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# DOING BUSINESS IN **HONG KONG**

# Doing business in Hong Kong

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# Welcome to our Guide to Doing Business in Hong Kong

## Why Hong Kong?

Hong Kong is recognised as one of the world's leading financial centres.

Hong Kong remains an attractive place to invest as it offers significant benefits for foreign investors, including:

- generally no foreign investment restrictions, including minimal government interference in most sectors of the economy;
- no exchange controls in force on remitting funds overseas;
- a simple tax system and the lowest corporate tax rate of any major Asian economy, currently at 16.5%<sup>1</sup>; and
- a gateway to a sizeable market in Mainland China.

This guide provides a general outline of the major legal issues relevant to doing business in Hong Kong as at 5 November 2016. Intending investors should always obtain specific and detailed professional advice about any proposed business activity in Hong Kong.

## Legal System

Since 1997 there has been an adherence to the “One Country, Two Systems” guarantee of Hong Kong Special Administrative Region autonomy. The Hong Kong legal system is a common law system.

## Business Organisation

The most common form of operating entity used by foreign companies in Hong Kong is a private limited liability company.

## Foreign Investment and Foreign Exchange

In keeping with its free-market philosophy, there are generally no restrictions on foreign investment in Hong Kong. In accordance with the Basic Law, no foreign exchange control policies shall be applied in Hong Kong. The Hong Kong dollar shall be freely convertible. Markets for foreign exchange, gold, securities, futures and the like shall continue. The Hong Kong Government shall also safeguard the free flow of capital within, into and out of Hong Kong.

## Taxation

There are no generally applicable withholding or capital gains taxes in Hong Kong, nor is there a general tax on the sale of goods or services or a value-added tax.

## Employment

There are a number of main employment issues that need to be considered when opening an office in Hong Kong under the Immigration Ordinance (Cap. 115 of the laws of Hong Kong) (the “Immigration Ordinance”), the Employment Ordinance (Cap. 57 of the laws of Hong Kong) (the “Employment Ordinance”), the Mandatory Provident Fund Schemes Ordinance (Cap. 485 of the laws of Hong Kong) (the “Mandatory Provident Fund Schemes Ordinance”), the Minimum Wage Ordinance (Cap. 608 of the laws of Hong Kong) (the “Minimum Wage Ordinance”) and the Disability Discrimination Ordinance (Cap. 487 of the laws of Hong Kong) (the “Disability Discrimination Ordinance”).

## Intellectual Property

Hong Kong is one of the main intellectual property hubs in the Asia Pacific region due to its comprehensive intellectual property laws and reliable enforcement systems.

## Competition Law

Hong Kong's first cross-sector competition law – the Competition Ordinance – came into full force on 14 December 2015.

## Dispute Resolution

Hong Kong's legal system is well established and well equipped to deal with the full range of commercial disputes.

### Legal System

British rule of Hong Kong ended as sovereignty over Hong Kong reverted to the People's Republic of China on 1 July 1997.

Since then, there has been adherence to the “One Country, Two Systems” guarantee of Hong Kong Special Administrative Region autonomy in all areas except foreign affairs and national defence, to last for a period of 50 years. This guarantee is enshrined in the Basic Law, Hong Kong's constitutional document.

The Basic Law states that the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of Hong Kong. This encompasses the common law, rules of equity, ordinances, subordinate legislation and customary law as at 30 June 1997.

# Business

# Organisation

## Forms of business organisation

The most common forms of business organisation available in Hong Kong are:

- companies (incorporated in Hong Kong);
- branch offices of foreign companies; and
- representative offices.

### New Companies Ordinance

A comprehensive exercise to rewrite the old Companies Ordinance (Cap. 32 of the laws of Hong Kong) (the “Old Companies Ordinance”) was launched in mid-2006 with the aim of modernising Hong Kong’s company law. The Companies Bill was introduced into the Legislative Council on 26 January 2011 and was passed on 12 July 2012.

The new Companies Ordinance (Cap. 622 of the laws of Hong Kong) (“new Companies Ordinance”), which consists of 921 sections and 11 schedules, provides a modernised legal framework for the incorporation and operation of companies in Hong Kong. It aims to achieve four main objectives, namely, to enhance corporate governance, ensure better regulation, facilitate business and modernise the law.

To facilitate implementation of the new Companies Ordinance, 12 pieces of subsidiary legislation were made to provide for the relevant technical and procedural matters. The new Companies Ordinance and its subsidiary legislation commenced operation on 3 March 2014, save for certain other provisions.

This guide has taken into account the effect of the new Companies Ordinance and references to the Companies Ordinance herein shall mean the new Companies Ordinance.

The most common form of operating entity used by foreign companies in Hong Kong is a private limited liability company. These companies can either be incorporated in Hong Kong as a subsidiary or a registered branch office of a non-Hong Kong company.

A non-Hong Kong company registered in Hong Kong will be governed by the law in its jurisdiction of incorporation as well as Part 16 under the Companies Ordinance which applies to non-Hong Kong companies registered in Hong Kong.

## Options when setting up a company in Hong Kong

The following options are available for foreign companies intending to carry on business in Hong Kong:

- setting up a separate subsidiary by either incorporating a new company under Hong Kong law or purchasing a shelf company;
- setting up a branch office by registering as a non-Hong Kong company with the Companies Registry; or
- setting up a representative office in Hong Kong

## Setting up a subsidiary by incorporating a new company in Hong Kong

The incorporation of a new company in Hong Kong is governed by the Companies Ordinance. The process involves preparing and filing various statutory forms with the Companies Registry.

The Companies Registry requires companies to provide the following when incorporating a new limited liability company:

- a name for the intended company:
  - (i) which is not the same as any registered name appearing on the index of company names kept by the Registrar of Companies;
  - (ii) which is not the same as that of a body corporate incorporated or established under any Ordinance in Hong Kong at the time of registration;
  - (iii) which use would not constitute a criminal offence; and
  - (iv) which is not offensive or otherwise contrary to the public interest;
- a copy of the articles of association of the intended company;
- Incorporation Form (Form NNC1);
- a Notice to Business Registration Office (Form IRBR1); and



- the prescribed fees and levy.

With the implementation of the one-stop company and business registration service on 21 February 2011, any company that applies for incorporation with the Companies Registry will automatically be deemed to have made an application for business registration. Once the Companies Registry has approved the application, it will issue a Certificate of Incorporation and the Business Registration Certificate at the same time. This eliminates the need to prepare a separate application to the Inland Revenue Department for a Business Registration Certificate.

The Companies Registry will normally issue the Certificates within 1 hour for private companies limited by shares for electronic applications and within 4 working days for paper applications.

### Setting up a subsidiary by buying a shelf company in Hong Kong

An alternative to incorporating a new company in Hong Kong is to buy an existing shelf company. If the shelf company's name needs to be changed, a Certificate of Change of Name will normally be issued by the Companies Registry within 1 hour for electronic applications and 4 working days for paper applications. The change in name is effective from the date stated on such certificate.

A shelf company is incorporated with all the necessary constitutional documents and officers. Following the acquisition, the particular aspects of the shelf company such as its directors, shareholders, place of registered office and share capital structure can be changed and tailored to particular business needs if desired.

### Setting up a branch office in Hong Kong

As an alternative to establishing a Hong Kong incorporated subsidiary, a branch office of a foreign company may be set up by registering a non-Hong Kong company with the Companies Registry.

