

DOING BUSINESS IN HONG KONG

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HONG KONG AT A GLANCE

Population: 7.8 million
 Languages: English, Cantonese and Mandarin

Political System

Hong Kong has been a Special Administrative Region of the People's Republic of China, since the handover of sovereignty to China on 1 July 1997. Hong Kong enjoys a high degree of autonomy and has been allowed to retain its political, social, commercial and legal system including the capitalist economic and trade systems.

Legal System

Hong Kong operates a common law legal system with a strong rule of law and an independent judiciary. It is separate from the legal system in China and, in most cases, the supreme judicial authority is the Court of Final Appeal in Hong Kong.

Financial System

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

There are no exchange controls in Hong Kong.

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

BUSINESS ENTITIES

TYPE OF BUSINESS VEHICLES

The most common forms of business vehicles for foreign companies wishing to carry on business in Hong Kong are:

- a limited company incorporated in Hong Kong;
- a branch office of that foreign company; or
- a representative office in Hong Kong.

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

Limited Companies

The most common form of company in Hong Kong is a private limited company.

The general features of a private limited company are:

1. Name: A company can be incorporated with any name (except for names which are the same as existing company names and a few restricted names). Chinese names can also be adopted but are not compulsory
2. Initial share capital: There is no prescribed minimum authorised or issued share capital. As a capital fee (at the rate of HK\$1 per HK\$1,000 of capital, subject to a cap of HK\$30,000) is payable on authorised (and not issued) share capital, most companies are incorporated with a fairly low authorised capital which is increased

later as the company's need for capital grows. It is common for companies to start with an authorised capital of HK\$1,000 or HK\$10,000 divided into shares of HK\$1 or HK\$10 each. The capital can be denominated in any currency.

3. Shareholders: At least one registered shareholder. Shareholders can be individuals or corporations of any nationality, domicile and residence. A sole shareholder can be a director of the company.
4. Directors: At least one director who can be an individual or corporation of any nationality, domicile and residence.
5. Company Secretary: A company secretary is required. If the company has one director only, the sole director cannot be the company secretary at the same time. If the secretary is an individual, he/she should ordinarily resident in Hong Kong. If the secretary is a body corporate, its registered office or place of business should be in Hong Kong.
6. Registered office: Must be situate in Hong Kong.
7. Auditors and accounts: A company must keep books of account which must be audited every year and submitted to the Hong Kong Inland Revenue Department. The accounts are not published or filed on any public record in Hong Kong.
8. Business registration: A company must register its business in Hong Kong with the Business Registration Office in the Inland Revenue Department and obtain a Business Registration Certificate within one month of incorporation. Additional BR certificates are required for each place

of business operated by the company as well as for its registered office (if different).

Branch Office

A company incorporated outside Hong Kong is permitted to establish branch offices in Hong Kong. This can be done by registering with the Hong Kong Companies Registry as a non-Hong Kong Company within one month of establishment of the place of business in Hong Kong.

The general features of a branch office are:

1. A branch office is not a separate legal entity. The foreign parent company is responsible for all the liabilities of the branch office.
2. The basic requirements to set up a branch office are: company name approval, a local resident authorized representative and an established place of business in Hong Kong.
3. Generally, branch offices are subject to the same legal and tax consequences as companies incorporated in Hong Kong.
4. Annual filing requirements: Branch offices are required to adhere to ongoing compliance requirements such as filing annual returns, filing tax returns and making other public disclosures.
5. Accounts: The foreign corporation is required to file a copy of its annual accounts with the Hong Kong Companies Registry unless it is not required to publish its accounts in its home jurisdiction. A separate audit of the branch operation is not required.

Representative Office

Foreign companies that wish to gain market insight, exposure and a better understanding of the Hong Kong business environment before setting up a full-fledged office can opt for establishing a representative office first.

The general features of a representative office are:

1. A representative office cannot engage in profit making activities and is not treated as a separate legal entity. The parent company is liable for its activities.
2. It cannot enter into contracts on behalf of the company, raise invoices or engage in trading activities.
3. The representative office is restricted to promotion and liaison activities, undertaking market research and co-ordinating activities on behalf of the parent company.
4. There are no registration requirements with the Companies Registry and no minimum capital requirements.
5. The only requirement is to register with the Business Registration Office and obtain a Business Registration Certificate.

VISAS AND EMPLOYMENT

Working Visa Requirements

Foreign nationals normally need a visa before living or working in Hong Kong. But Hong Kong's light touch visa policies mean that short-term visitors are permitted to conduct business negotiations and sign contracts while on a visitor's visa or entry permit.



Employment Visas

Foreign companies often wish to transfer employees to Hong Kong when setting up business operations in Hong Kong. Unless such employees have the right of abode or unconditional stay in Hong Kong, they will need to obtain a Hong Kong employment visa to work in Hong Kong.

