

Chapter 22

The Commercial Laws of Hong Kong

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I. GENERAL SYSTEM OF LAW

§ 22:1 In general

The People's Republic of China resumed the exercise of sovereignty over Hong Kong on 1 July 1997. Since the handover, Hong Kong's freedoms were allegedly guaranteed by the Basic Law. The principle of "one country, two systems" which is enshrined in the Basic Law

means that Hong Kong's previous legal system has continued in place as the foundation of the rule of law in the Hong Kong Special Administrative Region (the HKSAR), whilst the change of sovereignty is reflected in the HKSAR's new status as a part of China.

Hong Kong's legal system is separate from Mainland China's, and English common law prevails. Sitting at the pinnacle of Hong Kong's legal system is its own final appellate court, the Court of Final Appeal (CFA), which was established on July 1, 1997. The CFA is the ultimate arbiter of the development of the common law in Hong Kong.

The legal system of the Hong Kong Special Administrative Region (HKSAR) is based on the rule of law and the independence of the Judiciary. The constitutional framework for the legal system is provided by the Basic Law. Under the principle of 'one country, two systems', the HKSAR legal system, which is different from that of Mainland China, is based on the common law, supplemented by local legislation.

The Basic Law is the constitutional document that governs Hong Kong. Drafted jointly between the British and Chinese governments it took effect on 1st July 1997. It purports that the concept of 'one country-two systems' flourishes and that the previous pre-97 capitalist way of life in Hong Kong is to remain unchanged for 50 years.

The Basic Law attempts to maintain the rule of law and sets out the inter-relationship between China and Hong Kong. It also sets out the political, judicial and administrative structures, and the rights and freedoms of individuals. In addition the Basic Law provides for the common law system, rules of equity, ordinances, subordinate legislation and customary law.

The original source of authority of Basic Law is a controversial topic between legal scholars. Some argue that Basic Law was derived from the Sino-British Joint Declaration, while others believe it is a product of domestic legislation and obtains its authority from the Constitution of the People's Republic of China. The distinction is relevant as it affects the degree to which the People's Republic of China has the authority to amend and change the Basic Law.

Importantly, the common law rule of law and equity previously in force in Hong Kong has been maintained except for those that contravene the Basic Law. Under Article 158 of Basic Law, final interpretation of provisions is vested in the Standing Committee of the National People's Congress (NPCSC), a power derived from the constitution of the People's Republic of China. While Hong Kong courts are authorized to interpret provisions of Basic Law that are within the limits of their autonomy, provisions concerning the duties of, or the inter-relationship between, the People's Republic of China and Hong Kong require Hong Kong courts to seek interpretation by the NPCSC. The interpretation of a provision by the NPCSC is binding on Hong Kong courts.

The main provisions of the Basic Law are noted in the following sections.

§ 22:2 Inter-relationship between Hong Kong and China

A high degree of autonomy will be exercised by Hong Kong directly under the Central People's government, including executive, legislative and independent judicial power.

The pre-1997 capitalist system and way of life will remain unchanged for 50 years to the exclusion of the socialist system.

No department of the Central People's Government, or other region within mainland China or any of its other autonomous regions will be able to interfere in Hong Kong affairs. This includes all regional and government bodies.

Hong Kong has the authority to issue its own passports.

Although China is responsible for defense matters and will station troops in Hong Kong, such garrisons will not interfere in Hong Kong affairs.

§ 22:3 Political and administrative system

Hong Kong shall have independent finances and shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial center.

Hong Kong will be governed by the Chief Executive and will be selected through elections or consultations held locally. The Chief Executive will select an Executive Council to assist him in policy-making. The legislative branch of government is represented by the Legislative Council. There are 60 members: 30 members returned by geographical constituencies through direct elections and 30 members returned by functional constituencies.

The Chief Executive of Hong Kong is the head and representative of the Hong Kong Special Administrative Region and head of the Government of Hong Kong. The position was created to replace the Governor of Hong Kong, the representative of the Monarch of the United Kingdom during British rule. The office, stipulated by Basic Law, formally came into being on July 1, 1997 when the sovereignty of Hong Kong was transferred from the United Kingdom to the People's Republic of China.

The functions of the Chief Executive include nominating principal officials for appointment by the Government of the People's Republic of China, appointing judges and other public officers, giving consent to legislation passed by the Legislative Council, and bestowing honors.

In the Sino-British Joint Declaration, Annex I states that the Chief Executive in the future Hong Kong Special Administrative Region (HKSAR) shall be selected by election or through consultations and the Legislature of the HKSAR shall be constituted by elections.

Basic Law states the ultimate aim of selecting the Chief Executive and all members of the Legislative Council by way of universal suffrage is guaranteed in Article 45 and Article 68.

However, mainland China's highest legal authority, the Standing Committee of the National People's Congress (NPCSC), has the final say over any interpretation or amendment of the Basic Law. On August 31, 2014, the Tenth Session of the Standing Committee of the Twelfth National People's Congress set limits for the 2016 Legislative Council and 2017 Chief Executive elections. While calling for "universal suffrage" the decision imposes the standard that "the Chief Executive shall be a person who loves the country and loves Hong Kong" and requires that "the method for selecting the Chief Executive by universal suffrage must provide corresponding institutional safeguards for this purpose."

The decision states that for the 2017 Chief Executive election, a nominating committee be formed to nominate two to three candidates, each of whom must receive the support of more than half of the members of the nominating committee. After popular election of one of the nominated candidates, the new Chief Executive will have to be appointed by the Central People's Government. The process of forming the 2016 Legislative Council would be unchanged, but following the new process for the election of the Chief Executive, a new system to elect the Legislative Council via universal suffrage would be developed with the approval of Beijing.

Pro-Democracy politicians in Hong Kong report Chinese officials citing a requirement for Hong Kong's next leader to be a "staunch patriot," a phrase some interpret as being approved by the Communist Party government.

After the Standing Committee of the NPCSC announced its decision on electoral reform and the limitations on universal suffrage, protests burgeoned in Hong Kong starting in September, 2014. Demonstrations began outside Hong Kong's Government headquarters in what would eventually be called the "Occupy Central" movement. The Occupy Central movement announced that it would engage in civil disobedience, blocking many east-west routes and blocking government offices in northern Hong Kong as a result of the reform, necessitating the use of a variety of police tactics including tear gas in an attempt to ebb the demonstrations. Reports indicate that at any given time, more than 100,000 protestors were on the ground participating in the movement.