The registration process is similar to that of incorporating a new company and involves preparing and filing various statutory forms at the Companies Registry, attaching the following:

- a certified copy of the instrument defining the company's constitution e.g. charter, statutes or memorandum and articles of association;
- an Application for Registration as Registered Non-Hong Kong

Company (Form NN1);

- a certified copy of the company's Certificate of Incorporation (or its equivalent);
- a certified copy of the latest accounts of the company; and
- a Notice to Business Registration Office (Form IRBR2); and
- the prescribed fees and levy.

The person mentioned above who is authorised to accept process on behalf of the company may be an individual residing in Hong Kong, or a firm of solicitors or professional accountants with a registered office in Hong Kong. The one-stop company and business registration service applies to the registration of a non-Hong Kong company. This means that the registration application only needs to be submitted to the Companies Registry and a simultaneous application will automatically be made for a Business Registration Certificate.

A Certificate of Registration of Non-Hong Kong Company and the Business Registration Certificate (if the company has not yet registered its business) will normally be issued within 13 working days of the submission of the application.

### Choice between setting up a subsidiary or a branch office

When considering the commercial objectives of opening an office in Hong Kong, the following factors should be kept in mind in deciding whether to set up a wholly-owned subsidiary in Hong Kong (either by incorporating a new company or buying a shelf company) or to open a branch office:

#### Time and cost

It will be quicker to set up a subsidiary (by buying a shelf company or incorporating a new company) than registering a branch. In terms of costs, it costs slightly more to establish a subsidiary but the difference is not substantial.

#### Liability

A subsidiary is an entity which is separate from its parent company so the parent company would not be liable for the debts or obligations of the subsidiary. However, this separation may be diluted if the parent company has to provide security in respect of the subsidiary's obligations or if the parent company is considered by the courts to be a shadow director of the subsidiary.



## Accounts

A subsidiary is a separate legal entity and therefore the parent company's accounts are kept separate.

## Existing name/facilities of the company

Through a branch office, a company can use its existing name and credit facilities directly in Hong Kong without the need to look for new banking facilities.

## Residency requirements

A subsidiary established in Hong Kong needs to arrange for the services of a company secretary who ordinarily resides in Hong Kong. If a branch office is established, the company establishing the branch must nominate a person or firm to receive service of process on its behalf.

## Tax

There may be tax advantages under the tax laws of the place of incorporation of the parent company to incorporate a subsidiary.

## Setting up a representative office in Hong Kong

A representative office is a suitable option for foreign companies that wish to explore opportunities in Hong Kong before making investment. A representative office is established for the purpose of promotion, market research and liaising with customers in Hong Kong with the company's core business being maintained in another jurisdiction. A representative office has no legal status and cannot conduct any profit generating business activities save for the liaison, promotional work, and market research type activities mentioned. The company bears implicit liability for all the actions of its representative office. Given representative offices are non-earning entities, they are not liable for profits tax in Hong Kong.

To set up a representative office in Hong Kong, there is no registration requirement with the Companies Registry. The representative office is however required to apply for a Business Registration Certificate with the Inland Revenue Department within one month from its date of commencement, attaching the following:

- an Application by a Body Corporate for Registration (Form IRBR56);
- a copy of the Certificate of Incorporation (or its equivalent) issued by the relevant government authority in the place of incorporation of the company;
- principal officer's proof of identity; and
- the prescribed business registration fee and levy.

The Business Registration Certificate will normally be issued in the next working day following submission of the application in person and within 14 working days for submission of the application by post.

## Other general information on Hong Kong companies

The types of companies that may be formed under the Companies Ordinance are as follows:

- private companies limited by shares;
- public companies limited by shares;
- private unlimited companies with a share capital;
- public unlimited companies with a share capital; and
- companies limited by guarantee without a share capital.

## Limited companies versus unlimited companies

A limited company is a company limited by shares or by guarantee, and an unlimited company is a company with no limit on the liability of its members.

## Companies limited by shares versus companies limited by guarantee

A company is a company limited by shares if the liability of its members is limited by the company's articles to any amount unpaid on the shares held by the members. A company is a company limited by guarantee if it does not have a share capital and if the liability of its members is limited by the company's articles to the amount that the members undertake to contribute to the assets of the company in the event of its being wound up.



## Private companies versus public companies

A company is a private company if its articles restrict members' rights to transfer shares, limit the number of members to 50, and prohibit any invitation to the public to subscribe for any shares or debentures. A company is a public company if it is not a private company or a company limited by guarantee.

## Shares issued for non-cash consideration

Shares may be issued for valuable non-cash consideration, such as goods or services. There is no formal valuation process, but a form detailing the transaction must be lodged with the Companies Registry.

## No restrictions on rights attaching to shares

There are no restrictions on the rights that may attach to shares, provided the attached rights comply with the Companies Ordinance.

## No restrictions on foreign shareholders

For a company incorporated in Hong Kong, there is no requirement that a shareholder be resident in Hong Kong and there are no restrictions on the nationality of shareholders.

## Management and directors

The directors of a company are responsible for the business and affairs of the company. A private limited liability company must have at least one natural person as director, who is not required to be an employee of the company or a Hong Kong resident. Directors can be an individual who is over the age of 18 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.

## Secretary

All Hong Kong companies must have a company secretary who ordinarily resides in Hong Kong. If the company has a sole director, that person cannot also be the secretary of the company.

## Directors' liability

Directors are subject to both statutory and non-statutory duties. The Companies Ordinance imposes certain duties on directors of companies, such as requiring disclosure of their interests in any contract to which the company is a party. The Companies Ordinance further codifies the common law and provides that in performing the duties, a director must bring to bear his own general knowledge, skills and experience (subjective test) as well as the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company (objective test). Directors also have an equitable duty to act bona fide in utmost good faith in the interests of the company as a whole, and to exercise their powers properly.

Except in certain circumstances, the directors' duties are owed to the company, and not to the company's creditors or any individual or group of shareholders.

Directors of listed companies have additional duties imposed by the Securities and Futures Ordinance and the Listing Rules.

## Reporting requirements

Alterations of any of the company's registered details must be filed with the Companies Registry within a prescribed time. This includes changes in the authorised representative, directors and secretary of the company, the principal place of business, a change of name or an alteration of the articles of association (under the new Companies Ordinance, a company incorporated in Hong Kong is only required to have articles of association. The memorandum of association is abolished under the new Companies Ordinance and information which was required to be contained in the memorandum of association under the Old Companies Ordinance are set out in the articles of association).

In addition, the company has an annual obligation to lodge an annual return and, except where the company is a private company, together with audited financial statements (or its consolidated accounts) with the Companies Registry.



# **Foreign Investment and Foreign Exchange**

## We say...

“In order to maintain its competitiveness, Hong Kong must continue to strengthen its efforts to maintain a well-regulated and transparent market, the rule of law and the independence of the judiciary”

GARY LOCK, PARTNER, KWM HONG KONG

## General comments

In keeping with its free-market philosophy, there are no general restrictions on foreign investment in Hong Kong. Although certain sectors (for example, telecommunications, broadcasting, banking, deposit taking companies and similar financial institutions) require authorisations or licences issued by government or other regulatory or professional bodies, these are not designed as a means of regulating foreign investment.

There are some specific foreign investment restrictions for certain industries. For example, with respect to the television and radio broadcasting industries, control over local broadcasting licensees by foreign investors may not exceed 49%.

