

DEACONS
的近律師行

Doing business in Hong Kong



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Introduction

Hong Kong is a Special Administrative Region (SAR) of the People's Republic of China (PRC) that is governed by the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law) which forms a mini constitution for Hong Kong. Under the Basic Law, Hong Kong enjoys a high degree of autonomy except in relation to matters such as defence and foreign affairs. It has its own executive, legislative and independent judicial power, including that of final adjudication. Socialist systems and policies will not be practised in Hong Kong for a period of 50 years commencing from 1997 under the principle of "one country two systems".

Hong Kong is an attractive place to do business and a leading international trading and service hub as well as a high value-added manufacturing base. It is one of the freest economies in the world and a gateway to investment in China.

The Hong Kong SAR government practises an open and liberal investment policy and actively encourages inward investment. Generally, there are no tariffs or regulatory measures adversely affecting international trade. Hong Kong's continuing success is largely due to a relatively simple tax structure, comparatively low rates of tax, excellent infrastructure and the government's firm commitment to free trade and free enterprise.

The following provides an overview of the various factors that a foreign investor should consider when establishing a business in Hong Kong.

Types of business entities

General

A foreign investor has a wide range of business structures to choose from when doing business in Hong Kong. The type of entity the investor chooses will depend on what best suits the particular needs of the investor and his or her financial and tax considerations.

The most common business entities used by non-residents in Hong Kong include:

- (1) representative offices;
- (2) branches of parent companies;
- (3) subsidiaries of parent companies;
- (4) partnerships;
- (5) joint ventures; and
- (6) trusts.

Representative office

When a foreign company wishes to analyse the suitability of the Hong Kong market for its goods or services or both, a representative office can be opened. A company establishing a representative office should register under the Business Registration Ordinance (Cap.310) (Business Registration Ordinance). This type of business entity is only permitted to carry on promotional and liaison work in Hong Kong. A representative office is prohibited from carrying on any business in Hong Kong or entering into any contracts in Hong Kong. Once such a company commences the carrying on of a business, it is required to register as a non-Hong Kong company under the Companies Ordinance (Cap.622) (Companies Ordinance).

Branch office

If a foreign company wishes to carry on business in Hong Kong and operate through a branch office, it must register the business under the Business Registration Ordinance. It must also register as a non-Hong Kong company under the Companies Ordinance within one month after establishing its place of business in Hong Kong. To register under the Companies Ordinance, the foreign company will need to appoint a local person authorised to accept service of proceedings and notices in Hong Kong and have a registered place of business.

The branch will not be subject to limitations on the scope of its activities. However, certain types of business activities will require approvals and licences from other government authorities before the proposed business activities can begin. The registered foreign company will then be able to carry on business in Hong Kong.

Hong Kong subsidiary

A foreign company may wish to incorporate a wholly-owned Hong Kong subsidiary as a Hong Kong company. One advantage of a subsidiary arrangement is that it limits the liability of the parent company in relation to operations carried on by the Hong Kong subsidiary.

The subsidiary may be either a private company or a public company. Either type has unique advantages. Professional assistance should be sought to ensure that the most suitable corporate form is chosen.

The majority of subsidiary companies are private companies. Private companies are limited to a maximum of 50 shareholders, and must have restrictions on the transfer of shares. Private companies are also subject to fund raising restrictions and must not engage in any activity that would require the lodgement of a disclosure document (e.g. a prospectus). A company may be incorporated with one member, and a private company may have a single director who must be a natural person, and unless it is part of a listed group, may have corporate directors provided there is at least one director who is a natural person. The directors of a Hong Kong company are not required to be Hong Kong residents. A body corporate must not be appointed as a director where the company is (i) private but part of a listed group, (ii) public or (iii) limited by guarantee. Every Hong Kong incorporated company must have a company secretary, who (in the case of a natural person) must ordinarily reside in Hong Kong, and if it is a body corporate, must have its registered or principal office in Hong Kong.

Partnership

Partnerships are comparatively inexpensive to establish and can be formed quickly. The agreement creating the partnership does not need to be registered, but the partnership itself requires registration under the Business Registration Ordinance once it establishes a place of business in Hong Kong. The Partnership Ordinance (Cap.38) and any partnership agreements regulate the relationship among the partners.

Each partner is jointly liable with all the other partners for all debts and obligations of the partnership incurred while he or she is a partner.

Joint venture company

This is a normal company used to carry on the joint venture activity on behalf of its shareholders. This type of business structure is an entity which is legally distinct from the parties which comprise it. It is used where a number of parties wish to carry on business together. The component parties' liability is limited to their share of capital investment in the joint venture company. The formalities for establishment are similar to those for a subsidiary company.

Trusts

While not commonly used in Hong Kong in this way, a trust can be utilised as a business vehicle or as an investment vehicle whereby a trustee conducts the trust's business on behalf of the "members" (known as beneficiaries) of the trust. The trustee may be a company (usually a private company) incorporated for this purpose. The income generated will either belong beneficially to the beneficiaries of the trust, or otherwise be held by the trustee to be distributed at the trustee's discretion on the terms of the trust instrument. The rights, powers and duties of the trustees are set out in the trust deed, the general trusts law of Hong Kong, and the Trustee Ordinance (Cap. 29).

A trust is not a separate legal entity. The trustee can assume obligations as trustee and is allowed to use trust assets to satisfy its debts and obligations as trustee as provided for in the trust deed, the general trusts law of Hong Kong, and the Trustee Ordinance.

Shelf companies

Shelf companies are "ready-made" companies, waiting to be purchased. Shelf companies, therefore, offer an immediate solution to an urgent requirement for a pre-existing company. The ease with which to incorporate a company on the same day an application is submitted via electronic filing has otherwise rendered use of shelf companies unnecessary.

A shelf company comes with standard provisions in the Articles of Association which may be changed subsequent to the acquisition. The company name may also be changed after acquisition.

The Stock Exchange of Hong Kong Limited

Investors may wish to consider raising local equity by listing on The Stock Exchange of Hong Kong Limited (Exchange). This avenue is also available to companies incorporated in some jurisdictions outside Hong Kong. The Exchange serves a wide array of international and domestic investors and end users, including many of the world's largest financial institutions.

Potential investors should ask their legal adviser for a thorough outline of the current listing rules.

Business environment

General

Hong Kong is characterised by a high degree of internationalisation, business-friendly environment, open and fair competition, free flow of information, well-established and comprehensive financial network, superb network of transport and telecommunications infrastructure, sophisticated support services and a well-educated work force complemented by a pool of efficient entrepreneurs.

It also has a substantial amount of foreign exchange reserves, a fully convertible and stable currency, no exchange controls and a relatively simple tax system with tax being levied at a low rate.

Services sector

The services sector has flourished and diversified into types of activities in line with the structural transformation of the economy. Trade-related and tourism-related services, community, social and personal services and finance and business services such as banking, insurance, real estate and a host of related professional services have all grown substantially over the past two decades. There has also been strong expansion in information technology, especially telecommunications services and Internet applications, in line with the shift in economic structure towards a knowledge-based economy.

Manufacturing sector

Manufacturing businesses in Hong Kong are renowned for being versatile and flexible. The existence of many small establishments connected under an extensive local subcontracting network has facilitated producers in coping with changing conditions in overseas markets. By increased outward processing arrangements in Mainland China, Hong Kong's capacity has been substantially expanded, helping to maintain the price efficiency of its products, most of which are destined for export.

Intellectual property rights

Sources of intellectual property law

As a Special Administrative Region of the PRC, Hong Kong has a high degree of autonomy and will retain its own legal system until 2047. Under the Basic Law, for intellectual property purposes, Hong Kong remains a separate jurisdiction from the rest of Mainland China. The intellectual property laws and court decisions of the PRC do not apply to Hong Kong SAR. Intellectual property rights registered or protected in Hong Kong will not extend to the PRC and vice versa.