By December 2014, the clashes between police and the protestors escalated into aggressive violence. On December 3, 2014, citing concerns over safety, the student leaders of the movement urged occupiers to leave and transform the movement into a campaign driven by the community, and by December 15, 2014, the protests were brought to an end. The impact to the surrounding area was substan-

tially affected by the blockades, causing traffic jams stretching miles and suspending over 100 bus and tram routes. Reports from the *Shanghai Daily* estimate that the protests cost Hong Kong nearly HK \$40 billion.

§ 22:4 Judicial system

The Hong Kong courts have jurisdiction over all internal matters except those which relate to the state, defense or international affairs. Final appeals will go to Court of Final Appeal and no appeals to the Privy Council will be allowed. The final arbiter of legal matters however, is the Standing Committee of the National People's Congress in Beijing, that has, as a result of the acts of Dong Jianhua, the former Chief Executive of the SAR, interfered in two major legal matters in Hong Kong, unrelated to state, defense and in international affairs, undermining the Rule of Law.

Hong Kong can—but has yet to—enact its own laws prohibiting treason, secession, sedition or subversion against the central government, because the draft laws prepared by the former Chief Executive, Dong Jianhua, created very substantial opposition in Hong Kong, forcing the government to withdraw the draft.

§ 22:5 Individual rights and freedoms

Residents of Hong Kong will enjoy the freedom of speech, no restriction on their movement and the freedom to choose their own religion.

§ 22:6 Other provisions

The existing common law system will be maintained in Hong Kong. Chinese and English are the official languages of Hong Kong.

II. TRADERS AND NON-TRADERS

§ 22:7 In general

Hong Kong is basically a free port, and one does not require a license to engage in either domestic or international trade, unless the subject matter of the trade is a regulated commodity or service.

III. FOREIGN TRADE

§ 22:8 In general

Hong Kong is a free port which thrives on free trade. Its open door policy has enabled it to become the world's 10th largest trading economy and an international financial and commercial centre serving the Asia-Pacific region and China.

The cornerstone of this approach is a strong and credible multilateral trading system. The World Trade Organization (WTO), which

came into being on 1 January 1995 to succeed the General Agreement on Tariffs and Trade (GATT), provides strengthened rules and disciplines for the conduct of multilateral trade. Hong Kong is a founding member of the WTO and has been participating actively in its activities. This testifies to Hong Kong's dedication to an open and free multilateral trading system. Hong Kong has continued its separate membership, apart from China, since July 1, 1997 using the name "Hong Kong, China."

Through the Hong Kong Monetary Authority (HKMA), "Hong Kong, China," is a member of the Asian Development Bank (ADB), the Asia-Pacific Economic Cooperation (APEC), the Bank for International Settlements (BIS) (the People's Bank of China is also a member on its own), the Basel Committee on Banking Supervision (BCBS), the Executives' Meeting of East Asia and Pacific Central Banks (EMEAP), and the Financial Stability Board (FSB).

Hong Kong participates as a non-member, or as part of the China delegation in the G20, International Monetary Fund (IMF), and the World Bank Group.

As "Hong Kong, China," the region is an Associate Member of the UN Economic and Social Commission for Asia and the Pacific (ESCAP); it is a full member of the World Trade Organization (WTO); it is an observer to the OECD's Trade Committee and the Committee on Financial Markets; and it is a full member of the Pacific Economic Cooperation Council (PECC) (the HK Committee for Pacific Economic Cooperation (HKCPEC) co-ordinates HK's participation in PECC).

Hong Kong has been ranked the world's freest economy 17 years in a row by the Heritage Foundation. Hong Kong does not subsidize its exports or any sector of its economy. It maintains no barriers to trade. It does not levy any tariffs. It treats local and foreign companies equally, and the same for foreign and domestic products.

§ 22:9 Textiles control policy

In accordance with the WTO Agreement on Textiles and Clothing (ATC), all quantitative restrictions on exports of textile and clothing products among members of the WTO (including Hong Kong) have been completely eliminated starting 1 January 2005. Hong Kong's textiles and clothing exports now enjoy quota-free access to the world market. With the elimination of textiles quotas, the Trade and Industry Department [hereinafter TID] operates a system that facilitates the textile trade but also acts in the overall interest of the Hong Kong textile trade.

§ 22:10 Licensing control policy

Under the Import and Export Ordinance,¹ the Reserved Commodities Ordinance,² and their subsidiary legislation, imports and exports of certain articles are subject to licensing control by the Director-General of TID. Also, pursuant to delegated authority from the Director of Environmental Protection, TID also carries out licensing under the Ozone Layer Protection Ordinance. The following items are subject to some sort of import/export control and licensing by TID: Textiles, Rice (essential food), Rough diamonds, Strategic commodities,³ and Ozone depleting substances (1987 Montreal Protocol).

Additionally, the following items are subject to control and licensing by other government departments under delegated authority from TID: Chinese herbal and proprietary medicines (Department of Health); Frozen, chilled meat and poultry (Food and Environmental Hygiene Department); Non-pesticide hazardous chemicals (Environmental Protection Department); Optical disc mastering and replication equipment (Customs and Excise Department); Pesticides (Agriculture, Fisheries and Conservation Department); Pharmaceutical products and medicines (Department of Health); Radioactive substances and irradiating apparatus (Department of Health).

These are the major items; however this is not an exhaustive list.

§ 22:11 Strategic commodities control policy

The Hong Kong Special Administrative Region (HKSAR, or Hong Kong hereinafter) is a free port. It is the Government's policy to encourage free flow of imports and exports. Where controls are required, they are imposed for health, safety, environmental protection, and anti-smuggling reasons, or to secure unrestricted access to high technology products. Among the controlled items are strategic commodities.

Trade and Industry Department maintains import and export control on strategic commodities including munitions items, chemical and biological weapons and their precursors, nuclear materials and equipment, and dual-use goods that are capable to be developed into weapons of mass destruction. In addition, the Department imposes end-use control on products that are used in connection with the development of weapons of mass destruction. These controls are to prevent Hong Kong from being used as a conduit for the proliferation of weapons of mass destruction and to guarantee its access to high technology products.