In order to qualify for a Hong Kong employment visa, a person must possess special skills or experience not readily available in Hong Kong. This test can generally be satisfied in the case of an intra-company or intra-group transfer. A local sponsor is required (normally the employing company which is a Hong Kong Company or a foreign company registered in Hong Kong) to support the application. The local sponsor may submit the employee's application to the Hong Kong Immigration Department. Historically, employment visas have not been particularly difficult to obtain. Spouses and children are normally permitted to stay in Hong Kong under dependent visas. Adult holders of dependent visas are able to work in Hong Kong under the dependant's residency visa.

Employment Regulations

The Employment Ordinance sets out the minimum entitlements for employees, such as statutory holidays, sick and

maternity leave and severance and long service payments. Provided that the contractual terms are no less favourable than the basic protection afforded by the Employment Ordinance, the contract of employment governs the relationship between employer and employee. Employers are obliged to take out the employees' compensation insurance policies for their employees under the Employees' Compensation Ordinance and to make deductions and contributions to the Mandatory Provident Fund.

TAXATION

General

Hong Kong is a low tax jurisdiction. There is no capital gains, inheritance, estate duty, value added, payroll or goods and services taxes in Hong Kong. There is no tax on dividends paid by Hong Kong companies. The Hong Kong tax system is based on the principle of territoriality and only income with a Hong Kong source is subject to tax.

The principal taxes levied in Hong Kong are:

1. profits tax
2. salaries tax
3. property tax
4. stamp duty

The tax year runs from 1 April to 31 March.

There are various indirect taxes. The most significant of these are duties on tobacco and liquor, and fuels or vehicle registration and licensing.

Profits Tax

Profits tax is payable by individuals and companies who carry on a trade, business or profession in Hong Kong. It is payable on assessable profits acquired through that trade, profession or business which have a Hong Kong source. Receipts of a capital nature are not subject to profits tax.

Whether a taxpayer is carrying on a trade, profession or business in Hong Kong is largely a matter of fact and will depend on the circumstances of each case. In broad terms, a continuous commercial activity being carried on or performed in Hong Kong will be regarded as the carrying on of a business in Hong Kong.

Income from intellectual property may be subject to profits tax depending on its source.

Interest earned (other than by financial institutions) on deposits with an authorised institution are exempt from profits tax.

Expenses are generally deductible to the extent that they are incurred in the production of profits chargeable to tax. Such sums include rent in respect of business premises, bad debts, salaries and payments to approved pension schemes but not sums paid out on capital expenditure (unless allowances are permitted).

Currently, the rate of profits tax is 16.5% for corporations and 15% for partnerships and sole traders.¹

Salaries Tax

Salaries tax is chargeable on any income arising in or deriving from Hong Kong from any office, employment or pension. The location of the employment is only the starting point in determining the source of

¹ For the year of assessment 2013-2014

income and income from a non-Hong Kong source can sometimes be deemed to be Hong Kong income, depending on the circumstances.

Income includes wages, commissions, bonuses, cost-of-living allowances, travel or education allowances, stock option gains, and similar benefits. Accommodation which is provided by an employer is taxable on a concessionary basis. An employer is not required to withhold salaries tax but must make an annual return of remuneration paid to employees and must make various returns, e.g. on commencement and termination of employment or departure of the employee from Hong Kong.

The standard rate of salaries tax is 15%. However, tax payable is calculated with various personal allowances and tranches of income at different rates of up to 17%, but if the actual tax payable based on these allowances and tranches would exceed 15%, then the tax will be capped at 15%.²

No account is taken of services rendered in Hong Kong during visits not exceeding a total of 60 days per year.

Property Tax

Property tax is chargeable on rental income from property. Permissible deductions are bad debts and rates, together with a statutory allowance of 20% of rental income. Interest payments on loans and other actual outgoings cannot then be deducted.

Property tax is charged at the standard rate, which is currently 15%.³

Stamp Duty

Stamp duty is charged on the following documents:-

1. conveyances of real property –
 - 1.1. Ad valorem stamp duty (“**AVD**”) at maximum rate of 8.5% (for a consideration of more than HK\$21.73million) on the sale and purchase agreement;

Market Cooling Measures:

In addition to AVD, the following duties were recently imposed to “cool” the residential property market:-

Buyer’s stamp duty (“**BSD**”)

It is charged at a fixed rate of 15% of the consideration or the market value of the property (whichever is higher) on any residential property acquired by non-Hong Kong permanent resident or company on or after 27 October 2012;

Special stamp duty (“**SSD**”)

It is payable if a residential property is acquired by any individual or company (regardless of where it was incorporated) on or after 20 November 2010, and if

- disposed of within 24 months if the property was acquired between 20 November 2010 and 26 October 2012; or

- within 36 months if the property was acquired on or after 27 October 2012.

The rate of SSD varies from 5-20% depending on the holding period of the property and the time when the property is acquired.

² For the year of assessment 2013-2014

³ For the year of assessment 2013-2014

2. Leases of property – at a rate of between 0.25% and 1% of the yearly or average yearly rent;
3. Transfers of Hong Kong stock – at a rate of 0.2% of the consideration or the value of the shares, whichever is higher.

A nominal duty (usually HK\$5) is also payable in some circumstances.