Before the resumption of sovereignty in 1997, apart from the protection of trade marks, Hong Kong's intellectual property laws derived from UK legislation. Prior to the resumption of sovereignty, Hong Kong implemented its own copyright, registered designs and patents legislation. A separate Trade Marks Ordinance was passed in 2000.

As a common law jurisdiction, the Hong Kong courts may rely on previous judgments in similar cases within Hong Kong. They may also refer to other common law jurisdictions such as England, Australia and Canada. Although, these are not legally binding, they can be highly persuasive, particularly where the wording of the legislation is similar.

Trade marks

Hong Kong has had an independent trade mark registration system for well over 100 years. The current Trade Marks Ordinance (Cap.559) came into force in 2003. It is closely based on the UK Trade Marks Act 1994.

A trade mark is a sign that distinguishes the goods and services of one trader from those of another. A trade mark may consist of words, personal names, designs, letters, characters, numerals or any combination of these. Even sounds, smells or the shape of goods or their packaging may be a trade mark.

Distinctiveness is a key requirement. Invented words or logos are more likely to be registrable than marks consisting of common or descriptive words. Words which praise the quality, function or other characteristic of goods or services are generally not registrable. A trade mark application may also be rejected if the mark applied for resembles a prior application or registration. Hong Kong operates an examination system and applications will be examined by the Trade Marks Registry for registrability and conflict with prior marks.

A trade mark registration will give the registered proprietor the exclusive right to use the trade mark in relation to the goods and services for which the mark is registered. A trade mark registration is initially valid for 10 years from the date of application and can be renewed indefinitely for successive periods of 10 years.

The WIPO Protocol relating to the Madrid Agreement Concerning the International Registration of Marks 1989 (Madrid Protocol) is an international arrangement which seeks to facilitate the registration and management of trade marks in different jurisdictions. Hong Kong is not a member of the Madrid System although China has been a contracting party since 1995. The Hong Kong SAR government is proceeding with plans to adopt the Madrid Protocol in Hong Kong. Full implementation is not expected until 2022 as the Government needs to amend the current legislation and make changes to the IT infrastructure of the Intellectual Property Department.

Copyright

Copyright law in Hong Kong is principally governed by the Copyright Ordinance (Cap.528). The Ordinance is largely based on copyright sections of the UK Copyright, Designs and Patents Act 1988. However, Hong Kong's copyright law has developed away from the UK in many significant areas.

Copyright is the right given to the owner of an original work. Copyright can subsist in literary, musical, dramatic and artistic works, computer software, sound recordings, films, broadcasts and cable programmes.

In order to attract copyright, a work must be "original". Copyright arises automatically when a work is created and fixed in a material form, usually in writing or in the form of a drawing or recording.

The duration and type of protection afforded varies according to the type of copyright work. However, the general rule is that copyright lasts for the life of the author plus 50 years.

Hong Kong uniquely operates an "open qualification" system. This means that any original copyright works created by any person and/or published by any person anywhere in the world will qualify for protection in Hong Kong. Copyright works created in Hong Kong are recognised in other countries by virtue of international copyright conventions. Currently, Hong Kong is party to the Berne Convention, Universal Copyright Convention, the Phonograms Convention and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

The law provides protection against acts such as unauthorised copying of a work or issuing a work to the public. Certain dealings with infringing works are also prohibited, such as knowingly importing, exporting or selling infringing copies. Hong Kong has wide-ranging criminal provisions including offences relating to dealing in and selling counterfeit works, and illegal recording in public entertainment venues such as cinemas and concerts.

In addition, there are specific "business end-user" criminal provisions which prohibit the use of pirated computer software and the unauthorised copying or distribution of certain printed works, in the course of business.

Amendments to the law to address protection of copyright in the digital environment, including criminal liability for the electronic communication of works, a safe harbour for online service providers, and new "fair dealing" exemptions from infringement for certain uses, including "parody", were proposed in the Copyright (Amendment) Bill 2014. However, the Bill was hotly debated due

to concerns over freedom of expression and the Bill has been shelved indefinitely and it is unclear when any amendments to the law will now be introduced.

Patents

Patent law in Hong Kong is governed by the Patents Ordinance (Cap.514). A patent protects “inventions” and covers new products, substances, methods or processes which are novel and may be applied industrially. The invention must be “novel” – new over everything available to the public anywhere in the world as at the patent filing date.

Registration of a standard patent in Hong Kong has traditionally been based on the re-registration of a designated patent already granted in the UK, the European Patent Office (designating the UK) and the PRC. International applications under the Patent Co-operation Treaty covering those countries will also qualify. Once granted the Hong Kong patent is largely independent of the corresponding designated patent. Alternatively, an applicant can apply for a short-term patent (for products or processes that only have a short commercial life). The application can be for the same subject matter as for a standard patent and the requirements for novelty and inventive step will be the same.

Under changes introduced by the Patents (Amendment) Ordinance 2016 and Patents (General) (Amendment) Rules 2019 which came into force on 19 December 2019, Hong Kong now has an “original grant patent” (OGP) system for direct filing of standard patent applications in Hong Kong, obviating the need for a foreign designated patent application. A standard originating patent application will be subject to a substantive examination by local patent examiners in Hong Kong (supervised by the Chinese State Intellectual Property Office) before it will be allowed to proceed to grant. The resulting patent should carry a similar presumption of validity as a corresponding standard patent under the re-registration system.

It is important to note that the existing system for re-registration of Chinese, UK and European patents in Hong Kong and the short term patent system will be maintained, and will run in parallel with the OGP.

A patent will allow the patentee to stop others from using a patented process, or using, manufacturing, or selling, the patented invention without his consent. A standard patent confers a monopoly of 20 years from the date of filing the application. A short-term patent confers a maximum of 8 years protection.

Registered designs

The Registered Designs Ordinance (Cap.522) replaced the regime formerly based on the UK Designs (Protection) Ordinance and introduced an independent design regime to Hong Kong. The Ordinance generally follows the UK Registered Design Act 1949.

A registrable design consists of features of shape, configuration, pattern or ornament applied to an article by an industrial process. The features must have what is known as “eye-appeal”, in that the appearance of the article must be relevant to a customer’s decision to buy the product.

A registered design protects the outward appearance of a product and can be registered for a wide range of articles including appliances such as kettles and light fittings, wallpaper and textiles, jewellery, watches and toys.

A design registration is valid for an initial period of 5 years from the date of filing the application. The registration may be renewed for 4 further periods of 5 years, for a total of 25 years.

A design registration will prevent the unauthorised manufacture, import, use, sale or hiring items which look the same as the registered design in Hong Kong. In deciding whether there has been infringement, one must look at whether the substance of the registered design has been taken.

Plant variety rights

Under the Plant Varieties Protection Ordinance (Cap.490) proprietary rights may be granted to the owners of the varieties over plant varieties bred or discovered and developed by them. The Ordinance applies to any multicellular vascular organism with a root system e.g. food crops, vegetables and ornamental plants, as well as edible fungi and algae.

The variety must be new, distinct, homogeneous and stable and has an approved denomination.

Owners of plant variety rights shall have the exclusive rights to produce reproductive material of the protected variety for commercial purposes; sell reproductive material of the protected variety; import/export reproductive material of the protected variety; and licence others to carry out these activities.

Subject to the payment of an annual fee, a plant variety right shall be in force for a term of 25 years in the case of trees and vines and 20 years in other cases.

Semiconductor topography protection

The Layout-Design (Topography) of Integrated Circuits Ordinance (Cap.445) protects original layout designs of integrated circuits created after 31 March 1994. The Ordinance confers a right similar to copyright and prevents the reproduction or commercial exploitation of a protected layout design, an integrated circuit in which the protected layout design is incorporated, or an article containing the integrated circuit in which the protected layout is incorporated.