[Section 22:10]

¹Cap. 60.

²Cap. 296.

³See § 22:18 below.

In view of Hong Kong's status as a regional trading and distribution centre, the Government is committed to maintaining an effective and efficient import and export control system which could guard against illegal flow of strategic commodities and at the same time facilitate legitimate business.

Hong Kong is fully committed to upholding an effective system of control on strategic commodities. It will continue to update the controls to reflect changes agreed by the international control regimes.

§ 22:12 Certification system

Apart from providing licensing services, the Director General of TID also administers a certification of origin [CO] system to facilitate Hong Kong's export to foreign markets by establishing the origin of the goods which Hong Kong exports to meet the requirements of the importing authorities. There are penalties for certification violations.

Besides the Trade and Industry Department, the following five Government Approved Certification Organizations [GACOs] are authorized for issuing COs:

- (1) The Hong Kong General Chamber of Commerce
- (2) The Indian Chamber of Commerce, Hong Kong
- (3) The Federation of Hong Kong Industries
- (4) The Chinese Manufacturers' Association of Hong Kong
- (5) The Chinese General Chamber of Commerce

The issue of COs is governed by the Export (Certificates of Origin) Regulations of the Import and Export Ordinance and the Protection of Non-Government Certificates of Origin Ordinance.

IV. FOREIGN DIRECT INVESTMENT

§ 22:13 In general

All persons operating a business in Hong Kong must register that business within a month of commencing operation.

The Profits tax rate which applies to Corporations is 16.5% and the rate for Unincorporated Businesses is 15%. There is no distinction made between residents and non-residents for purposes of the Profits tax. The Profit tax is chargeable on all profits arising in or derived from Hong Kong.

V. CONTRACTS**§ 22:14 Form of contracts for companies formed under the Companies Ordinance**

Contracts on behalf of a company may be made as follows:¹

- (a) a contract which if made between private persons would be by law required to be in writing and under seal, may be made on behalf of the company in writing under the common seal of the company;²
- (b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;
- (c) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.

A contract made according to this section may be varied or discharged in the same manner in which it is authorized by this section to be made.

§ 22:15 Pre-incorporation contracts

Where a contract purports to have been made in the name or on behalf of a company at a time when the company has not been incorporated:

- (a) subject to any express agreement to the contrary, the contract shall have effect as a contract entered into by the person purporting to act for the company or as agent for it, and he shall be personally liable on and entitled to enforce the contract accordingly;
- (b) the company may, after incorporation, ratify the contract to the same extent as if it had already been incorporated at that time and as if the contract had been entered into on its behalf by an agent acting without its authority.

Where a contract is ratified by virtue of this section, the person who purported to act for or on behalf of the company in making the contract

[Section 22:14]

¹Amended L.N. 223 of 1976.

²Amended L.N. 6 of 1984 s. 20.

shall not thereafter be under any greater liability than he would have been if he had entered into the contract on behalf of the company as an agent acting without its authority and after its incorporation.¹

§ 22:16 Form of contracts for other corporate bodies (cases where contracts need not be under seal)

Contracts may be made on behalf of any body corporate, wherever incorporated, as follows:

- (a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the body corporate in writing signed by any person acting under its authority, express or implied; and
- (b) a contract which if made between private persons would by law be valid although made by parol only and not reduced to writing, may be made by parol on behalf of the body corporate by any person acting under its authority, express or implied.

This Ordinance shall not apply to any company formed and registered under the Companies Ordinance or to any existing company as defined in that Ordinance.

§ 22:17 Contract of sale

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

A contract of sale may be absolute or conditional.

Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

§ 22:18 Formalities of a contract of sale

Subject to the provisions of Sale of Goods Ordinance and of any enactment in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of

[Section 22:15]

¹Added 6 of 1984 s. 21.

the parties, provided that nothing in this section shall affect the law relating to corporations.

Under the new Companies Ordinance of 2014, Chapter 622, Hong Kong companies will no longer be required to have a common seal. A company may simply execute a document by having a director sign it, in the case of a company with only one director, or by two directors or one director and a secretary, in the case of company with more than one director, which now has the same effect as if the document were executed under the company's common seal.

Purchasers in good faith and for valuable consideration are entitled to rely on such a means of execution as being a valid execution of the company.

VI. AGENCY AND COMMERCIAL REPRESENTATION (FACTORS ORDINANCE)

§ 22:19 In general

Mercantile agent means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

§ 22:20 Power of mercantile agent with respect to disposition of goods

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Ordinance, be as valid as if he were expressly authorized by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, notice that the person making the disposition does not have authority to make the same.

Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not, at the time thereof, notice that the consent has been determined.

Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Ordinance, be deemed to be with the consent of the owner.

For the purposes of Factors Ordinance, the consent of the owner shall be presumed in the absence of evidence to the contrary.

§ 22:21 Pledge of document of title

A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

§ 22:22 Pledge for antecedent debt

Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

§ 22:23 Rights acquired by exchange of goods or documents

The consideration necessary for the validity of a sale, pledge, or other disposition of goods, in pursuance of this Ordinance, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, document, or security when so delivered or transferred in exchange.

§ 22:24 Agreement through clerk, etc

For the purposes of this Ordinance, an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

§ 22:25 Provisions as to consignor and consignee

Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

§ 22:26 Disposition by seller remaining in possession of goods

Where a person, having sold goods, continues, or is, in possession of

the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

§ 22:27 Disposition by buyer obtaining possession of goods

Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

§ 22:28 Effect of transfer of document of title on vendor's lien or right of stoppage in transit

Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transit as the transfer of a bill of lading has for defeating the right of stoppage in transit.

§ 22:29 Mode of transferring documents

For the purposes of Factors Ordinance, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery or makes the goods deliverable to the bearer, then by delivery.

§ 22:30 Saving for rights of true owner

Nothing in the Factors Ordinance shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

Nothing in the Factors Ordinance shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the

owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods, or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

Nothing in the Factors Ordinance shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

VII. BILLS OF EXCHANGE, PROMISSORY NOTES AND CHECKS

§ 22:31 Bills of exchange—Form and interpretation

A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer.