## Incentives for foreign investors

Hong Kong's free market philosophy means that there are few incentive schemes for businesses to invest in Hong Kong. Hong Kong's general business environment, proximity to Asia and China in particular, and its low tax rate are all promoted as incentives in themselves.

Certain government funding schemes are potentially available to foreign investors particularly those involved in design and creative industries; innovation and technology upgrading in the manufacturing and service industries; technology ventures and R&D in high-value added industries; new technology training and patent application.

Small and medium sized enterprises (SMEs) are eligible for grants and funding administered by the Trade and Industry Department, such as low interest loans for business installations and equipment, and funding for export marketing and training. To qualify as a SME, a manufacturing business must have fewer than 100 employees and a non-manufacturing business must have fewer than 50 employees, in addition to being registered in Hong Kong under the Companies Ordinance and the Business Registration Ordinance (Cap. 310 of the laws of Hong Kong).

## Foreign exchange

In accordance with the Basic Law, no foreign exchange control policies shall be applied in Hong Kong. This means that there is no restriction on transfer of money in Hong Kong and the government does not demand for any kind of charges on money transfer. Laws and regulations however apply to combat money laundering and suspected terrorist financing.

The Hong Kong Dollar is freely convertible and is currently pegged to the US Dollar.

It is allowed to trade within a range of between 7.75 and 7.85 Hong Kong Dollars to one US Dollar.

Markets for foreign exchange, gold, securities, futures and the like shall continue. The Hong Kong Government shall also safeguard the free flow of capital within, into and out of Hong Kong.



# Taxation

## Corporate taxation

### General comments

Taxes in Hong Kong are territorially based – taxes are only imposed on profits or income with a Hong Kong source (ie, which arise in or are derived from Hong Kong). There are no generally applicable withholding or capital gains taxes in Hong Kong, nor is there a general tax on the sale of goods or services or a value-added tax.

The Inland Revenue Department is the responsible authority for taxation matters in Hong Kong.

### Activities of non-tax resident companies

There is no concept of residence for tax purposes under Hong Kong law. Companies, whether Hong Kong incorporated or not, are subject to Hong Kong taxes on their Hong Kong sourced income.

The main taxes in Hong Kong which may potentially apply to companies are:

#### Profits tax

The company profits tax rate is currently 16.5% of assessable profits<sup>2</sup>. This is charged on all profits arising in or derived from Hong Kong, regardless of where the company is incorporated. There is unlimited carry-over of losses.

#### Stamp duty

Stamp duty is payable on instruments granting leases and conveying land, effecting transfers of Hong Kong stock (including shares of any Hong Kong incorporated company), and Hong Kong bearer instruments

#### Stamp duty rates on stock

The rate on transfers of Hong Kong stock is 0.2% on the consideration paid on the sale or the market value of the Hong Kong stock, whichever is higher.

#### Stamp duty rates on property

For transfers of interests in land, there are three stamp duty rates which may be applicable:

- ad valorem stamp duty, generally applicable to all transfers of Hong Kong residential property;
- special stamp duty, generally applicable to disposals of Hong Kong property within a certain holding period; and
- buyer's stamp duty, generally applicable to acquisitions of Hong Kong residential property by any person (including companies) who are not Hong Kong permanent residents.

In recent years, there have been a number of measures taken by the Hong Kong Government to address the issue of rising property prices. Amendments to the Stamp Duty Ordinance (Cap. 117 of the laws of Hong Kong) ("Stamp Duty Ordinance") to increase the rates applicable to Hong Kong property have been a key part of these Government efforts.

The following timeline provides an overview of the applicable rates and how they have been adjusted by the amendments to the Stamp Duty Ordinance:

#### Ad valorem stamp duty

For all transfers of interests in land, since 1 April 2016 there is a sliding rate with a maximum ad valorem stamp duty rate of 4.25% of the consideration paid<sup>3</sup>.

However, pursuant to the Stamp Duty (Amendment) (No.2) Ordinance 2014, starting from 23 February 2013, any residential property and non-residential property acquired by either an individual or a company will be subject to the new ad valorem stamp duty rates (except a residential property acquired by a Hong Kong permanent resident who does not own any other residential property in Hong Kong at the time of acquisition). The new rates are based on a sliding rate with a maximum ad valorem stamp duty rate of 8.50% of the consideration or value of the residential property; whichever is the higher. On 4 November 2016, the Government introduced a new round of stamp duty measure. Under the Government's proposal, on or after 5 November 2016 the acquisition of residential property will be subject to the proposed new flat ad valorem stamp duty rate of 15% of the consideration or value of the residential property; whichever is the higher (except a residential property acquired by a Hong Kong permanent resident who does not own any other residential property in Hong Kong at the time of acquisition). If the acquisition is specifically exempted as aforesaid or otherwise provided in the said Ordinance or the said proposal, the original stamp duty regime applies.

#### Special stamp duty

Special stamp duty is levied on property disposals which occur within a specified time period. For residential properties acquired between 20 November 2010 and 26 October 2012 (inclusive), special stamp duty will arise if they are disposed within 24 months of acquisition while for properties acquired on or after 27 October 2012, special stamp duty will arise if they are disposed within 36 months of acquisition. The buyer and the seller are jointly and severally liable to pay special stamp duty and such stamp duty is chargeable in addition to the ad valorem stamp duty.

The special stamp duty is calculated by reference to the stated consideration or market value of the residential property, whichever is higher. The applicable rates of special stamp duty based on the holding period of the residential property by the seller or transferor before disposal are summarised in the table below:

Holding Periods	Properties purchased from 20 Nov 2010 to 26 Oct 2012	Properties purchased on or after 27 Oct 2012
Six months or less	15%	20%
More than six months but 12 months or less	10%	15%
More than 12 months but 24 months or less	5%	10%
More than 24 months but 36 months or less	No special stamp duty liability	10%

Exemptions will be provided for certain transactions.

## Buyer's Stamp Duty

Buyer's stamp duty was introduced by the Stamp Duty (Amendment) Ordinance 2014 and imposes additional stamp duty liability on an agreement for sale or a conveyance on sale for the acquisition of any residential properties executed on or after 27 October 2012, except where the buyer is a Hong Kong permanent resident acquiring the residential property on his/her own behalf. The buyer's stamp duty is charged at a flat rate of 15% of the stated consideration or the market value of the residential property acquired; whichever is higher. Only the buyer is liable to pay the buyer's stamp duty and such duty is chargeable in addition to the ad valorem stamp duty and the special stamp duty. Exemptions will be provided for certain transactions.

## Stamp Duty Relief

There are a number of stamp duty reliefs provided under the Stamp Duty Ordinance, one of the most commonly used is the intra-group relief, which is available for the transfer of immovable property or shares from one associated body corporate to another. The companies are associated where one company is the beneficial owner of at least 90% of the issued share capital of the other, or a third such company is the beneficial owner of at least 90% of the issued share capital of each. The associated relationship must remain for at least 2 years after the transfer or a clawback provision would apply.

## Property tax

Property tax is computed at the standard rate on the net assessable value of the property for the relevant year of assessment. The current rate is 15%<sup>4</sup>. Deductions of a fixed percentage may be made for payment of property rates and the cost of repairs and outgoings.

If a corporation pays profits tax on income that it receives from the use of any property owned by it, the corporation may be eligible for an exemption from property tax.