Protection is for 10 years after the product is first commercially exploited or, if not commercially exploited, then 15 years from creation.

Passing-off

This is a common law action that can be used to protect an unregistered trade mark, trade name or an individual's name or reputation and the look of a particular product including packaging. In order to establish passing off, it is necessary to show that the plaintiff has a reputation or goodwill in Hong Kong, that a misrepresentation is being made in the course of trade which will confuse the public into believing that his business or goods and services are those of the plaintiff's, or that they are somehow associated; and that the misrepresentation is likely to cause damage to the business or goodwill of the plaintiff.

Passing off can be used to prevent all sorts of misrepresentations that cause confusion and damage to a plaintiff. The categories of potentially actionable misrepresentations are not exhaustive.

Conclusion

Hong Kong has a comprehensive system for the protection of intellectual property rights in line with international standards. Over the past 2 decades since 1997, Hong Kong's role as the go-between for the PRC and the rest of the world, has become more important than ever. With many PRC companies doing business through Hong Kong and global trade fairs operating out of the territory, Hong Kong remains an international trading centre and a jurisdiction of strategic importance itself. The protection of intellectual property right in Hong Kong is key to a comprehensive cross border strategy, particularly when it comes to enforcement.

Franchising

Hong Kong has no regulatory regime applicable to franchising, thereby enabling overseas franchisors to enter the Hong Kong market with minimum formalities and regulatory compliance. Franchise agreements are, however, subject to various consumer protection rules, including restrictions that apply to contracts generally such as exemption clauses, unconscionable provisions and restrictions on unreasonable restraints of trade.

Competition

Competition Ordinance

The Competition Ordinance was enacted in June 2012 and the substantive prohibitions came into full effect on 14 December 2015. It introduced a cross-sector competition law regime that prohibits certain conduct, including agreements, concerted and unilateral practices and mergers that adversely impact on competition in Hong Kong.

Competition authorities

The Competition Commission is the principal authority responsible for enforcing the Competition Ordinance through enforcement proceedings before the Competition Tribunal. The Communications Authority has concurrent jurisdiction in respect of anti-competitive conduct in respect of certain undertakings operating in the telecommunications and broadcasting sectors.

Restrictive agreements and practices

The First Conduct Rule of the Competition Ordinance prohibits an undertaking (this includes any entity, including natural persons, engaged in economic activity) from making or giving effect to an agreement, engaging in a concerted practice as a member of an association of undertakings, making or giving effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

Unilateral conduct

The Second Conduct Rule of the Competition Ordinance prohibits an undertaking that has a substantial degree of market power in a market from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

Extra-territorial reach

The Competition Ordinance has extra-territorial reach in that it applies to activities conducted outside Hong Kong, if they have the object or effect of preventing, restricting or distorting competition in Hong Kong.

Consequences of contravention of the Competition Ordinance

The Competition Tribunal may impose a wide range of civil sanctions on an undertaking found to have contravened the First or Second Conduct Rule, including pecuniary penalties of up to 10% of the total turnover obtained in Hong Kong for each year of infringement, up to a maximum of three years, and disqualification of directors of up to five years. Criminal sanctions, including fines and imprisonment, are available in respect of obstructing the Competition Commission in exercising its enforcement powers.

Merger control

The Merger Rule of the Competition Ordinance prohibits mergers and acquisitions that have, or are likely to have, the effect of substantially lessening competition in Hong Kong. The application of the Merger Rule is currently limited to transactions involving a telecommunications carrier licence within the meaning of the Telecommunications Ordinance.

Notification under the merger control regime is voluntary. The Merger Rule applies to direct and indirect mergers and acquisitions and the creation of full-function joint ventures. Foreign-to-foreign transactions are captured by the merger control regime as long as the transaction involves a telecommunications carrier licence holder within the meaning of the Telecommunications Ordinance.

The Communications Authority will ordinarily take the role of the lead authority on matters which fall within its concurrent jurisdiction with the Competition Commission pursuant to a memorandum of understanding signed between the two agencies.

Foreign investment policy

Investment possibilities generally

Foreign investment plays a key role in the Hong Kong economy. Various sources of foreign investment like Mainland China, Japan, the United States and the United Kingdom have substantial amounts of inward direct investment in Hong Kong. No industries (with certain narrow exceptions) in Hong Kong are closed to foreign investment. Indeed, it is not only permitted but quite common to have 100% foreign investment in most industries.

Government attitude

The Hong Kong SAR government upholds a free and open market policy which generally applies to all trade and investment, with very few restrictions on foreign investment. Whilst there are no specially enacted incentives for foreign investment, all foreign companies benefit from the government's policy of providing an appealing climate for investment through its physical infrastructure including good communications, efficient port and airport facilities, a relatively simple tax structure with low rates of tax and its legal and administrative system. The Hong Kong government promotes fair competition and with limited exceptions does not discriminate between foreign and domestic investors.

In terms of international recognition, Hong Kong is consistently described as the world's freest economy by highly reputable international institutions.

Gateway to Mainland China

The fast expanding China market, especially after China's accession to the World Trade Organisation (WTO) and its continued reduction in administrative barriers to trade, has been highly attractive to foreign investors. Given the geographic proximity and business synergies between Hong Kong and Mainland China, many foreign companies find it advantageous to choose Hong Kong as their base and a service platform for investment in China. What makes Hong Kong an even easier route in and out of China is the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) entered into between Mainland China and Hong Kong. CEPA came into effect on 1 January 2004 and its measures are above and beyond China's WTO commitments in the sense that they grant easier access to Mainland markets for Hong Kong-made products and Hong Kong-based companies in various service sectors.

CEPA is not a closed agreement and both sides hold regular meetings on further concessions and the details for implementation. Following the signing of the main text of CEPA on 29 June 2003, additional supplements and amendment agreements have been signed by both sides to expand market liberalisation and further facilitate trade and investment.

CEPA mainly covers the following areas:

- (1) the removal of tariffs and other barriers on trade in goods;
- (2) the opening up of the Mainland market to Hong Kong service suppliers;
- (3) measures for the promotion of trade and investment;
- (4) mutual recognition of professional qualifications;
- (5) strengthening of cooperation in various areas of trade and investment facilitation between Mainland China and Hong Kong to improve the overall business environment.

A substantial number of service sectors and businesses are opened up to Hong Kong service suppliers under CEPA.

Foreign companies can take advantage of the liberalisation measures for trade in services under CEPA through establishing a legal presence in Hong Kong or a merger with, or acquisition of, an existing Hong Kong service supplier.

Foreign investment restrictions

The Hong Kong SAR government in general makes no distinction between local and foreign companies, and welcomes investment from both. Foreign companies setting up operations in Hong Kong do not face any special approval procedures and the procedural requirements are not materially different from those for the local counterparts. Funds from profit or capital accounts may be freely repatriated and remitted overseas and there is no foreign exchange control.

100% foreign ownership of companies is generally permitted and common in Hong Kong, with very few foreign investment restrictions. The table below sets out the business sectors where foreign investment restrictions or limitations are in place:

Sector	Foreign investment restriction related regulations/ situation
Banking	Foreign banks in Hong Kong are common and free to operate with limited restrictions. They have been allowed to establish as many branches as they wish since November 2001. A number of market entry criteria were relaxed in May 2002 such as the lowering of the minimum asset size and the lifting of the requirement to have maintained a local representative office for a period of one to two years before its authorisation request.
Civil Aviation	Generally no foreign ownership restrictions. Control over international airlines serving Hong Kong is shared with the Chinese government. Arrangements for air services between Hong Kong and other parts of Mainland China are made by the Chinese government in consultation with the Hong Kong SAR government.
Television Broadcasting	Control over the licensees of domestic free TV programme services by foreign investors may not exceed 49%. Prior approval is required

	for the holding, acquisition or exercise of voting control by foreign investors of 2% or more of a television licensee.
Sound Broadcasting	Control over sound broadcasting licensees by foreign investors may not exceed 49%.