An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with: (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount; or (b) a statement of the transaction which gives rise to the bill, is unconditional.

A bill is not invalid by reason:

- (a) that it is not dated;
- (b) that it does not specify the value given or that any value has been given therefor;
- (c) that it does not specify the place where it is drawn or the place where it is payable.

§ 22:32 Bills of exchange—Inland and foreign bills

Adaptation amendments were retroactively made.¹

An inland bill is a bill which is, or on the face of it purports to be:

[Section 22:32]

¹See L.N. 60 of 1999 s. 3.

- (a) both drawn and payable within Hong Kong; or
- (b) drawn within Hong Kong, upon some person resident therein.²

Any other bill is a foreign bill.

Unless it appears to the contrary on the face of the bill, the holder may treat it as an inland bill.

§ 22:33 Laws governing legal interest rates: Penalties against usury

Part IV of the Money Lenders Ordinance governs excessive interest rates in Hong Kong.

Any person, whether a money lender or not, who lends or offers to lend money at any effective rate of interest exceeding 60% per annum (but this rate can be adjusted by the Legislative Council subject to a grandfather clause), commits a criminal offense with maximum fine of \$500,000 and two years imprisonment. No agreement for the repayment of any loan or for the payment of interest on any loan and no security given in respect of any such agreement or loan shall be enforceable in any case in which the effective rate of interest exceeds 60% per annum.

§ 22:34 Fraud and forgery

Fraud is governed by the Theft Ordinance and forgery by the Crimes Ordinance.

Fraud: If any person by any deceit (whether or not the deceit is the sole or main inducement) and with intent to defraud induces another person to commit an act or make an omission, which results either (a) in benefit to any person other than the second-mentioned person; or (b) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person, the first-mentioned person commits the offence of fraud and is liable on conviction upon indictment to imprisonment for 14 years.

Forgery: A person who makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice, commits the offence of forgery and is liable on conviction on indictment to imprisonment for 14 years.

§ 22:35 Stamp taxes

Stamp duties levied in Hong Kong are governed by the Stamp Duty Ordinance. *Ad valorem* duties are charged on conveyances (including a voluntary disposition *inter vivos*), on sale and leases of immovable

²Amended L.N. 60 of 1999 s. 3.

property, contract notes for the sale of stock and the issue of bearer instruments.

Unless duly stamped, no instrument chargeable with stamp duty may be received in evidence in any proceedings or available for any other purpose except (1) criminal proceedings; and (2) civil proceedings by the collector to recover stamp duty or penalty payable.

VIII. REAL ESTATE

§ 22:36 Land Registry

The Land Registry is responsible for: the registration of documents affecting land under the Land Registration Ordinance; the provision of facilities for search and supply of copies of the Land Registers and related records; and the registration of owners' corporations under the Building Management Ordinance.

The existing land registration system is a deeds registration system governed by the Land Registration Ordinance. The deeds registration system only confers priority on registered deeds and serves as notice of registered instruments to the public. Registration is not proof that the person registered as the owner as good title to the property.

There is a central registration system called the Integrated Registration Information System (IRIS), which allows customers to register all documents affecting land at the Queensway Headquarters of the Land Registry.

Hong Kong is moving to a Title Registration System which will be governed by the Land Titles Ordinance and will supplant the deed registration system. Under the proposed system, once a person is registered in the title register as the owner, his or her title to the relevant property is guaranteed. However the Title Registration Ordinance is not yet in effect.

§ 22:37 Leaseholds

Landlord includes any person, other than the Government, who is from time to time entitled to receive rent in respect of any premises and in relation to a particular tenant means the person entitled to receive rent from such tenant.

Lease or tenancy agreement includes every agreement for the letting of any premises, whether oral or in writing;

§ 22:38 Leaseholds—Duties of principal tenant

Every principal tenant shall affix and shall keep affixed on a conspicuous part of the premises comprised in his principal tenancy a notice in Form 1 in the Second Schedule stating the rent payable by him to his landlord and shall give to each sub-tenant notice in writing of the part of such rent which he attributes to the premises let to such sub-tenant.

Every principal tenant shall, whether the same shall be demanded or not, give to each sub-tenant at the time of his paying the same a receipt for the amount of the rent paid and such receipt shall state the period in respect of which such rent was payable.

Every principal tenant shall, within 1 month after becoming a principal tenant, furnish to his landlord a full and true statement showing the name of all the sub-tenants of such principal tenant with sufficient particulars of the parts of the premises occupied by and of the standard rent and gross rent payable by and of the date of first occupation by each of them.¹

A principal tenant who fails to comply with any of the provisions of subsections (1), (2) and (3) of the law shall be guilty of an offence and shall be liable on summary conviction to a fine of \$2,000.²

Upon the hearing of any summons issued under this section, it shall be lawful for a magistrate, in addition to imposing a fine if the defendant is convicted, to order the eviction of the defendant.³

Where a principal tenant is evicted under the provisions of section 10 or of section 15, the sub-tenants of such principal tenant shall be deemed to be and shall thereafter be tenants of the immediate landlord of such principal tenant and shall be deemed to hold their respective premises upon the terms and conditions upon which they held them from the principal tenant, provided that such immediate landlord shall be entitled to demand or receive from such sub-tenant only such rent as he would have been entitled to demand or receive if the tenancy of the principal tenant had been terminated under the provisions of section 21 and shall undertake towards the sub-tenants all those obligations formerly undertaken by the principal tenant.

It shall be the duty of the immediate landlord of the principal tenant to ensure that the provisions of subsection (1) are complied with, and an immediate landlord who fails without reasonable excuse (the burden of proving which shall be upon him) to ensure that the said provisions are complied with shall be guilty of an offence and shall be liable on summary conviction to a fine of \$2,000.⁴

§ 22:39 Leaseholds—Termination of principal tenancy

The immediate landlord of a principal tenant may by service of notice to quit in Form 2 in the Second Schedule and in manner specified in section 44 terminate the tenancy of such tenant in accordance with the provisions of, and to the extent provided in, this section.

[Section 22:38]

¹Amended L.N. 11 of 1954 s. 3.

²Amended L. N. 22 of 1953 s. 10.

³Amended L.N. 22 of 1953 s. 10.

⁴Added L.N. 22 of 1953 s. 10.

