong is similar to that in England and the Commonwealth. It is an adversarial common law system with the legal representatives of the parties appearing before the District Court or the Court of First Instance. The judiciary is generally recognised as efficient, independent and free from government interference.

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# Appendix – Useful Contacts in Hong Kong

BUSINESS SERVICES	
The Hong Kong General Chamber Of Commerce	<a href="http://www.chamber.org.hk">www.chamber.org.hk</a>
Support And Consultation Centre For SMEs	<a href="http://www.success.tid.gov.hk">www.success.tid.gov.hk</a>
Hong Kong Trade Development Council	<a href="http://www.hktdc.com">www.hktdc.com</a>
Investhk	<a href="http://www.investhk.gov.hk">www.investhk.gov.hk</a>
Mayer Brown	<a href="http://www.mayerbrown.com">www.mayerbrown.com</a>
Meeting & Exhibition Hong Kong	<a href="http://www.mehongkong.com">www.mehongkong.com</a>
HONG KONG SAR GOVERNMENT	
Home Page	<a href="https://www.gov.hk/en/business/">https://www.gov.hk/en/business/</a>
Business Registration Office	<a href="http://www.ird.gov.hk/eng/tax/bre.htm">www.ird.gov.hk/eng/tax/bre.htm</a>
Companies Registry	<a href="http://www.cr.gov.hk">www.cr.gov.hk</a>
Competition Commission	<a href="http://www.compcomm.hk">www.compcomm.hk</a>
Commerce & Economic Development Bureau	<a href="http://www.cedb.gov.hk">www.cedb.gov.hk</a>
Consulates	<a href="https://www.protocol.gov.hk/en/posts_bodies.html">https://www.protocol.gov.hk/en/posts_bodies.html</a>
Customs And Excise Department	<a href="http://www.customs.gov.hk">www.customs.gov.hk</a>
Education Bureau	<a href="http://www.edb.gov.hk">www.edb.gov.hk</a>
Hong Kong Observatory	<a href="http://www.hko.gov.hk">www.hko.gov.hk</a>
Hong Kong Privacy Commissioner For Personal Data In Hong Kong	<a href="http://www.pcpd.org.hk">www.pcpd.org.hk</a>
Immigration Department	<a href="https://www.immd.gov.hk/eng/index.html">https://www.immd.gov.hk/eng/index.html</a>
Inland Revenue Department	<a href="http://www.ird.gov.hk">www.ird.gov.hk</a>
Intellectual Property Department	<a href="http://www.ipd.gov.hk">www.ipd.gov.hk</a>
Judiciary	<a href="https://www.judiciary.hk/en/home/index.html">https://www.judiciary.hk/en/home/index.html</a>
Labour Department	<a href="http://www.labour.gov.hk">www.labour.gov.hk</a>
Mandatory Provident Fund Schemes Authority (MPFA)	<a href="https://epa.mpfa.org.hk/mpfa_web/index.html#!?lang=eng">https://epa.mpfa.org.hk/mpfa_web/index.html#!?lang=eng</a>
Small Medium Enterprises Funding	<a href="http://www.smefund.tid.gov.hk">www.smefund.tid.gov.hk</a>
Trade And Industry Department	<a href="http://www.tid.gov.hk">www.tid.gov.hk</a>
Transport Department	<a href="http://www.td.gov.hk">www.td.gov.hk</a>
FINANCIAL	
Hong Kong Exchanges And Clearing Limited	<a href="http://www.hkex.com.hk">www.hkex.com.hk</a>
The Securities And Futures Commission	<a href="http://www.sfc.hk">www.sfc.hk</a>
Hong Kong Monetary Authority	<a href="http://www.hkma.gov.hk">www.hkma.gov.hk</a>



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