## No withholding tax on dividends or interest

Dividends paid to foreign corporate shareholders are not subject to tax in Hong Kong. In addition, dividends received from a foreign company are generally not subject to tax in Hong Kong.

Interest paid to foreign corporate shareholders is not subject to tax in Hong Kong unless the shareholder is carrying on the business of providing loans to corporations in Hong Kong.

## Double tax treaties

Under the "territorial principle", only income/profit generated in Hong Kong is taxed (ie, income derived from a source outside Hong Kong is, in most cases, not taxed in Hong Kong). This obviates the need for double taxation treaties with respect to income. Notwithstanding this, Hong Kong has concluded double taxation agreements with a number of its trading partners to provide certainty to investors and add incentive for overseas companies to do business in Hong Kong.

As at 31 August 2016, Hong Kong has entered into Double Taxation Agreements with the following countries:

Country	Effective From
Austria	Year of Assessment 2012/2013
Austria (Protocol)	03/07.2013
Belgium	Year of Assessment 2004/2005
Brunei	Year of Assessment 2011/2012
Canada	Year of Assessment 2014/2015
Czech	Year of Assessment 2013/2014
France	Year of Assessment 2012/2013
Guernsey	Year of Assessment 2014/2015
Hungary	Year of Assessment 2012/2013
Indonesia	Year of Assessment 2013/2014
Ireland	Year of Assessment 2012/2013
Italy	Year of Assessment 2016/2017
Japan	Year of Assessment 2012/2013
Japan (Exchange of Notes)	Year of Assessment 2016/2017
Jersey	Year of Assessment 2014/2015
Korea	Pending
Kuwait	Year of Assessment 2014/2015
Latvia	Pending
Liechtenstein	Year of Assessment 2012/2013
Luxembourg	Year of Assessment 2008/2009
Luxembourg (Protocol)	Year of Assessment 2012/2013
Mainland China	Year of Assessment 2007/2008
Mainland China (Second Protocol)	11/06/2008
Mainland China (Third Protocol)	20/12/2010
Mainland China (Fourth Protocol)	29/12/2015
Malaysia	Year of Assessment 2013/2014
Malta	Year of Assessment 2013/2014
Mexico	Year of Assessment 2014/2015

Country	Effective From
Netherlands	Year of Assessment 2012/2013
New Zealand	Year of Assessment 2012/2013
Portugal	Year of Assessment 2013/2014
Qatar	Year of Assessment 2014/2015
Romania	Pending
Russia	Year of Assessment 2017/2018
South Africa	Year of Assessment 2016/2017
Spain	Year of Assessment 2013/2014
Switzerland	Year of Assessment 2013/2014
Thailand	Year of Assessment 2006/2007
United Arab Emirates	Year of Assessment 2016/2017
United Kingdom	Year of Assessment 2011/2012
Vietnam	Year of Assessment 2010/2011
Vietnam (Protocol)	Year of Assessment 2016/2017

## Arrangement between the Mainland of China and Hong Kong for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income

Hong Kong and Mainland China signed the Arrangement between the Mainland of China and Hong Kong for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (the "Mainland Arrangement") and its First Protocol in 2006. The Second Protocol, the Third Protocol and the Fourth Protocol supplementing and/or amending the Mainland Arrangement were signed in 2008, 2010 and 2015 respectively (together with the Mainland Arrangement, the "HK-China Double Tax Arrangement"). These protocols should be read together with the Mainland Arrangement and form integral parts of it. The HK-China Double Tax Arrangement are intended to minimise or eliminate double taxation of the types of income covered by

arrangement, and enable undertakings to assess with greater certainty the tax implications of their cross border activities.

The HK-China Double Tax Arrangement provides materially better treatment to Hong Kong resident companies than most double tax arrangements that Mainland China has entered into with other countries.

The HK-China Double Tax Arrangement covers profits tax, salaries tax and property tax in Hong Kong and individual income tax and enterprise income tax in Mainland China.

In particular, the withholding tax charged in Mainland will not exceed:

- (i) 5% of the gross amount of the dividends paid by a PRC company to a Hong Kong company provided that the recipient is a company that directly holds at least 25% of the capital of the PRC company; or
- (ii) 10% of the gross amount of the dividends in all other cases.

In addition to the reduced withholding tax rates on dividends, there are also provisions for reduced withholding tax rates on royalties (a tax limit of 7%) and interest (the withholding tax on interest arising in Mainland China and received by a Hong Kong company is reduced to 7%) under the HK-China Double Tax Arrangement.

The table below provides a comparison of withholding tax rates between the HK-China Double Tax Arrangement rate and the PRC non-treaty rate.

Holding Periods	Dividend	Royalty	Interest
PRC non-treaty rate	20%	10% <sup>5</sup>	10%
HK-China Double Tax Arrangement rate	5% <sup>6</sup> /10%	7%	0% <sup>7</sup> / 7%