The length of notice given by the notice to quit aforesaid shall be either that required by the contract between the landlord and the principal tenant or in default of any term in the contract specifying the length of notice, one calendar month from the date of service thereof.

Upon the expiration of such notice to quit:

- (a) each sub-tenant shall be deemed to be the tenant of the immediate landlord and to hold the premises upon the same terms and conditions as he held them from the principal tenant;
- (b) each sub-tenant affected thereby shall be liable to pay to the immediate landlord on demand the permitted rent of the premises let to him under contract with the principal tenant;
- (c) the immediate landlord shall undertake towards each sub-tenant all those obligations undertaken by the principal tenant previous to service of notice under subsection (1).

At any time within 14 days after the service of the notice to quit, the principal tenant may elect by notice in writing to the landlord to deliver up the whole of the premises subject to the tenancy or to retain any portion thereof retained, immediately before the service of the notice to quit, for his own occupation.

Where the principal tenant retains for his own occupation any part of the premises the subject of his tenancy from the immediate landlord, he shall be deemed to be the tenant of the immediate landlord in respect of the retained part and to hold the same upon a monthly tenancy. The rent of the retained part shall, subject to this Part, be such proportion of the rent of the whole of the premises immediately before the expiration of the notice to quit as is fairly attributable to the retained part,¹ provided that in the event of any dispute between the immediate landlord and the principal tenant as to the amount of the rent payable by such principal tenant, such dispute may be referred to and decided by the Commissioner.²

Notwithstanding anything in this Part, and in particular, the definition of “tenant,” a lessee of the Government who recovers by virtue of this section any premises to which this section relates shall be deemed to be an immediate landlord of his principal tenant for all the purposes of this section and shall have all the rights and obligations conferred and imposed by this section on an immediate landlord.³

§ 22:40 Powers of the Building Authority

The Building Authority or any public officer authorized in writing

[Section 22:39]

¹Amended L.N. 53 of 1993 s. 14.

²Amended L.N. 76 of 1981 s. 12.

³Amended L.N. 29 of 1998 s. 105.

by him in that behalf may at any time enter and where necessary, in the presence of a police officer, break into any premises or enter upon any land:

- (a) to ascertain whether any building, structure, street or natural, formed or man-made land is dangerous or liable to become dangerous;¹
- (b) to inspect or test any groundwater drainage works, drainage works or drainage system;²
- (c) to ascertain whether the provisions of this Ordinance or of any notice order or regulation hereunder are being complied with;
- (d) to carry out or cause to be carried out any work which he is authorized to carry out under this Ordinance.³

For the purposes of the above paragraph:

- (a) access to every part of any building works or street works shall be provided by the registered general building contractor and registered specialist contractor;⁴ and
- (b) the Building Authority or a public officer authorized under this section may take such steps as he may deem necessary, including the making of openings and the taking of reasonable samples.⁵

The Building Authority may by order in writing require an authorized person to carry out such tests as may be specified in the order.⁶

The Building Authority may specify any form for the purposes of this Ordinance.⁷

§ 22:41 Urban Renewal Authority

There shall be established a body corporate to be named the Urban Renewal Authority which shall have such powers and duties as are conferred and imposed on it by, or by virtue of the Urban Renewal Authority Ordinance.

The purposes of the Authority are to:

- (a) replace the Land Development Corporation as the body corporate established by statute having the responsibility of improving the standard of housing and the built environment of Hong Kong by

[Section 22:40]

¹Amended L.N. 72 of 1980 s. 7.

²Amended L.N. 44 of 1959 s. 8; 41 of 1982 s. 7.

³Amended L.N. 44 of 1959 s. 8.

⁴Replaced 43 of 1993 s. 4. Amended L.N. 54 of 1996 s. 18.

⁵Amended L.N. 44 of 1959 s. 8.

⁶Amended 52 of 1974 s. 9.

⁷Added 68 of 1993 s. 13.

- undertaking, encouraging, promoting and facilitating urban renewal;
- (b) improve the standard of housing and the built environment of Hong Kong and the layout of built-up areas by replacing old and dilapidated areas with new development which is properly planned and, where appropriate, provided with adequate transport and other infrastructure and community facilities;
 - (c) achieve better utilization of land in the dilapidated areas of the built environment of Hong Kong and to make land available to meet various development needs;
 - (d) prevent the decay of the built environment of Hong Kong by promoting the maintenance and improvement of individual buildings as regards their structural stability, integrity of external finishes and fire safety as well as the improvement of the physical appearance and conditions of that built environment;
 - (e) preserve buildings, sites and structures of historical, cultural or architectural interest; and
 - (f) engage in such other activities, and to perform such other duties, as the Chief Executive may, after consultation with the Authority, permit or assign to it by order published in the Gazette.

The resources of the Authority shall consist of: (a) all money paid by the Government to the Authority and appropriated for that purpose by the Legislative Council; and (b) all other money and property, including fees, rent, interest and accumulations of income received by the Authority for its purposes. All money paid to or received by the Authority shall be deposited with banks licensed by the Hong Kong Monetary Authority. The Secretary for Financial Services and the Treasury may give directions in writing of a general or specific character to the Authority in relation to the amount of money which may be expended by the Authority in any financial year and the Authority shall comply with those directions.¹ The Authority shall exercise due care and diligence in the handling of its finances.

§ 22:42 Transfer of properties, assets and contracts, etc.

All immovable property owned by the Land Development Corporation at the date of commencement of Parts II to VIII of the Urban Renewal Authority Ordinance shall, at that date, be owned by the Authority by virtue of this Ordinance for the residue of the term of years created by the respective Government leases, subject to the covenants, conditions, stipulations, exceptions, reservations, provisos and powers contained in and reserved by those respective Government leases.

[Section 22:41]

¹Amended L.N. 106 of 2002.

All permissions and approvals obtained by the Land Development Corporation from the Town Planning Board, the Secretary, the Financial Secretary, or the Chief Executive in Council which were in force immediately before the commencement of Parts II to VIII of this Ordinance shall, on the commencement of Parts II to VIII of this Ordinance, be transferred to the Authority on the same terms and conditions.