Government initiatives and incentives

General

Hong Kong provides an appealing tax environment for foreign investors. In particular:

- (1) Hong Kong has lower headline tax rates than most other Asian jurisdictions;
- (2) there is in general no tax on gains arising from the sale of capital assets;
- (3) there is in general no tax on profits arising or derived from outside Hong Kong;
- (4) dividends are generally not taxable;
- (5) estate duty has in effect been abolished – there is currently no inheritance tax or death duties; and
- (6) there is no value added tax or similar turnover tax.

Whereas Hong Kong does not have an extensive regime of specific tax incentives designed to attract foreign investment, there are a number of exemptions from tax or tax allowances designed to encourage investment in certain strategic industries. Further, Hong Kong has entered into comprehensive double taxation agreements with approximately 40 jurisdictions, and it is the policy of the Hong Kong SAR government to expand this treaty network.

Tax exemptions

Important exemption regimes include:

- (1) deposit interest from bank deposits paid to corporations (other than financial institutions) and individuals carrying on business in Hong Kong is tax exempt;
- (2) interest income and trading profits derived from qualifying debt instruments are either subject to a concessionary tax rate of half of the normal rate or are exempt (qualifying debt instruments must be approved by the Hong Kong Monetary Authority, have a suitable credit rating and be of a minimum denomination of HK\$50,000 or its equivalent in a foreign currency);
- (3) profits on all debt instruments with a maturity period of seven years or more are tax exempt;
- (4) certain offshore funds are exempt from profits tax; and
- (5) profits received or accrued in respect of a fund that is a collective investment scheme authorised by the Securities and Futures Commission or is otherwise a bona fide widely held investment scheme complying with the requirements of an acceptable supervisory regime are exempt from profits tax.

Tax incentives

Hong Kong now provides a wide range of tax incentives, including reduced rates of profits tax on the following activities and income:

- (1) insurance, insurance brokerage, reinsurance, and captive insurance business;
- (2) corporate treasury centres and associated intra-group lending;
- (3) aircraft leasing and aircraft leasing management;

- (4) ship leasing;
- (5) widely-held collective investment schemes; and
- (6) carried interest.

Allowances

Hong Kong has a comprehensive capital allowances regime, which includes:

- (1) (i) an initial allowance of 20% of the cost (excluding land cost) of an industrial building for the purpose of a qualifying trade (which includes mills, factories or similar premises, certain utility undertakings, manufacturing, storage, farming and scientific research); and
(ii) an annual depreciation allowance of 4% of the initial capital expenditure;
- (2) an annual depreciation allowance of 4% is available for commercial buildings or structures used other than for industrial purposes;
- (3) capital expenditure on the renovation or refurbishment of a building other than a domestic building is deductible on a straight line basis of 20% a year over a five year period; and
- (4) (i) an initial allowance of 60% of the capital expenditure on machinery or plant is available in the year in which the expenditure is incurred; and
(ii) annual depreciation allowances at varying prescribed rates are available in subsequent years on the reducing value.

There is a more generous 100% initial allowance for capital expenditure on prescribed fixed assets. This covers certain machinery or plant used specifically and directly for any manufacturing process, computer hardware, computer software, and computer systems. It does not apply to leased assets.

Capital expenditure on environmental protection machinery and environment-friendly vehicles is fully deductible in the year of assessment in which the expenditure was incurred. Super-deductions of 300% for the first HK\$2 million of expenditure and 200% thereafter are available for expenditure incurred for research and development in Hong Kong, subject to certain conditions, the most relevant of which is that the expenditure be for bona fide research and development effected in Hong Kong.

Capital expenditure for the acquisition of certain intellectual property rights, including the purchase of patent rights and attendant expenditure, is likewise fully deductible.

Balancing allowances and charges may arise where the capital asset with respect to which expenditure is claimed as a tax deduction is subsequently sold or otherwise disposed of.

Double taxation agreements

Hong Kong has:

- (1) Comprehensive double taxation agreements with Austria, Belarus, Belgium, Brunei, Cambodia, Canada, the Czech Republic, Estonia, Finland, France, Georgia, Guernsey, Hungary, India, Indonesia, Ireland, Italy, Japan, Jersey, the Republic of Korea, Kuwait, Latvia, Liechtenstein, Luxembourg, Macao SAR, Mainland China, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Pakistan, Portugal, Qatar, Romania, Russia, Saudi Arabia, Serbia, Spain, South Africa, Switzerland, Thailand, United Arab Emirates, the United Kingdom, and Vietnam.
- (2) Double taxation agreements concerning airline and shipping income with Norway, Singapore, and Sri Lanka.
- (3) Double taxation agreements concerning airline income with Bangladesh, Canada, Croatia, Denmark, Estonia, Ethiopia, Fiji, Finland, Germany, Iceland, Israel, Jordan,

Kenya, Korea, Kuwait, Laos, Macao SAR, Maldives, Mauritius, Mexico, Norway, the Russian Federation, the Seychelles, and Sweden.

- (4) Double taxation agreements concerning shipping income with Denmark, Germany, Norway, and the USA.

Comprehensive double taxation agreements generally cover income taxes such as profits tax and salaries tax, and withholding taxes on dividends, interest, and royalties, although the specific taxes covered in particular agreements may differ. Generally, double taxation agreements are intended to minimise or eliminate double taxation of the types of income covered by such agreements, and to enable undertakings to assess with greater certainty the tax implications of their cross border activities.

Hong Kong's comprehensive double taxation agreements contain exchange of information provisions compliant with the latest model from the Organisation for Economic Co-operation and Development, which are nevertheless in practice subject to safeguards built into Hong Kong's domestic law and procedure to prevent "fishing expeditions" by the tax authorities of other jurisdictions.

Hong Kong is currently in negotiations with a number of jurisdictions with a view to expanding its comprehensive double taxation agreement network and is a signatory to the Multilateral Convention.

The Legislative Council of Hong Kong has recently passed legislation enabling Hong Kong to enter into standalone tax information exchange agreements (TIEAs) with jurisdictions with which it does not have a comprehensive double taxation agreement. Hong Kong has since entered into TIEAs with the USA and six Nordic jurisdictions.

Taxation

General

The principal sources of revenue for the Hong Kong SAR government (apart from revenue from the sale of government land) are:

- (1) salaries tax;
- (2) profits tax;
- (3) property tax;
- (4) stamp duty; and
- (5) property rates.

Hong Kong does not impose any payroll, turnover, sales, value added or goods and services, gift or capital gains taxes or any estate duty or inheritance tax. Hong Kong does not levy capital duty.

There are various indirect taxes. The most significant of these are excise duties on hydrocarbons, tobacco and liquor, and fees for vehicle registration and licensing.

The taxation regime in Hong Kong contains broad anti-avoidance provisions designed to disregard the effect of certain transactions giving rise to a tax advantage which are held to be fictitious or artificial or which have a primary tax avoidance motive. Such provisions are typically not invoked as aggressively as in many other common law jurisdictions.

The Inland Revenue (Amendment) (No.6) Ordinance 2018 came into force on 13 July 2018 and introduced a comprehensive transfer pricing regime, compliant with OECD guidelines, which

applies to all transactions and arrangements between connected parties. Intra-group transactions and arrangements effected otherwise than on an arm's length basis and giving rise to a tax advantage in Hong Kong will, subject to certain conditions, therefore be disregarded by the Commissioner of Inland Revenue, who is authorised to negate that tax advantage by disregarding the non-arm's length provision.