## Taxation of individuals

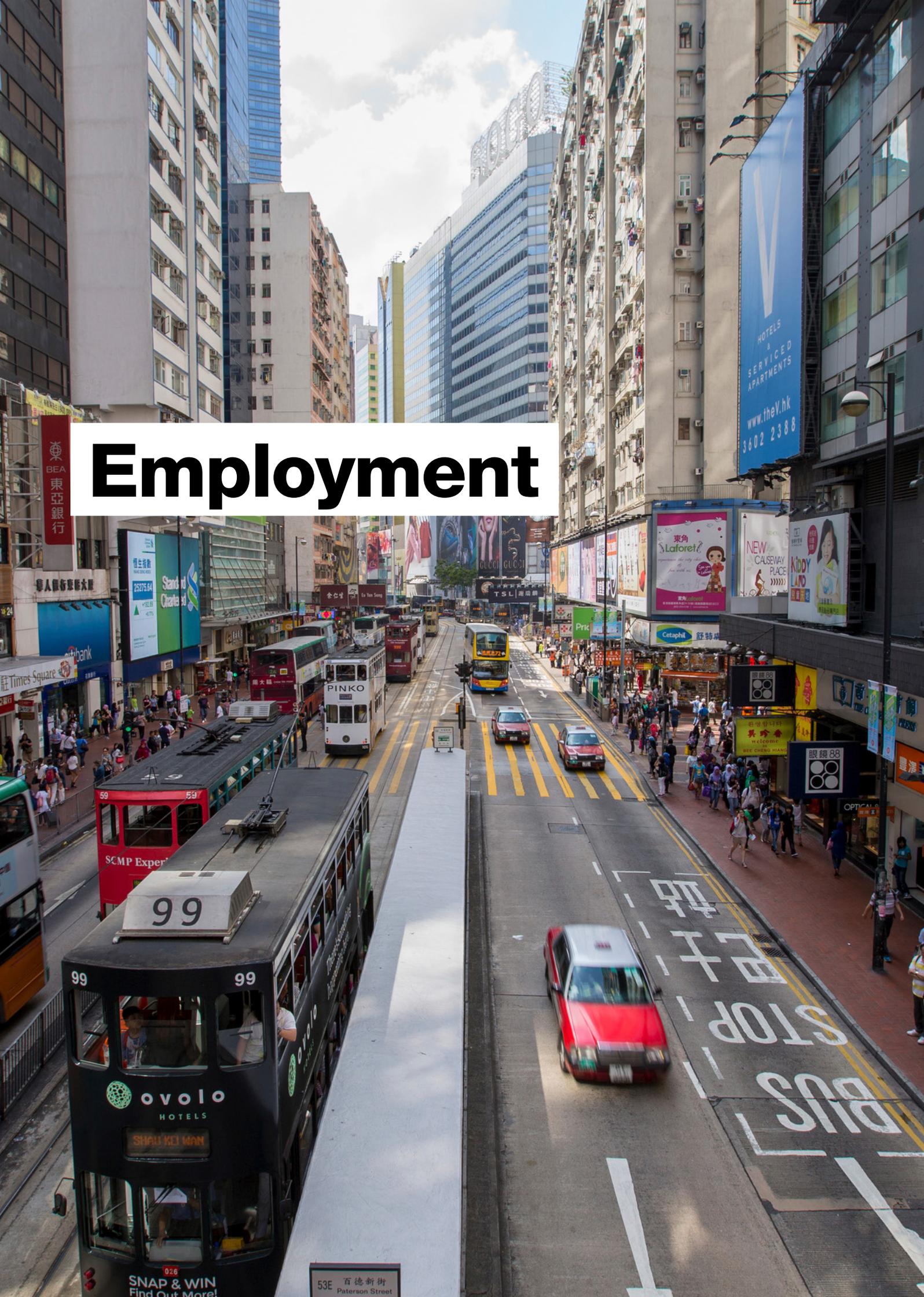
### Taxation of foreign individuals

Salaries tax is payable on every person's Hong Kong sourced income, regardless of nationality. Income is defined as all benefits such as salary, bonuses and all perquisites capable of being turned into money.

The standard rate (ceiling to tax liability) of salaries tax is currently 15%<sup>8</sup>.

Employees of foreign companies seconded to Hong Kong from abroad are liable to pay salaries tax on their Hong Kong sourced income. An exemption exists if a person renders services in Hong Kong for a period not exceeding 60 days per tax year in Hong Kong.

# Employment



## General comments

The main employment law issues that need to be considered at the outset with respect to opening an office in Hong Kong under the Immigration Ordinance, the Employment Ordinance, the Mandatory Provident Scheme Ordinance, the Minimum Wage Ordinance and the Disability Discrimination Ordinance are set out below.

## Employment visa

Under the Immigration Ordinance, every person who wishes to enter Hong Kong for the purpose of employment, investment, education, training or residence is required to obtain an entry visa before coming to Hong Kong. This is so unless they:

- are a Hong Kong permanent resident with a Hong Kong Permanent Identity Card;
- have the right of abode in Hong Kong; or
- have the right of unconditional stay in Hong Kong.

“The unemployment rate in Hong Kong averaged 3.71% from 1961 until 2016, reaching an all time high of 8.50% in June of 2003 and a record low of 1% in July of 1989.”

CENSUS AND STATISTICS DEPARTMENT,  
HONG KONG, SEPTEMBER 2016

In the case of foreigners travelling to Hong Kong to work for a company, the company will need to consider whether it will need to obtain employment visas for such foreign employees before they arrive in Hong Kong. If the employees will be:

- spending a substantial amount of their time in Hong Kong;
- working at a fixed place; and
- having a fixed place of accommodation,

it is highly likely that such employees will be deemed as working in Hong Kong and they will therefore require employment visas.

To qualify for an employment visa under the existing immigration policy, a person seeking to enter Hong Kong for employment is required to possess special skills, knowledge or experience of value to and not readily available in Hong Kong. He should also be able to show that he is not filling a post which can be filled locally. It is not unusual for the Hong Kong Immigration Department to require a letter from the employer explaining why they are not employing a Hong Kong resident for a position being filled by a foreigner.

Applications for an employment visa should be made through a sponsor (a sponsor is usually the Hong Kong employer) prior to the applicant's arrival in Hong Kong. The applicant needs to complete the appropriate application form and submit it to the Hong Kong Immigration Department together with other personal information and specific information about the employer and the position.

It usually takes about 4 to 12 weeks for the Hong Kong Immigration Department to process an application for employment visa.

A person holding an employment visa may only work for the Hong Kong employer that is his sponsor. If he wishes to change employment, an application for change of employment will have to be made to the Hong Kong Immigration Department and the person will not be allowed to commence work for the new employer until such application has been approved.

## Statutory employment rights and protection

The Employment Ordinance is the main legislation that prescribes the basic rights and protection for employees in Hong Kong. All employees, irrespective of the number of hours they work in each week, are entitled to:

- statutory holidays;
- wage protection; and
- protection against anti-union discrimination.

Employees employed under a continuous contract, whether temporary or part-time, are entitled to all the statutory benefits under the Employment Ordinance subject to satisfaction of the conditions stipulated therein. A continuous contract is one in which an employee is employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week.

## Annual leave

### General

An employee is statutorily entitled to 7 days' annual leave with pay after serving every period of 12 months under a continuous contract. An employee's statutory entitlement to paid annual leave increases progressively with 1 additional day of paid annual leave for each completed year of service up to a maximum of 14 days of paid annual leave.

### Calculation of annual leave pay and time for payment

The daily rate of annual leave pay is a sum equivalent to the average daily wages earned by an employee in the 12-month period preceding the annual leave day or the first annual leave day (if more than 1 consecutive annual leave day).

In calculating the average daily wages, an employer has to exclude (a) the periods for which an employee is not paid his wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (b) the sum paid to the employee for such periods.

Annual leave pay should be paid to the employee not later than the normal day after the period of annual leave taken.

### Other points to note

An employer should not include in an employment contract a term to forego all or any of his employee's annual leave entitlement, including payment of wages in lieu of any annual leave days. However, the law allows an employee to choose to accept payment in lieu of that part of his leave entitlement which exceeds 10 days.



## Sick leave and sickness allowance

### General

An employee employed under a continuous contract is entitled to sickness allowance if:

- the sick leave taken is not less than four consecutive days (unless under certain circumstances);
- the sick leave is supported by an appropriate medical certificate; and
- the employee has accumulated sufficient number of paid sickness days (paid sickness days are accumulated at the rate of two paid sickness days for each completed month of the employee's employment during the first 12 months, and four paid sickness days for each completed month of employment thereafter. Paid sickness days can be accumulated throughout the whole employment period, but shall not exceed 120 days at any one time).

Paid sickness days are divided into two categories i.e. paid sickness days can first be accumulated up to 36 days in Category 1 and then 84 days in Category 2.

For taking paid sickness day(s) under Category 1, a medical certificate issued by a registered medical practitioner, registered Chinese medicine practitioner or a registered dentist is required.

When the sickness days taken exceeds the number of paid sickness days remaining in Category 1, any further sickness day(s) taken will enter in Category 2. For taking paid sickness day(s) under Category 2, if so required by the employer, a medical certificate issued by a registered medical practitioner, registered Chinese medicine practitioner or a registered dentist attending the employee as an out-patient or in-patient in a hospital should be produced. Upon the employer's request, a brief record of the investigation carried out and the treatment prescribed by the issuer of the medical certificate should also be produced.

### Calculation of sickness allowance and time for payment

The daily rate of sickness allowance is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the sickness day or the first sickness day (if more than 1 consecutive sickness day). If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

For calculation of the average daily wages for sickness allowance, an employer has to exclude the same items mentioned above that apply to the calculation of average daily wages for annual leave pay.

Sickness allowance should be paid to the employee not later than the normal pay day.