Any movable property, right and privilege vested in the Land Development Corporation shall, on the commencement of Parts II to VIII of Urban Renewal Authority Ordinance, be vested in the Authority on the same terms and conditions, and the Authority shall be subject to the same obligations and liabilities to which the Land Development Corporation was subject at the date of commencement of Parts II to VIII of this Ordinance.

At the date of commencement of Parts II to VIII of Urban Renewal Authority Ordinance, all books, papers, documents, minutes, equipment, receipts and accounts relating to the Land Development Corporation and to its operation under the repealed Ordinance shall be delivered to the Authority.

Every contract entered into by the Land Development Corporation which was in force immediately before the commencement of Parts II to VIII of this Ordinance shall, as from that date, have effect as if the Authority is substituted for the Land Development Corporation, and the contract may be enforced by or against the Authority.

The legal claims including present, future, actual and contingent claims by or against the Land Development Corporation and judicial proceedings instituted by or against the Land Development Corporation that existed immediately before the commencement of Parts II to VIII of this Ordinance, do not abate by reason only of the fact of the repeal of the Land Development Corporation Ordinance,¹ and the Authority is substituted for the Land Development Corporation in any proceedings pending before any court or tribunal.

The property of the Land Development Corporation owned by it immediately before the commencement of Parts II to VIII of this Ordinance is transferred to and is owned by the Authority subject to any existing claim or liability, and the Authority may sue on, recover or enforce a chose in action transferred by this subsection without having to give notice of the transfer to a person bound by the chose in action, and without limitation it is provided that the insurance policies and any benefit of trademarks, copyright and other intellectual property rights held by the Land Development Corporation are transferred to the Authority.

Any contributory or non-contributory scheme for payment of

[Section 22:42]

¹Cap 15.

provident funds to the employees of the Land Development Corporation which was in place immediately before the commencement of Parts II to VIII of this Ordinance shall, as from that date, continue to operate as if the scheme had been put in place by the Authority. The employees of the Land Development Corporation under the arrangements of such a scheme shall be taken to be the employees of the Authority, and the Authority shall replace the Land Development Corporation in all the arrangements of such a scheme.

The effect of subsections (5) and (8) in relation to any employment contract with the Land Development Corporation which was in force immediately before the date of commencement of Parts II to VIII of this Ordinance is merely to modify that contract, as from that date, by substituting the Authority for the Land Development Corporation and, accordingly, employment with the Land Development Corporation and the Authority under an employment contract to which those subsections apply is deemed for all purposes to be a single continuing employment.

On the commencement of Parts II to VIII of Urban Renewal Authority Ordinance, the Authority is to repay any outstanding balance of the loan referred to in paragraph 1(k) of Part I of the Schedule to the Loan Fund² of the Land Development Corporation to the Government under the same terms and conditions as was determined between the Land Development Corporation and the Government prior to that commencement.

IX. LIENS ON REAL PROPERTY

§ 22:43 In general

Priority of registered charging orders and *lites pendentes*: a charging order or *lis pendens* which is duly registered shall have priority from the commencement of the day following the date of its registration.

§ 22:44 Case if *lis pendens* not registered

No *lis pendens* shall be registered in the Registry of the High Court, or elsewhere than in the Land Registry; and a *lis pendens* not registered in the said office shall not bind any purchaser or mortgagee of the estate intended to be thereby affected.

§ 22:45 Discharge of encumbrances by the court

Where land is subject to any encumbrance, whether immediately realizable or payable or not, and the encumbrancer is out of the jurisdiction, cannot be found or is unknown, or if it is uncertain who the encumbrancer is, the court may, if it thinks fit, on the application of

²Cap 2 sub. leg.

the party for the time being entitled to redeem the encumbrance, direct or allow payment into the court of a sum of money sufficient to redeem the encumbrance and any interest thereon.

Upon payment into the court of the sum referred to above, the court may if it thinks fit, and either after or without any notice to the encumbrancer, as the court thinks fit, declare the land to be free from the encumbrance, and make any order for conveyance or vesting order as appropriate, and give directions for the retention and investment of the sum of money paid into court and for the payment or application of the income thereof, and for the payment of an amount certified by the court to be the reasonable costs of the applicant in making the application, such amount to be deducted from the sum of money paid into court.

On application by the encumbrancer or any person entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

X. INTELLECTUAL PROPERTY

§ 22:46 In general

Hong Kong's existing Copyright Ordinance came into effect on June 27, 1997 and has been amended with effect from April 1, 2001, 2008, and 2011 to put it beyond doubt that any person who knowingly possesses an infringing copy of a copyright work for the purpose of, in the course of, or in connection with trade or business will commit a criminal offence, regardless of whether the business is involved in dealing in the infringing copies. Both management and the appointer concerned can be liable.

On June 11, 2014, the Hong Kong government introduced the Copyright (Amendment) Bill, which proposed to significantly develop the existing copyright regime to mirror international standards. The following are some of the important proposed changes.

First, under the old copyright regime where certain rights were only triggered upon using certain methods of communication, for example "cable" or "broadcasting," the new Bill introduces an exclusive right for communication that will be updated in manner capable of catching existing and future modes of electronic communication.

The Bill also proposes to introduce a new fair dealing exception for the purpose of protecting parody and satire of protected material. The new fair dealing exception for parody introduces a balancing test to determine whether the act constitutes fair dealing. The court will take into account all relevant circumstances, including:

- (a) the nature of the use (whether not for profit or commercial),
- (b) the nature of the copyrighted work,

- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- (d) The effect of the use on the potential market for or value of the copyrighted work.

Furthermore, the proposed 2014 Bill will attempt to introduce criminal sanctions against the unauthorized communication of work to the public where the wrongful act is either:

- (1) in the course of trade for profit, or
- (2) to a degree that prejudicially affects the owner of the copyrighted material.

This amendment effectively raises the standard for what was criminally sanctionable higher than under the previous standard. Under the previous standard unauthorized communication could be sanctioned when the act conferred “more than trivial economic prejudice,” which was widely criticized for being vague and over-broad.

§ 22:47 Copyright and copyright works

Copyright is a property right which subsists in accordance with this Part in the following descriptions of work:

- (a) original literary, dramatic, musical or artistic works;
- (b) sound recordings, films, broadcasts or cable programs; and
- (c) the typographical arrangement of published editions.