Salaries tax

A person is subject to salaries tax on his Hong Kong sourced employment income, income from an office in Hong Kong (e.g. a directorship), or a Hong Kong pension. If the employment is a Hong Kong employment, all income derived from it will normally be subject to salaries tax even if some services are performed outside Hong Kong.

Income from a non-Hong Kong employment is only taxed to the extent of income derived from services rendered in Hong Kong. What constitutes a Hong Kong employment will ultimately be a matter of fact and law. In making this determination, the practice of the Inland Revenue Department (IRD) is to take all relevant factors into account, with particular emphasis on where the employment contract was negotiated and entered into, its governing law, where it is enforceable, where the employer is resident, and where contractual payments are made.

No account is taken for salaries tax purposes of visits to Hong Kong by persons with a non-Hong Kong employment not exceeding 60 days in any fiscal year. In other words, a person holding a Hong Kong employment will be exempt from salaries tax if he renders services in Hong Kong during visits not exceeding 60 days in a year of assessment.

Perquisites, including non-monetary remuneration, are generally taxable but where the employer has the primary liability for payment of benefits they may not be. Perquisites by way of educational allowance or vacation allowance are taxable.

Housing provided by an employer is taxable, but on a concessionary basis.

An employer is not required to withhold salaries tax at source (with limited exceptions in the case of an employee about to leave Hong Kong) but it must furnish an annual return of remuneration paid to employees and must make various other returns as required; e.g. on commencement or termination of employment or departure of the employee from Hong Kong.

Collection of tax is by way of provisional assessment based on the previous year's salary and final assessment on filing of the tax return for the year in question. Provisional tax paid is credited against final tax payable, with any over payment being refunded or under payment being charged, as appropriate.

Salaries tax is chargeable at a progressive rate, up to a maximum of 17%, and is calculated with reference to various personal allowances and bands of taxable employment income. However, the aggregate rate of taxation is capped at 15% of taxable income.

Hong Kong has a "light touch" pensions regime. Employers are required to deduct at source 5% of an employee's remuneration capped at a maximum of HK\$18,000 per year, which must be paid, together with a matching employer contribution, by way of mandatory provident fund contribution (for which see further the Workplace Relations section below). Voluntary contributions of up to HK\$60,000 are deductible for an employee.

Profits tax

Hong Kong's taxing regime is source based.

In the absence of an applicable tax treaty, liability to profits tax is not dependent on a person being treated as tax resident in Hong Kong. The place of residence or domicile of a taxpayer plays little or no part in determining whether a profits tax liability exists and the quantum of any such liability.

Profits tax is currently chargeable on taxable profits at a rate of 16.5% on corporations and 15% on other taxpayers. Subject to certain conditions, a concessionary rate of 8.25% for corporations and 7.5% for other taxpayers is available on the first HK\$2 million of taxable profits.

A person will be subject to profits tax under section 14 of the Hong Kong Inland Revenue Ordinance (Cap.112) (Inland Revenue Ordinance) if and to the extent that both of the following conditions are met:

- (1) The person carries on a trade, profession or business in Hong Kong (either in its own right or through a dependent / independent agent); and
- (2) Profits are derived from that trade, profession or business (other than profits arising from the sale of capital assets not held as trading stock), which arise in or are derived from Hong Kong (i.e. the profits have a Hong Kong source) and are not otherwise regarded as taxable or exempt from tax.

Whether a trade, profession or business is carried on in Hong Kong is ultimately a mixed question of fact and law. Generally, a person will be regarded as carrying on a trade, profession or business in Hong Kong if it has an office, a place of business or where a significant portion of its business activities are undertaken in Hong Kong. The general consensus is that the threshold test is low and easily satisfied.

The broad guiding principle in determining the source of a profit is first to identify the nature of the profit in question and then look at what the taxpayer has done to earn it, and where he has done it, discounting antecedent or incidental matters.

The term "person" is defined broadly in the Inland Revenue Ordinance, and includes individuals, bodies corporate, partnerships, and persons in their capacity as trustees.

Dividends are generally exempt from profits tax by operation of statute, and are, in any event, not taxed as a matter of IRD practice. Bank deposit interest income is also exempt from profits tax, except in the hands of a financial institution. There is no domestic withholding tax on dividend and interest payments to residents and non-residents.

There is no capital gains tax in Hong Kong. Broadly, the disposal of capital assets is only taxable where such assets are held as trading stock.

Certain categories of profits are, where they would ordinarily fall outside of the section 14 of the IRO charging provision, nonetheless deemed taxable in Hong Kong, including:

- (1) fees for exhibition or use in Hong Kong of films or tapes or sound recordings;
- (2) royalties for use of intellectual property rights in Hong Kong and, in some circumstances, outside Hong Kong;
- (3) grants, subsidies or financial assistance to a business carried on in Hong Kong;
- (4) rentals for use of property in Hong Kong;
- (5) interest accruing to a financial institution through, or from, its business in Hong Kong;
- (6) interest received in respect of the funds of a business carried on in Hong Kong not otherwise exempt;

- (7) Hong Kong sourced profits arising to corporations carrying on a trade or business in Hong Kong on sale or redemption of certain commercial paper;
- (8) consideration for the transfer of certain rights to receive income from property; and
- (9) transfer of income streams without a transfer of the underlying property.

Outgoings and expenses incurred (but not necessarily wholly or exclusively incurred) in the production of taxable profits are broadly speaking deductible irrespective of source. Certain specific types of deductible and non-deductible expenses are set out in the Inland Revenue Ordinance. Capital expenditure is generally not deductible, though capital allowances are available with respect to a wide variety of assets. There is no amortisation regime for goodwill or other intangibles.

Losses are deductible from profits arising in the same year of assessment and may be carried forward indefinitely to the extent they are not utilised. Group tax relief or intra-group transfer of losses is not available, though in practice certain corporate planning structures may be available to achieve a similar result.

Financial institutions, insurance companies, corporate treasury centres, aircraft lessors and aircraft leasing managers, shipowners, and aircraft operators are subject to special tax regimes.

Tax is collected by way of provisional assessment based on the previous year's profits and final assessment on filing of the tax return for the year in question. Provisional tax paid is credited against final tax payable, with any over payment being refunded or underpayment being charged, as appropriate.

The rate of profits tax is 16.5% for corporations and 15% for taxpayers other than corporations.

Property tax

Property tax is charged at the rate of 15% of the net assessable value of any land or buildings in Hong Kong. The net assessable value is the rent receivable less: (i) any rent which has become irrecoverable; (ii) rates paid; and (iii) a fixed allowance of 20% of assessable value (after any rates have been paid) for repairs. Corporations carrying on a trade or business in Hong Kong can elect to be exempted from property tax and subject instead to profits tax.

Collection is by way of provisional assessment based on the previous year's net assessable value and final assessment on the filing of the tax return for the year in question. Provisional tax paid is credited against final tax, with any over payment being refunded or underpayment being charged, as appropriate.

Stamp duty

Ad valorem stamp duty (AVSD)

AVSD is charged on the following documents:

- (1) agreements for sale and purchase of immovable property (whether residential or non-residential) at a progressive rate of up to 8.5% (or in certain cases involving residential property a flat rate of 15%) of the consideration – there are two scales for AVSD: Scale 1 is the default rate; Scale 2 is a lower rate, which applies, broadly, to first-time Hong Kong permanent resident buyers of residential property and to commercial property;
- (2) leases of property not exceeding one year at 0.25% of the total rent payable over the term of the lease;
- (3) leases of property exceeding one year but not exceeding three years at 0.5% of the yearly or average yearly rent;
- (4) leases of property exceeding three years at 1% of the yearly or average yearly rent;
- (5) transfers of Hong Kong stock (including shares of companies incorporated in Hong

Kong or listed on the Exchange) at 0.26% of the consideration or the value of the stock, whichever is higher; and

- (6) Hong Kong bearer instruments at 3% of the market value.