### Other points to note

An employer is prohibited from terminating the contract of employment of an employee on his paid sickness day, except in cases of summary dismissal due to the employee's serious misconduct.

## Termination by notice or by payment in lieu of notice

### Termination by notice

In the case of a continuous employment contract, the employment of an employee on probation may be terminated by either the employer or employee without notice during the first month of employment and not less than 7 days' notice thereafter.

Where there is no probation period or after the probation period, the continuous employment contract may be terminated by either the employer or employee by not less than 1 month notice if there is no agreement as to the length of notice in the contract, or 7 days or the agreed period, whichever is longer, where the length of notice is provided for in the contract.



#### Termination by payment of wages in lieu of notice

A continuous employment contract may also be terminated by either the employer or employee without notice by paying wages in lieu of notice.

In the case of notice period expressed in days or weeks, the amount of wages in lieu of notice would be the average daily wages earned by the employee in the 12-month period preceding the day when a notice of termination of contract is given multiplied by the number of days specified in the notice period.

Where the notice period is expressed in months, the amount of wages in lieu of notice would be the average monthly wages earned by the employee in the 12-month period preceding the day when a notice of termination of contract is given multiplied by the number of months specified in the notice period.

For calculation of the average daily/monthly wages for wages in lieu of notice, an employer has to exclude the same items mentioned above that apply to the calculation of average daily wages for annual leave pay.

Wages in lieu of notice shall be paid as soon as practicable and in any case not later than 7 days after the date of termination.

#### Termination without notice or payment of wages in lieu of notice

An employer may summarily dismiss an employee without notice or payment of wages in lieu of notice if the employee, in relation to his employment:

- wilfully disobeys a lawful and reasonable order;
- misconducts himself;
- is guilty of fraud or dishonesty; or
- is habitually neglectful in his duties.

Employers should note that summary dismissal is a serious disciplinary action. It only applies to cases where an employee has committed very serious misconduct or fails to improve after the employer's repeated warnings.

On the other hand, an employee may terminate his employment contract without notice or payment of wages in lieu of notice if:

- he reasonably fears physical danger by violence or disease;
- he is subjected to ill-treatment by the employer; or

- he has been employed for not less than 5 years and he is certified by a registered medical practitioner as being permanently unfit for the type of work he is engaged.

### Severance payment and long service payment

#### Severance payment

An employee employed under a continuous contract for not less than 24 months is eligible for severance payment if:

- he is dismissed by reason of redundancy;
- his fixed term employment contract expires without being renewed due to redundancy; or
- is laid off.

“Redundancy” refers to the case where the dismissal is due to the fact that:

- the employer closes or intends to close his business;
- the employer has ceased, or intends to cease, the business in the place where the employee was employed; or
- the requirement of the business for employees to carry out work of a particular kind or for the employee to carry out work of a particular kind in the place where the employee was employed, ceases or diminishes or is expected to cease or diminish.

“Laid off” refers to the case where an employee who is employed on such terms and conditions that his remuneration is dependent on his being provided by the employer with work of the kind he is employed to do and the total number of days on which no work is provided or no wages is paid to such employee exceeds:

- half of the total number of normal working days in any 4 consecutive weeks; or
- one-third of the total number of normal working days in any 26 consecutive weeks.

The days of lock-out, rest days, annual leave and statutory holidays should not be counted as normal working days during the above periods.



For a monthly-paid employee, the amount of severance payment is, for each year (and pro rata for an incomplete year) in which the employee has been continuously employed, two-thirds of their last full month's wages, or two-thirds of HK\$22,500, whichever is less. For a daily-rated/piece-rated employee, the amount of severance payment is, for each year (and pro rata for an incomplete year) in which the employee has been continuously employed, 18 days' wages based on any 18 days chosen by the employee and occurring during their last 30 normal working days, or two-thirds of HK\$22,500, whichever is less. The entitlement to severance payment is subject to a maximum amount of HK\$390,000.

Severance payment should be paid to the employee as soon as practicable. The Employment Ordinance also requires an employer to make severance payment to his employee not later than 2 months from the receipt of a written notice for claiming such payment from the employee.

#### Long service payment

An employee employed under a continuous contract for not less than 5 years is eligible for long service payment if:

- he is dismissed (except by reasons of redundancy or summary dismissal due to the employee's serious misconduct);
- his fixed term employment contract expires without being renewed;
- he dies during employment;
- he has been issued a certificate in a specified form by a registered medical practitioner or a registered Chinese medicine practitioner, certifying that he is permanently unfit for his present job and he resigns; or
- he is aged 65 or above and resigns on ground of old age.

The calculation of long service payment is the same as that mentioned above for severance payment and is also subject to the same restrictions on maximum amount.

Long service payment should be paid to an employee within 7 days after the date of termination of employment contract, except as otherwise specified in the case of payment to the beneficiaries of a deceased employee.

#### Points to note

An employee is not entitled to both severance payment and long service payment.

In addition, if an employee becomes entitled to severance payment or long service payment and:

- gratuities based on length of service or occupational retirement scheme benefits (excluding any part attributable to employee's contributions) have been paid to the employee; or
- accrued benefit (excluding any part attributable to employee's contributions) has been paid to the employee, or is being held in a mandatory provident fund scheme by the employee.
- the severance payment/long service payment is to be offset against the aforementioned amount of gratuities and benefits to the extent that they relate to the employee's years of service for which the severance payment/long service payment is payable.

### Mandatory Provident Fund (MPF)

The MPF is a privately managed retirement system under the prudential regulation and supervision of the MPF Schemes Authority of Hong Kong. All employees and the self-employed aged between 18 and 65, except for those falling within certain exempt categories, are required to join a MPF scheme.

Under the Mandatory Provident Fund Schemes Ordinance, an employee is defined as any full-time and part-time employee who is employed for a continuous period of not less than 60 days under an employment contract.

The level of contributions required from employees and employers is summarised in the table below:

Employee's Income (per month)	Employer Contribution	Employee Contribution
Below HK\$7,100	5%	optional
HK\$7,100 to \$30,000	5%	5%
Above HK\$30,000	HK\$1,500 (5% on first HK\$30,000) balance optional	HK\$1,500 (5% on first HK\$30,000) balance optional



## Minimum wage

The Minimum Wage Ordinance has commenced operation on 1 May 2011, pursuant to which an employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage.

The statutory minimum wage applies to all employees, whether they are monthly-rated, weekly-rated, daily-rated, hourly-rated, piece-rated, permanent, casual, full-time, part-time or other employees, and regardless of whether or not they are employed under a continuous employment contract as defined in the Employment Ordinance, with the following exceptions:

- persons to whom the Employment Ordinance does not apply
- live-in domestic workers

The statutory minimum wage is expressed as an hourly rate. Wages payable to an employee in respect of any wage period, when averaged over the total number of hours worked in the wage period, should be no less than the statutory minimum wage rate, which is currently HK\$32.5.

The employment and wage payment mode (i.e. employed and remunerated at monthly-rated, weekly-rated, daily-rated, hourly-rated or piece-rated, etc.) formulated between employers and employees in accordance with their employment contracts and the Employment Ordinance need not be changed with the implementation of the statutory minimum wage.

## Disability discrimination

The Disability Discrimination Ordinance protects persons with disabilities from discrimination and harassment when applying for a job and in employment.