Intra-group transfers are exempt from stamp duty if one company is (directly or indirectly) the beneficial owner of 90% or more of the issued share capital of the other, or a third company is directly or indirectly beneficial owner of 90% or more of both. There are a number of further exemptions which may be available, depending on the circumstances.

INTELLECTUAL PROPERTY

General

Hong Kong has comprehensive laws for the protection of intellectual property deriving from local legislation, case law and international treaties, such as the Berne, Universal Copyright and Paris Conventions.

The following types of intellectual property rights are protected in Hong Kong:-

1. Trade Marks (Trade Marks Ordinance, Cap.559)
2. Patents (Patents Ordinance, Cap.514)
3. Copyright (Copyright Ordinance, Cap.528)
4. Designs (Registered Designs Ordinance, Cap 522)
5. Plant varieties (Plant Varieties Protection Ordinance, Cap.490)
6. Layout design of integrated circuits (Layout-Design (Topography) of Integrated Circuits Ordinance, Cap.545)



Hong Kong law also protects other intangible rights such as confidential information and domain names. Trademarks, patents and designs must be registered with the Hong Kong Trade Marks, Patents and Designs Registry in order to be protected. Domain names also need to be registered but other intellectual property rights such as copyright and confidential information do not require registration. Unregistered trademarks, trade names, an individual's name or the get up of a particular product, including the packaging, may be protected under the common law action of passing off which can be used to prevent misrepresentations that cause confusion and damage to a plaintiff.

Intellectual property rights registered or protected in Hong Kong will not extend to the PRC and vice versa.

DISPUTE RESOLUTION

Litigation

Litigation in the courts in Hong Kong is based on an adversarial common law system with the legal representatives of the parties appearing before the District Court (for civil cases involving a value of HK\$50,000 up to a maximum of HK\$1,000,000) or the Court of First Instance. Appeals are to the Court of Appeal, and then to the Court of Final Appeal.

Claims less than HK\$50,000 are generally brought in the Small Claims Tribunal, where legal representation is not allowed.

Hong Kong courts have specialist judges hearing, for example, admiralty, arbitration, commercial, company and construction related matters.

The legal profession is divided into solicitors (who advise clients on their legal rights and usually have only limited rights to appear in court) and barristers (who appear as advocates in the Hong Kong courts instructed by solicitors).



Hong Kong judgements can be registered and enforced in any country where an agreement has been reached as to reciprocal enforcement of judgments. At present, these countries include Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Italy, Israel, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka. However, in a number of countries, notably the United States, Japan and since 1997, the United Kingdom, a Hong Kong judgment is not directly enforceable, but is only enforceable at common law. In other words, in those countries, it is necessary to commence fresh proceedings to pursue the Hong Kong judgment and to obtain and enforce a judgment of the Courts of that country.

The Mainland Judgments (Reciprocal Enforcement) Ordinance came into effect in Hong Kong on 1 August 2008. It provides for the mutual enforcement of final judgments requiring the payment of money in commercial cases provided that the relevant requirements under the Mainland Judgments (Reciprocal Enforcement) Ordinance are met.

Arbitration

Arbitration as a means of dispute resolution has been actively pursued in Hong Kong for many years. It is a legal process where arbitrator(s) hear the parties' case and make an award which is final and binding and which can only be challenged in very limited circumstances.

Arbitration in Hong Kong is currently governed by the Arbitration Ordinance, which stipulates the relevant basic legal framework. The Arbitration Ordinance was amended in 2010 which unifies its dual-track system for domestic and international arbitrations into a single unified regime substantially based on the UNCITRAL Model Law.

The Hong Kong International Arbitration Centre ("HKIAC") has its own body of institutional arbitral rules which parties can choose to apply to their disputes, and provides a panel of international and local arbitrators.

Hong Kong (as part of the PRC) is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), which provides for mutual recognition and enforcement of arbitral awards in countries which are parties to the New York Convention. Pursuant to the Convention, arbitral awards of 145 foreign countries that are signatories to the Convention are summarily enforceable in Hong Kong with the leave of the Court.

There are also arrangements for mutual enforcement of arbitral awards between Mainland China and Hong Kong similar to the New York Convention. In addition, all awards (including non-New York Convention awards) may be enforced in Hong Kong in the same way as a judgment of the Court of First Instance, with the leave of the court.

Arbitration is a popular mode of dispute resolution where the matter in issue is of a technical nature, such that there are advantages of having an adjudicator with relevant technical expertise.

Mediation

Following the introduction of the Civil Justice Reform there has been a greater emphasis on the role of mediation in solving disputes. Mediation is not only used in Hong Kong in conjunction with court proceedings but also as a standalone method of dispute resolution or in conjunction with arbitration proceedings and other forms of alternative dispute resolution (“ADR”).

Although the courts can only encourage, not compel, the use of ADR, the courts can take into account a party’s refusal to mediate or follow other ADR procedures when deciding the issue of costs.

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This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have questions on issues reported here or on other areas of law, please contact one of your regular contacts or contact us at info@jsg.hk.