There are special rules for:

- (1) stock lending;
- (2) transactions by market makers for hedging options transactions in the ordinary course of acting as a market maker;
- (3) transactions in regional derivative options and convertible bonds or notes; and
- (4) units of a unit trust.

Special stamp duty (SSD)

SSD is chargeable on the transfer of residential properties acquired on or after 20 November 2010 and resold within 36 months. For property acquired on or after 27 October 2012, the rate of SSD ranges from 10% for properties held for a period of more than 24 months but less than 36 months, to 20% for properties held for six months or less. SSD is calculated by reference to the stated consideration or market value of the property, whichever is higher. It is chargeable in addition to AVSD. Certain agreements for sale of residential property are not chargeable with special stamp duty such as a sale to the vendor's parent, spouse, child, brother or sister, a sale pursuant to a court order, and a sale by a mortgagee.

Buyer's stamp duty (BSD)

BSD is chargeable on the acquisition of Hong Kong residential property by any person other than a Hong Kong permanent resident individual. BSD is charged at a flat rate of 15% of the stated consideration or the market value of the property acquired, whichever is higher. The buyer or transferee alone is liable for BSD. BSD is chargeable in addition to both AVSD and SSD.

Relief

The Stamp Duty Ordinance (Cap.117) provides that a transfer of shares from one associated corporate body to another is exempt from stamp duty, subject to the approval of the Collector of Stamp Revenue. Two companies are associated where one is the beneficial owner of not less than 90% of the issued share capital of the other, or a third company owns not less than 90% of the issued share capital of each company. In addition to the 90% association test, a number of other conditions need to be satisfied to qualify for this exemption. A clawback provision applies where the 90% association test ceases to be satisfied within two years from the date of the transfer.

Rates

Rates are charged at a percentage of the rateable value which is the estimated annual rental value of a property at a designated valuation reference date, assuming that the property was then vacant and to let. Rateable value is an estimated annual rental value of a property at a designated valuation reference date, assuming that the property was then vacant and to let from year to year, on the basis that the tenant undertakes to pay all usual tenant's rates and taxes, whilst the landlord undertakes to pay the government rent, the costs of repairs and insurance and any other expenses necessary to maintain the tenement to a state to command that rent.

For the Financial Year 2020-2021, rates are charged at 5% of the assessable value. The designated valuation reference date is 1 October 2019 and the rateable values take effect from 1 April 2020.

Generally, properties in all parts of Hong Kong are liable to be assessed to rates under the Rating Ordinance (Cap. 116). Altogether the 2020-2021 Valuation List includes about 2.56 million assessments comprising about 3.35 million units.

Both the owner and the occupier are liable for rates. In practice, this will depend on the terms of the agreement between the owner and occupier of the premises. In the absence of any agreement to the contrary, liability for rates rests with the occupier.

Visas and work permits

Who requires an entry visa?

Every person who wishes to enter Hong Kong for employment, investment, education, training or residence is required to obtain the appropriate entry visa before coming to Hong Kong unless he or she:

- (1) is a Hong Kong permanent resident with a Hong Kong Permanent Identity Card;
- (2) has the right of abode in Hong Kong;
- (3) has the right to land in Hong Kong; or
- (4) has the right of unconditional stay in Hong Kong.

Sponsorship

In most cases, every applicant for an entry visa, irrespective of the category of visa, needs to have a sponsor.

In the case of an application for a visa for employment purposes, the applicant should be sponsored by the employing company in Hong Kong.

The sponsor must undertake to assume responsibility for the applicant's repatriation to his or her original country of residency if, at the expiration of the stay period granted by the Immigration Department, the applicant fails to leave Hong Kong. In addition, the sponsor must undertake to inform the Immigration Department of any change in the conditions of the applicant's stay in Hong Kong (e.g. cessation of the applicant's employment with the sponsor in Hong Kong).

Normally, applications should be made through the sponsor before the applicant's arrival in Hong Kong. However, if the applicant has already entered Hong Kong (i.e. as a visitor), it is important to note that the applicant may not commence work in Hong Kong until he obtains his employment visa, save for certain limited business-related activities which may be carried out by persons entering Hong Kong on a visitor status (e.g. attending meetings).

Policies regarding employment visa

Under the existing immigration policy, a person seeking to enter Hong Kong for employment should possess a special skill, knowledge or experience of value relevant to the job which is not readily available in Hong Kong and show that he or she is not filling a post which can be filled locally.

A person holding an employment visa may only work for the sponsoring company unless otherwise approved by the Immigration Department. If he or she wishes to change employment, an application for change of employment will need to be made to the Immigration Department through his or her new employer. He or she may then only commence work for the new employer if such application has been approved.

Subject to certain exceptions, dependants of a person holding an employment visa are able to work in Hong Kong under the dependant's residency visa. However, dependants that are subject to a condition of stay prohibiting employment which was imposed on them before 15 May 2006, may need to apply for cancellation of such condition so that they can take up employment in Hong Kong.

Workplace relations

General

The workplace relations climate in Hong Kong is generally very stable and hence favourable for foreign investors.

Hong Kong employers have always been and continue to be committed to making their industries internationally competitive. As Hong Kong progresses to a knowledge-based economy, the nature of work, workplaces and workplace practices are being aligned to the new demands of the economy.

Hong Kong's combination of a highly educated, skilled and dedicated workforce is very appealing to foreign investors.

The government recognises the need to promote good employer-employee relations and enhance the rights and benefits of employees in a way commensurate with Hong Kong's socio-economic development. Considerable importance is also attached to health and safety at work.

The Labour Department implements labour policy and labour legislation for the promotion of harmonious labour relations and safeguarding employees' rights and benefits. It also provides free employment services to employers and job seekers.

Employment conditions

Employment conditions are usually provided for in the contracts of service entered into between employers and employees. For employees who fall within the ambit of the Employment Ordinance (Cap.57) (Employment Ordinance), employers must observe its provisions to the extent that it sets out certain basic employment conditions that would apply on a mandatory basis.

Generally speaking, there is no collective bargaining in Hong Kong. However, depending on the particular industry or employer, trade unions may be involved in negotiating terms and conditions of employment between employers and employees.

Employment Ordinance

General

The Employment Ordinance is the main legislation prescribing the minimum rights, benefits and protection for employers and employees in Hong Kong. The employer and the employee cannot contract out of the prescribed minimum rights, benefits and protection given to the respective parties by the Employment Ordinance.

To whom does the Ordinance apply?

The Employment Ordinance applies to every employee engaged under a contract of employment in Hong Kong with only limited exceptions. These exceptions include:

- (1) employees who are family members living with the employers;
- (2) certain employees working outside of Hong Kong; and
- (3) apprentices.

Whether an employment relationship exists is a matter of fact.

Minimum protection

All employees covered by the Employment Ordinance, irrespective of their hours of work, are entitled to basic protection under the Employment Ordinance including (but not limited to) payment of wages, restrictions on wage deductions and the granting of statutory holidays. Employees who are employed under a continuous employment contract are further entitled to benefits such as rest days, paid annual leave, paid maternity leave, paid paternity leave, sickness allowance, severance payment and long service payment.

Continuous employment

Under the Employment Ordinance, an employee is deemed to have been continuously employed if he or she has been employed under a contract of employment for a period of four or more weeks, with each week working for no less than 18 hours. Certain breaks such as maternity leave, paternity leave and sickness days are deemed not to interrupt the continuity of employment.

Employee protection/benefits

Employees employed under a continuous contract are entitled to the following protection and benefits:

Rest days

Employees are entitled to not less than one rest day in every period of seven days. These rest days shall be appointed by the employer, which may be granted on a regular or irregular basis.

Annual leave

Employees are entitled to paid annual leave ranging from a minimum of seven days to a maximum of 14 days, depending on their length of service. The daily rate of annual leave pay is a sum equivalent to the daily average of the wages earned by the employee.