In this Part “copyright work” means a work of any of those descriptions in which copyright subsists.

Copyright does not subsist in a work unless the requirements of this Part with respect to qualification for copyright protection are met (see section 177 of the Law and the provisions referred to there).

§ 22:48 Copyright and copyright works—Infringement of copyright by copying

The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies are construed as follows.

Copying of a work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.

In relation to an artistic work copying includes the making of a copy in 3 dimensions of a 2-dimensional work and the making of a copy in 2 dimensions of a 3-dimensional work.

Copying in relation to a film, television broadcast or cable program includes making a photograph of the whole or any substantial part of any image forming part of the film, broadcast or cable programme.

Copying in relation to the typographical arrangement of a published edition means making a facsimile copy of the arrangement.

Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work.

§ 22:49 Copyright and copyright works—Infringement by issue of copies to the public

The issue of copies of the work to the public is an act restricted by the copyright in every description of copyright work.

References in this Part to the issue of copies of a work to the public are to the act of putting into circulation copies not previously put into circulation, in Hong Kong or elsewhere, by or with the consent of the copyright owner.

References in this Part to the issue of copies of a work to the public do not include: (a) any subsequent distribution, sale, hiring or loan of copies previously put into circulation (but see section 25: infringement by rental); or (b) any subsequent importation of those copies into Hong Kong.

References in this Part to the issue of copies of a work include the issue of the original and the issues of copies in electronic form.

§ 22:50 Copyright and copyright works—Infringement by rental of work to the public

The rental of copies of any of the following works to the public is an act restricted by the copyright in the work:

- (a) a computer program;
- (b) a sound recording;
- (c) a film;
- (d) a literary, dramatic or musical work included in a sound recording;
- (e) [a literary or artistic work included in a comic book; or
- (f) the typographical arrangement of a published edition of a comic book.]

In this Part, subject to the following provisions of this section, rental means making a copy of the work available for use, on terms that it will or may be returned, for direct or indirect economic or commercial advantage.

The expression “rental” does not include:

- (a) making available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable program service;
- (b) making available for the purpose of exhibition in public; or
- (c) making available for on-the-spot reference use.

References in this Part to the rental of copies of a work include the rental of the original.

§ 22:51 Copyright and copyright works—Infringement by making available of copies to the public

The making available of copies of the work to the public is an act restricted by copyright in every description of copyright work.

References in this Part to the making available of copies of a work to the public are to the making available of copies of the work, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the work from a place and at a time individually chosen by them (such as the making available of copies of works through the service commonly known as the internet).

References in this Part to the making available of copies of a work to the public include the making available of the original.

The mere provision of physical facilities for enabling the making available of copies of works to the public does not of itself constitute an act of making available of copies of works to the public.

§ 22:52 Copyright and copyright works—Infringement by performing, playing or showing of work in public

The performance of the work in public is an act restricted by the copyright in a literary, dramatic or musical work.

In this Part “performance,” in relation to a work: (a) includes delivery in the case of lectures, addresses, speeches and sermons; and (b) in general, includes any mode of visual or acoustic presentation, including presentation by means of a sound recording, film, broadcast or cable programme of the work.

The playing or showing of the work in public is an act restricted by the copyright in a sound recording, film, broadcast or cable programme.

Where copyright in a work is infringed by its being performed, played or shown in public by means of apparatus for receiving visual images or sounds transmitted by electronic means, the person by whom the visual images or sounds are sent, and in the case of a performance the performers, shall not be regarded as responsible for the infringement.

§ 22:53 Copyright and copyright works—Secondary infringement of copyright

The copyright in a work is infringed by a person who, without the license of the copyright owner, imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use, a copy of the work which is, and which he knows or has reason to believe to be, an infringing copy of the work.

§ 22:54 Copyright and copyright works—Research and private study

Fair dealing with a work of any description for the purposes of

research or private study does not infringe any copyright in the work or, in the case of a published edition, in the typographical arrangement.

Copying by a person other than the researcher or student himself is not fair dealing if:

- (a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 49 would not permit to be done under section 47 or 48 (articles or parts of published works: restriction on multiple copies of same material); or
- (b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.

In determining whether any dealing with a work is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular:

- (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the work;
- (c) the amount and substantiality of the portion dealt with in relation to the work as a whole; and
- (d) the effect of the dealing on the potential market for or value of the work.¹

XI. ELECTRONIC COMMERCE

§ 22:55 Electronic contracts

For the avoidance of doubt, it is declared that in the context of the formation of contracts, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be in whole or in part expressed by means of electronic records.

Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

For the avoidance of doubt, it is declared that in the context of the formation of contracts, if an offer or the acceptance of an offer is in whole or in part expressed by means of an electronic record, an electronic signature attached to or logically associated with the

[Section 22:54]

¹Replaced 15 of 2007 s. 12.

electronic record shall not be denied legal effect on the sole ground that it is an electronic signature.¹

For the avoidance of doubt, it is stated that this section does not affect any rule of common law to the effect that the offeror may prescribe the method of communicating acceptance.

XII. COMPETITION AND ANTITRUST LAWS

§ 22:56 Prohibition on anti-competitive conduct

On June 22, 2012, Hong Kong's Competition Ordinance was published. The Competition Ordinance introduced important regulations affecting companies operating in the same market and affords significant penalties for noncompliance.

Alleged violations of the Competition Ordinance will be investigated by the newly independent Competition Commission, comprising of 5 to 16 members. The Commission has a broad range of investigative powers, including the power to search and enter premises. The Commission, after investigation, may make an application to the newly established Competition Tribunal authorized to impose large fines proportional the size of the entity. The Tribunal is authorized to impose fines of up to 10% of a business' gross revenues from each year in which the conduct occurred for violations of the Conduct Rules.

There are three major Conduct Rules designed to reduce and ebb anti-competition in Hong Kong.

The First Conduct Rule regulates agreements that restrict competition in Hong Kong. This would include ordinary non-compete provisions in employment contracts, selective distribution agreements, and agreements among competitors. The restrictions on agreements among competitors include agreements to:

- (a) agree on prices, rebates, or contract terms offered to customers,
- (b) divide up territories or customer bases,
- (c) knowingly reduce output or supply, or
- (d) collaborate in public bids on what prices to offer.