Under the Disability Discrimination Ordinance, it is unlawful for an employer to discriminate a job applicant/an employee on the ground of the person's disability unless:

- The person, because of his/her disability, is unable to perform the inherent requirements of the job
- Provision of accommodation would cause unjustifiable hardship to the employer

There are two forms of disability discrimination, namely direct discrimination and indirect discrimination. Direct discrimination

means treating an employee with a disability less favourably on the ground of the person's disability in comparable circumstances while indirect discrimination means imposing the same requirement/condition to everyone where the proportion of persons with disabilities who can comply is considerably smaller than those without and such requirement/condition cannot be objectively justified, as a result persons with disabilities suffer a detriment.

Disability discrimination also occurs in the form of victimisation, disability harassment and vilification:

“Victimisation” refers to treating a person less favourably because he/she has made or plans to make a disability discrimination complaint, takes legal action, acts as witness against disability discrimination or helps somebody else to do so.

“Disability harassment” refers to an unwelcome conduct on account of a person's disability where a reasonable person, after considering everything, would have anticipated that the person being harassed would be offended, humiliated or intimidated.

“Vilification” refers to any activity in public that incites hatred towards, serious contempt for or severe ridicule of persons with disabilities.



# Intellectual Property

## General comments

Hong Kong is one of the main intellectual property hubs in the Asia Pacific region due to its comprehensive intellectual property laws and reliable enforcement systems.

It is important to note at the outset that intellectual property rights are territorial in nature, and thus, having an intellectual property right registered elsewhere does not automatically give intellectual property protection in Hong Kong.

This section summarises the main areas where intellectual property protection is available in Hong Kong.

## Patents

The grant of a patent protects against the unauthorised manufacture, use, sales, or imports of the patent owner's invention in Hong Kong. Hong Kong has two types of patents, namely, standard patents and short term patents.

The Hong Kong patent system is essentially a re-registration patent system. The grant of a standard patent in Hong Kong is based on the registration of a patent granted by one of the three following designated patent offices:

- the State Intellectual Property Office, People's Republic of China (a Chinese patent);
- the European Patent Office, in respect of a patent designating the United Kingdom (a EP (UK) patent); or
- the United Kingdom Patent Office (a UK patent).

No substantive examination is conducted in Hong Kong. This means that an application in Hong Kong for a standard patent cannot be filed unless there is application for a patent in any of the three offices listed above.

The standard patent application is made in two stages. The first stage requires the filing of a request to record a pending application for a Chinese, EP (UK) or UK patent. The second stage is the request for registration and the grant in Hong Kong of the Chinese, EP (UK) or UK granted patent. Protection under standard patents is renewable annually after the end of the third year, for a maximum of 20 years.

As a supplement to standard patents, short-term patents may also be granted to offer protection for products with a shorter commercial life cycle. Unlike standard patents, applicants may file a short-term patent application directly with the Patents Registry without first having to apply for a patent at a designated patent office. The grant of a short term patent is based on a search report from an international searching authority or one of three designated patent offices. Protection with short term patents is renewable after four years from filing, up to a maximum of eight years.

## Trade marks

Typically, trademarks encompass "visually perceptible" marks, and include signs capable of distinguishing goods or services of one undertaking from those of other undertakings which can be represented graphically. This allows distinctive sounds and smells to be registered as a trade mark, provided they are graphically represented.

A trademark may be registered with the Hong Kong Trade Marks Registry.

A registered trademark owner has an exclusive right to use the trademark in relation to the goods and services in Hong Kong for which the mark is registered. A registered trademark shall be registered for a period of 10 years beginning on its date of registration and may be renewed for further periods of 10 years.

A registered mark is infringed if an identical or similar mark is used on other goods or services, and legal action can be taken by the owner of a registered mark to prevent its unauthorised use. Both civil and criminal liabilities are provided for trademark infringements.

## Passing off

Passing off is a common law tort, which protects one's goods or services from being associated with a person who is not the owner. Protection under passing off applies to a trader where its goods or services have distinctive features recognised by a class of persons, and members of that class will or will likely be confused by the defendant's misrepresentation as to the origin of the goods or services, thereby causing damage to the trader's business goodwill. Such misrepresentation and confusion may relate to the trader's distinctive packaging, trade names, product designs, advertising materials, etc. Remedies include injunctions, discovery, and damages for lost sales and reputation.

## Registered designs

For a design to be registered, it must be new. Under the Registered Designs Ordinance (Cap. 522 of the laws of Hong Kong), a design consists of aesthetically appealing features of shape, configuration, pattern or ornament applied to an article by any industrial process. As designs do not include the functional features of the article, registration of a design will only protect the appearance of a product.

Registered design protection is renewable for periods of five years up to a maximum of 25 years.

## Copyright

Copyright is an automatic property right which subsists in original literary, dramatic, musical or artistic works, sound recordings, films, broadcasts, cable programmes, and the typographical arrangement of published editions. Copyright arises whenever a work is created; there is no need to register a work to obtain copyright protection. Hong Kong's copyright protection extends to any original work created by an author from any place in the world, or works first published anywhere in the world.

Criminal enforcement actions are available in addition to the civil remedies of injunction or damages.



**Competition**

**Law**

## General comments

Hong Kong's competition law applies to all businesses in Hong Kong. It prohibits conduct that harms competition in Hong Kong. Penalties for failing to comply with the law can be severe – a company group may be fined up to 10% of its annual turnover in Hong Kong for each contravention. Individuals involved in a breach may also be penalised and banned from holding management positions.

There are three key competition rules, known as the First Conduct Rule, the Second Conduct Rule and the Merger Rule. Merger control is limited to the telecommunications sector, but may be extended to other sectors in the future.

The Competition Commission and the Competition Tribunal are the main enforcement agencies. The Commission has issued a number of guidelines and policies that provide useful guidance on the competition rules.

## First Conduct Rule

The First Conduct Rule prohibits arrangements between businesses that have the object or effect of preventing, restricting or distorting competition in Hong Kong.

The prohibition applies to both formal agreements and informal understandings between parties. Exchanging confidential information with competitors may also breach the rule.

Businesses should conduct an audit of their existing contracts and business practices to determine whether they are engaging in conduct that is prohibited under the First Conduct Rule.

## Cartel conduct

The First Conduct Rule is particularly focused on preventing cartel conduct. Cartels are arrangements between competitors involving price fixing, market sharing, bid-rigging or output limitation. Cartel conduct is considered to be one of the most serious forms of anti-competitive conduct, and is a key target of the Commission's enforcement efforts.

Conduct	Description
Price fixing	Agreeing with competitors to fix, maintain, increase or control the price, including the formula to calculate price, discounts, rebates, promotions or credit terms, for the supply of goods or services.
Market sharing	Agreeing with competitors to allocate sales, territories, customers or markets for the production or supply of goods or services.
Bid-rigging	Exchanging information on, or agreeing strategy with, competitors when bidding for (or considering whether or not to bid for) contracts. This includes agreeing who should win a bid and manipulating the bidding process to achieve that outcome.
Output limitation	Agreeing with competitors to fix, maintain, control, prevent, limit or eliminate the production or supply of goods or services (including volume and type).

“Competition is a much cherished value in Hong Kong. Competition drives economic vibrancy, stimulates innovation, creates work opportunities and brings consumer benefits. It is one of the cornerstones of our open economy.”

ANNA WU HUNG-YUK, CHAIRPERSON,  
COMPETITION COMMISSION

## Other agreements that may breach competition law

Examples of other agreements that may breach the First Conduct Rule are set out in the table below. A competition law assessment should be carried out before entering into such agreements.