Maternity leave and pay

All female employees under a continuous contract are entitled to maternity leave of 14 weeks and those who have been employed under a continuous contract for a minimum qualifying period are entitled to be paid during maternity leave. An employee who is pregnant may decide to commence her maternity leave from two to four weeks before the expected date of confinement, with the agreement of her employer. Maternity leave pay is currently paid at the rate of four-fifths of the daily average wage earned by the female employee.

Paternity leave and pay

All male employees are entitled to paternity leave of five days for the birth of each child (twins or multiple births in one pregnancy are treated as one child) and those who have been employed

under a continuous contract for a minimum qualifying period are entitled to be paid during paternity leave. Paternity leave can be taken consecutively or separately during the period beginning four weeks before the expected date of delivery of the child and ending 14 weeks after the actual date of delivery of the child. Paternity leave pay is currently paid at the rate of four-fifths of the daily average wages earned by the male employee in the 12-month period preceding the day of paternity leave.

Sickness allowance

Employees are currently entitled to paid sickness leave at the rate of four-fifths of their daily average wage. Sickness days can be accumulated at the rate of two paid sickness days for each completed month of employment during the first 12 months of employment and four paid sickness days for each month of employment thereafter, up to a maximum of 120 paid sickness days. The entitlement to sickness pay applies only if the sickness leave taken is not less than four consecutive days.

Severance payment

An employee who has been employed under a continuous contract for 24 months or more and is dismissed by reason of redundancy or his fixed term employment contract expires without being renewed due to redundancy or lay-off is entitled to a severance payment. The amount of the severance payment is two-thirds of the employee's last full month's wages or two-thirds of HK\$22,500, whichever is less, multiplied by the number of years of service (pro-rata for an incomplete year). The current maximum severance payment payable is HK\$390,000. Currently, the amount of any gratuity or retirement scheme payment to the employee, based on length of service, is deductible from the amount of severance payment entitlement. In the case of a retirement scheme payment, only the employer's contributions (and interest return thereon) may be deducted. However, the off-setting mechanism may be abolished by the government in the future.

Long service payment

An employee who has been employed under a continuous contract for five years or more and is dismissed for any reason other than redundancy or serious misconduct is entitled to a long service payment on termination of employment by the employer. An employee who has been paid a severance payment will not be entitled to a long service payment. The calculation of long service payment is the same as severance payment and is also subject to the same maxima as stated above. Currently, the amount of any gratuity and retirement scheme payment paid to the employee, based on length of service, is deductible from the amount of long service payment entitlement, as in the case of severance payment.

End of year payment

For every employment contract made after 27 June 1997, it is presumed that an annual payment or annual bonus (if provided) is not of a gratuitous nature and is not payable only at the discretion of the employer unless a written term or condition in the contract expresses an intention to the contrary.

Prohibition from making deductions from wages

In general, employers are not allowed to make deductions from the wages of their employees. There are, however, a number of limited exceptions. These exceptions include deductions:

- (1) for absence from work;
- (2) for damage to or loss of goods or equipment belonging to, or in the possession or control of, the employer or expressly entrusted to an employee for custody where such damage or loss is directly attributable to the employee's neglect or default;
- (3) for meals supplied by the employer at the request of the employee;
- (4) for accommodation provided by the employer and occupied by the employee or the family of the employee;
- (5) for recovery of any advance or over-payment of wages made by the employer to the employee;
- (6) for any loan owed by the employee to the employer;
- (7) in respect of contributions to be paid by the employee through the employer for any medical benefit scheme, superannuation scheme, retirement scheme or thrift scheme of which the employee is a member;
- (8) authorised by an enactment of law;
- (9) approved by the Commissioner for Labour;
- (10) in respect of paternity leave pay paid to the employee before the required document is provided if the employee fails to provide the employer with the required document within 3 months after the first day of paternity leave taken, or if the employee has ceased to be employed, fails to provide the required document before the cessation; and
- (11) in respect of any payment that an employer would be liable to pay for wrongfully terminating an employment contract.

All other deductions not listed above are unlawful. An employer who makes unlawful deductions commits a strict liability offence and will be liable to prosecution and, upon conviction, to a fine and imprisonment for one year.

Definition of wages

Wages under Hong Kong law means all remuneration, earnings, allowances, tips and service charges, however designated or calculated, payable to an employee in respect of work done or work to be done. Allowances including travelling allowances, attendance allowances, commissions and overtime pay are within the definition, but the following are excluded:

- (1) the value of any accommodation, education, food, fuel, light, medical care or water provided by the employer;
- (2) any contribution paid by the employer on his or her own account to any retirement scheme;
- (3) any commission which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (4) any attendance allowance or attendance bonus which is of a gratuitous nature or which is payable only at the discretion of the employer;
- (5) any travelling allowance which is of a non-recurrent nature;
- (6) any travelling allowance payable to the employee to defray actual expenses incurred by him or her by the nature of his or her employment;
- (7) the value of any travelling concession;
- (8) any sum payable to the employee to defray special expenses incurred by him or her by the nature of his or her employment;
- (9) any end-of-year payment or any proportion thereof;

- (10) any annual bonus which is payable by the employer at his discretion; and
- (11) any gratuity payable on completion or termination of employment.

Overtime pay which is of a consistent character or the monthly average of which over the past 12 months is 20% or more of the average monthly wages of the employee during the same period should also be included in calculating wages.

Calculating the daily or monthly average wages earned

In calculating the average wages, certain periods of time in which an employee is not paid his/her wages or full wages must be disregarded and deducted from the relevant time period. Such periods include, but are not limited to, rest day, maternity leave, paternity leave, sick leave, holidays and annual leave taken by the employee (Disregarded Periods).

Accordingly, any amount of wages paid to the employee for the Disregarded Periods and the Disregarded Periods are to be excluded in calculating the average daily or monthly wages earned by the employee. After taking into account the exclusion, the resulting amount (Relevant Amount) will be used in the calculation of the respective average wages.

The respective average daily and monthly wages of an employee is to be calculated as follows:

Daily average wage = Relevant Amount / (365 days – Disregarded Periods)

Monthly average wage = Relevant Amount / (12 months – Disregarded Periods)

In the event that the employee has been employed for less than 12 months, the period of 365 days and 12 months should be replaced with the shorter period of employment.

Termination

General

The employment of an employee on probation may be terminated by the employer or the employee without notice during the first month and with at least seven days' notice after the first month. In all other cases, unless summarily dismissed for good cause, the employee is entitled to:

- (1) at least one month's notice of termination where the contract does not provide for the length of notice required to terminate the contract; or
- (2) seven days or the agreed period, whichever is the longer, where the length of notice of termination is provided for in the contract.

Alternatively, a contract of employment can be terminated without notice by making a payment in lieu of notice equal to the amount of wages which would have accrued to the employee during the requisite period of notice.

Notwithstanding the above, if an employee has willfully disobeyed lawful and reasonable order, committed serious misconduct or fraud or is habitually neglectful of his/her duties, the employer may summarily dismiss the employee without notice or payment in lieu for good cause.

Statutory restrictions on termination of employment contract

It is unlawful for an employer to dismiss an employee under certain circumstances, including the following:

- (1) when a female employee has been confirmed pregnant and has served a notice of pregnancy on the employer (up until and including the day she is due to return to

- work on the expiry of her maternity leave or the date of cessation of pregnancy);
- (2) when an employee is on statutory sick leave;
 - (3) if one of the reasons for dismissing an employee is by reason of his or her giving of evidence or information in any proceedings or inquiry in connection with the enforcement of the Employment Ordinance, work accidents or breach of work legislation;
 - (4) if one of the reasons for dismissing an employee is due to his trade union membership and activities, disability, gender, marital status, pregnancy, race, or family status; or
 - (5) when an injured employee is suffered from work related injury or occupational diseases but he has not entered into an agreement with the employer for employee's compensation or before the issue of a certificate of assessment.