Conduct	Description
Resale price maintenance	Suppliers must not set a fixed or minimum resale price to be observed by the buyer of a product. It may however be permissible to fix a maximum resale price or to recommend a resale price.
Group boycotts	Companies may infringe competition law if they agree with competitors not to do business with targeted individuals or businesses with the aim of excluding an actual or potential competitor from the market.
Exclusive distribution	In most cases, exclusive distribution agreements will not give rise to competition concerns. However, concerns may arise if the agreement leads to reduced competition between distributors for the same products/brands, market sharing, or limiting market access to potentially competing distributors.
Joint ventures	In general, a joint venture agreement will be permissible if it does not have the object or effect of harming competition. It may also be excluded from the First Conduct Rule on the basis that it enhances overall economic efficiency. This requires an analysis of the joint venture and its impact on competition in the market.

## Second Conduct Rule

The Second Conduct Rule prohibits entities with substantial market power from abusing that power by engaging in conduct that has the object or effect of restricting or distorting competition in Hong Kong. The Commission's enforcement



focus in relation to the Second Conduct Rule is on conduct that prevents or limits the ability of competitors to compete.

The test of substantial market power is broader than the test for dominance adopted by other regimes. It involves an assessment of market share as well as consideration of other factors such as the power of an entity to make pricing decisions and the height of barriers to entry.

Examples of conduct that may amount to an abuse of market power in some circumstances are set out in this table:

### We say...

“We would like to think that we are presenting to you the HK competition law framework that’s succinct, simple and easy to understand. You will also recognise that the Hong Kong model incorporates best practices that are applied in multiple jurisdictions.”

RONALD ARCULLI, PARTNER, KWM HONG KONG

Conduct	Description
Predatory pricing	Occurs when a company sets the price of its goods or services so low that it deliberately forgoes profit in order to force a competitor out of the market, or to otherwise “discipline” the competitor.
Refusal to deal	Occurs when a company with substantial market power refuses to supply a product or service, or refuses to supply on reasonable terms. It can also occur when a company refuses to grant access to certain facilities essential to a competitor’s business.
Tying and bundling	Tying occurs when a supplier makes the sale of one product conditional on the purchase of a different product. Bundling occurs when two products are discounted if they are purchased together. Both these strategies are often legitimately used in the market, but may be anti-competitive if they interfere with or eliminate a competitor’s ability to sell the tied or bundled product.
Exclusive dealing	Occurs when a supplier requires a customer to exclusively or largely acquire a good or service from the supplier, or incentivises a customer to do the same. Exclusive dealing is a common commercial arrangement and in most cases will not harm competition. Competition concerns may arise where the object or effect of the exclusive dealing arrangement is to foreclose competitors by preventing them from selling to customers.

## Merger Rule

The Merger Rule only applies to mergers involving entities that hold a telecommunications carrier licence. The rule prohibits mergers that have, or are likely to have, the effect of substantially lessening competition in Hong Kong. The rule may be extended to other sectors in the future.



## Exemptions and exclusions

There are a number of exemptions and exclusions from the competition rules, including those in the table below.

Grounds	Assessment	First Conduct Rule	Second Conduct Rule
Agreements enhancing overall economic efficiency	Commission decision or self-assessment	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Block exemptions issued by the Commission	Commission decision	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Arrangements (other than cartels) between entities with a combined global turnover of less than HK\$200 million	Self-assessment	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Entity with a global turnover of less than HK\$40 million	Self-assessment	<input type="checkbox"/>	<input checked="" type="checkbox"/>

## Enforcement

### Penalties and other orders

The Competition Ordinance contains a range of sanctions for contraventions, including pecuniary penalties of up to 10% of annual turnover for each year of infringement (capped at 3 years), disqualification orders, divestiture of assets, shares or businesses, voiding of agreements, and criminal sanctions for obstruction.

### Competition Commission

The Commission is responsible for investigating and enforcing the law. It has a number of enforcement powers, including the ability to issue warning and infringement notices, to accept legally binding commitments in lieu of prosecution, and to commence proceedings in the Tribunal for breaches of the competition rules. The Commission may also grant leniency in exchange for co-operation.

The Commission's investigation powers include the ability to require a person to produce documents and information, and to conduct "dawn raids". The Commission must obtain a search warrant from the Court before carrying out a dawn raid. Businesses should ensure that employees are appropriately trained, and procedures to be followed are in place, in the event that a dawn raid occurs.

The Communications Authority has concurrent jurisdiction with the Commission in respect of certain companies operating in the telecommunications and broadcasting sectors.

### Competition Tribunal

The Tribunal is responsible for hearing and determining competition cases. It has the power to impose penalties and make other orders for breaches of the competition rules.

### Follow-on actions

The Competition Ordinance allows a person who has suffered loss or damage as a result of conduct that has been determined to be a contravention of a conduct rule to commence a private follow-on action.



# Dispute Resolution

## Court based litigation

Hong Kong's legal system is well-established. It is based on the common law and the Hong Kong judiciary is well-equipped to deal with the full range of commercial disputes. The major courts in Hong Kong include:

- the District Court;
- the High Court (comprising the Court of Appeal and the Court of First Instance); and
- the Court of Final Appeal.

There are a number of specialist lists in the High Court, for example, construction, commercial and companies matters.

## Arbitration

Arbitration is well-established in Hong Kong with an extensive and experienced pool of certified arbitrators qualified to deal with both domestic and international arbitrations. With the high level of both local and regional construction, disputes are inevitable and it is common for them to be resolved by arbitration. Arbitration is sometimes viewed as a parallel form of dispute resolution to litigation, with similar advantages and disadvantages in terms of formality of the process, time, cost and enforceability. However, strong influencing factors for many parties choosing arbitration is its confidential nature and the fact that an arbitral award is more readily enforceable across borders as compared with a court judgment.

## Alternative Dispute Resolution

Mediation is a popular dispute resolution tool offering a speedy and inexpensive means to resolve disputes. It has been successfully used to resolve many large disputes in Hong Kong. The Mediation Ordinance, which was enacted in 2013, provides a statutory framework for mediation.

Although it is not compulsory for parties to civil litigious cases to attempt mediation, the Hong Kong courts may, in appropriate cases, order costs to be taxed on a more generous basis if a party unreasonably refuses to attempt mediation.

The Financial Dispute Resolution Centre ("FDRC") has been established to deal with monetary disputes (in which the claimable amount does not exceed HK\$500,000) between financial institutions and their clients via mediation and arbitration. All financial institutions regulated by the Hong Kong Monetary Authority and the Securities and Futures Commission are obligated to comply with the financial dispute resolution scheme, which is administered by the FDRC.

<sup>1</sup> Since the 2008/2009 tax year.

<sup>2</sup> From the 2008/2009 tax year onwards.

<sup>3</sup> From the 2016/2017 tax year onwards.

<sup>4</sup> From the 2008/2009 tax year onwards.

<sup>5</sup> Not including the business tax on PRC-sourced royalty payments.

<sup>6</sup> For Hong Kong Companies which own at least 25% of the equity interest of a PRC company only.

<sup>7</sup> For Government of the Hong Kong Special Administrative Region and institutions mutually recognised by competent authorities of Hong Kong and PRC only.

<sup>8</sup> Since the 2008/2009 tax year.

# A new global marketplace



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