Employers who terminate an employee's employment in contravention of these prohibitions are liable to prosecution and, upon conviction, are liable to a fine, and in some instances imprisonment.

Employers should also ensure that employees are terminated only for valid reasons as provided under the Employment Ordinance, namely:

- (1) the conduct of the employee (such as misconduct);
- (2) the incapability or absence of qualifications of the employee for performing work of the kind which he was employed to do;
- (3) the redundancy of the employee or other genuine operational requirements of the business of the employer;
- (4) the fact that the employee or the employer or both of them would, in relation to the employment, be in contravention of the law, if the employee was to continue to work in his original position or, was to continue with the original terms of his/her contract of employment; or
- (5) any other reason of substance, which, in the opinion of the court or the Labour Tribunal, was sufficient to warrant the dismissal of the employee or the variation of the terms of his/her contract of employment.

Any termination that does not fit into one of the five categories above will be deemed unreasonable. In such circumstances, the employee will be entitled to seek remedies such as an order for reinstatement, re-engagement or an award of terminal payments from the Labour Tribunal.

Termination payments

Termination payments may differ depending on the length of service, the terms of the employment contract and the reason for termination. These payments will usually include the following:

- (1) outstanding wages;
- (2) notice/payment in lieu of notice (if applicable);
- (3) payment in lieu of any accrued but untaken annual leave;
- (4) any outstanding sum of end of year payment and pro rata end of year payment for the current payment period (if any);
- (5) where appropriate, long service payment or severance payment; and
- (6) other payments under the employment contract, such as gratuity, provident fund, etc.

Other issues

Statutory minimum wage

The Minimum Wage Ordinance requires that the wages payable to an employee in respect of any wage period should be at least equal to the statutory minimum wage rate on average for the total number of hours worked. For the purposes of computing minimum wage, "hours worked" means the time during which the employee is, according to his employment contract or at the direction of the employer, in attending at a place of employment, or travelling in connection with his employment (excluding travelling between the employee's residence and his place of employment).

The current statutory minimum wage rate is set at HK\$37.5 per hour. Based on the current rate, the statutory minimum wage payable to an employee for a wage period is calculated as follows:
Statutory minimum wage = HK\$37.5 x no. of hours worked.

The monthly monetary cap (under which an employer is required to keep a record of the total number of hours worked by an employee in a wage period) is at HK\$15,300.

Standard working hours

Except in relation to the employment of children and young persons, Hong Kong does not currently have legislation regulating the working hours of employees. However, there are talks to introduce a standard working hours regime in Hong Kong and the government has set up a Standard Working Hours Committee to carry out public consultation and explore the options for Hong Kong in this area.

Insurance coverage

Employers are required to maintain insurance coverage in respect of employees employed in Hong Kong pursuant to the Employees' Compensation Ordinance (Cap.282) to cover their liabilities for work-related injuries, diseases and death, but other than this, there is currently no statutory requirement to provide medical benefits to employees.

Mandatory provident fund

The Mandatory Provident Fund Schemes Ordinance requires both the employer and the employee to contribute 5% of the employee's relevant income into a mandatory provident fund scheme. Currently, the minimum relevant income is fixed at HK\$7,100. This means that if the monthly relevant income of an employee is less than \$7,100, the employee will not be required to make the employee's contribution, whilst his employer remains obliged to make the employer's contribution.

The current maximum level of mandatory contribution required is HK\$1,500 paid each month by both the employer and the employee. The employer and / or the employee may make additional voluntary contributions to the scheme if they wish.

Commencing from the year of assessment 2019 – 2020, employees who are members of an MPF scheme or an MPF exempted ORSO scheme can claim tax deductions under salaries tax and personal assessment for making voluntary contributions to tax deductible voluntary contribution accounts. The aggregate maximum tax deductible limit for each taxpayer is set at HK\$60,000 per year.

Taxation

Employers are required to notify the Inland Revenue Department of the commencement and cessation of employment of its employees within a prescribed time.

Discrimination

The introduction of the Sex Discrimination Ordinance (Cap.480), the Disability Discrimination Ordinance (Cap.487), the Family Status Discrimination Ordinance (Cap.527) and the Race Discrimination Ordinance (Cap.602) in Hong Kong makes any discrimination in the workplace by reason of a person's gender, marital status, pregnancy, breastfeeding status, disability, family status or race unlawful. These ordinances also make other forms of discrimination including victimisation, sexual harassment, disability harassment and vilification unlawful.

Currently, only discrimination as described above is unlawful. It is therefore strictly speaking not unlawful for an employer to discriminate on some other basis such as a person's age, physical appearance, height, educational attainment, political beliefs or social skills. However, the Equal Opportunities Commission is seeking to make discrimination on some or all of these grounds unlawful.

Dispute resolution

Courts

The Court system is in essence the same as that which existed prior to reunification in 1997. It is largely based on the English Court system although, after 1997, the final appellate court was changed from the Privy Council in London to the Court of Final Appeal in Hong Kong. The judiciary operates on the same principle fundamental to the common law system, namely the principle of the independence of the judiciary from the executive and legislative branches of government. The Court system operates efficiently and is the usual avenue for the settlement of disputes in Hong Kong.

Enforcement of Hong Kong judgments abroad is largely based on reciprocity of enforcement in Hong Kong. On this basis, enforcement of Hong Kong judgments is possible in Commonwealth and various other jurisdictions, and in Mainland China under "An Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Agreements between Parties Concerned" (Choice of Court Arrangement) where the strict conditions under that arrangement are met.

On 18 January 2019, a further arrangement was entered into by Hong Kong and the Mainland, namely the "Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region", providing for recognition and enforcement of judgments between Hong Kong and the Mainland in civil and commercial matters. The aim of the new arrangement is to establish a bilateral legal mechanism with greater clarity and certainty for the recognition and enforcement of judgments in a wider range of civil and commercial matters between Hong Kong and the Mainland. It will take effect after Hong Kong and the Mainland have completed the necessary procedures to enable implementation and will apply to judgments made after the commencement date. Once this new arrangement comes into effect, it will supersede the Choice of Court Arrangement referred to above.

Arbitration

Arbitration has become a very popular dispute resolution method in the Asia-Pacific region with Hong Kong being one of the foremost and most respected arbitration centres. Hong Kong's arbitration regime is set out in the Arbitration Ordinance (Cap.609). Hong Kong has widely adopted the UNCITRAL Model Law, which represents a worldwide consensus on key aspects of international arbitration practice. Hong Kong has a unitary arbitration regime that applies to all arbitrations seated in Hong Kong.

Awards made in Hong Kong are enforceable in over 160 countries through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and in Mainland China and Macau, through separate arrangements. Under an arrangement between Hong Kong and the Mainland, which came into effect on 1 October 2019, namely the "Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region", Mainland courts can order interim measures, (including, for example, orders for property preservation) in support of arbitrations administered by prescribed arbitration institutions in Hong Kong. Hong Kong is the first jurisdiction to have this arrangement with the Mainland.

The main arbitral institution in Hong Kong is the Hong Kong International Arbitration Centre (HKIAC). The HKIAC offers a wide range of dispute resolution services, including the administration of arbitrations, and is committed to developing arbitration in the Asia Pacific Region. The HKIAC is authorised to determine the number of arbitrators and act as appointing authority where parties have failed to and are unable to agree the appointment. The HKIAC provides a panel of arbitrators and accredited mediators.

Apart from the enforceability of arbitral awards, major advantages of arbitration are seen to be procedural flexibility, confidentiality, the possibility to appoint neutral arbitrators with relevant expertise and conduct the arbitration in private, at a neutral venue.

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