The Second Conduct Rule prohibits businesses with a large presence in a market from exploiting their substantial degree of market power for the purpose of restricting competition in Hong Kong. Noncompliance with the Second Conduct Rule only applies to businesses that earn revenue of more than HK \$40 million and have a "substantial degree" of market presence. This particular regulation seeks to reduce the incentive for businesses to price consumer goods below cost so as to eliminate competitors.

The Merger Rule is limited to affecting mergers, acquisitions, and joint ventures affecting telecommunications.

[Section 22:55]

¹Added 14 of 2004 s. 11.

With regard to telecommunications, subject to subsections (4) and (5) of the Competition Ordinance provisions in Hong Kong Chapter 106, a licensee shall not engage in conduct which, in the opinion of the Authority, has the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market.¹

The Authority may consider conduct to fall within subsection (1) as including, but not limited to:²

- (a) direct or indirect agreements to fix the price in a television programme service market;
- (b) conduct preventing or restricting the supply of goods or services to competitors;
- (c) direct or indirect agreements between licensees to share any television programme service market between them on agreed geographic or customer lines;
- (d) limiting or controlling production, markets, technical development or investment;
- (e) applying dissimilar conditions to equivalent agreements with other trading parties, thereby placing them at a competitive disadvantage;
- (f) making the conclusion of agreements subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

Subject to subsection (4) of the Law, a provision in an agreement is void in so far as it provides for or permits, whether directly or indirectly, conduct which contravenes subsection (1).

The Authority may:³

- (a) on an application made to it in the specified form by a licensee;
- (b) on a prescribed ground; and
- (c) by notice in writing served on the licensee,

exempt conduct specified in the application from subsection (1) subject to such conditions as the Authority thinks fit specified in the notice.⁴

Subsection (1) of the Law shall not apply to:

- (a) any restriction imposed on the inclusion in a television programme service of a television programme produced wholly or substantially by the licensee of the service; or
- (b) any prescribed restriction.

[Section 22:56]

¹Amended 17 of 2011 s. 28.

²Amended 17 of 2011 s. 28.

³Amended 17 of 2011 s. 28.

⁴Amended 17 of 2011 s. 28.

For the avoidance of doubt, it is hereby declared that nothing in this section shall prejudice the existence of any rights arising from the operation of the law relating to copyright or trademarks.

XIII. BUSINESS ORGANIZATIONS

§ 22:57 Forms of business

Effective March 3, 2014, the new Hong Kong Companies Ordinance, Chapter 622 of the laws of Hong Kong, has enacted new ways in which companies operate and are incorporated in Hong Kong. The main objective of the change was to enhance corporate governance, ensure better regulation, and modernize the legal framework governing companies in Hong Kong pursuant to international standards. The new Companies Ordinance consists of 21 Parts, 921 Sections and 11 schedules, and replaces many core provisions of the old Hong Kong Companies Ordinance, Chapter 32. The remaining provisions of the existing ordinance, Chapter 32, regarding insolvency, winding up, disqualification of directors, receivers, and managers have not been repealed. Some of the core changes are represented below.

Under the new Ordinance companies will be streamlined into three types: limited or unlimited private companies with share capital, limited or unlimited public companies with share capital, and companies limited by guarantee without share capital. The new Ordinance also recognizes publicly listed companies.

There is no distinction between traders and non-traders except that any company or person carrying on a business is required to register the business and pay a fee to the Business Registration Office of the Inland Revenue Department.¹

§ 22:58 Partnerships

A partnership is a relationship subsisting between persons, (including companies), carrying on a business in common with a view to profit. But the relation between members of any company or association which is (a) registered as a company under any Ordinance relating to the registration of joint-stock companies;¹ or (b) formed or incorporated by or in pursuance of any other Ordinance, or any enactment or instrument,² is not a partnership within the meaning of this Ordinance.

[Section 22:57]

¹Chapter 310.

[Section 22:58]

¹Amended 50 of 1911; 1 of 1912 Schedule.

²Amended 25 of 1998 s. 2.

§ 22:59 Partnerships—Liability of partners

Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

§ 22:60 Elements of companies

Under Chapter 622 of the new Companies Ordinance the requirement for a company to have a Memorandum of Association as a constitutional document has been abolished. New companies can be registered by submitting an incorporation form and a copy of the company's new Articles of Association.

For companies registered under Chapter 32, the provisions in their Memorandum of Association that do not contradict provisions in the new Companies Ordinance will be regarded as provisions of the Articles of Association.

The new Companies Ordinance has abolished the par value of shares. All shares issued before the effective date of the new Companies Ordinance shall have no nominal value (Section 135). The concepts of share premium, authorized share capital, and capital redemption are similarly abolished. Section 37 requires that any previous amounts standing to the credit of the company's share premium account and capital redemption reserve becomes a part of the company's share capital. The abolition of par value is designed to be in line with the international trend to afford companies more flexibility in structuring their share capital.

Every company must also now have at least one natural person director. This change does not abolish the use of Corporate Directors in Hong Kong, however, at least one natural person director must be appointed as a director in addition to Corporate Directors that may be employed for the same purpose. The new ordinance has additionally codified the common law duty of care for directors, which includes both objective and subjective elements. Firstly, a court may look into the objective standard of whether a director acted within the general knowledge, skill, and experience that may be reasonably expected of a person who is carrying out the functions of the director in relation to the company. Secondly, a court may try to determine if a director acted reasonably under the circumstances due to the subjective element of the general knowledge, skill, and experience that the director actually has. Remedies for breach continue to be determined according to existing case law.

Additionally, the financial remuneration of directors requires more heightened transparency than under the old Ordinance:

- (a) the director's compensation and retirement benefits,

- (b) payments made or benefits provided in respect to the termination of the services of directors,
- (c) loans in favor of directors,
- (d) material interests of directors in transactions, and
- (e) consideration provided to third-parties for making available the services of a person as director or in any other capacity while director.

Broadly, Section 373 of the new Companies Ordinance requires a company to keep accounting records sufficient to show and explain the company's transactions, to disclose with reasonable accuracy a company's financial position at any time, and to enable to directors to ensure that the financial statements comply with the new provisions of the Companies Ordinance. Full financial statements are required to give a fair and true view of a company's financial position and performance.

The sufficiency for financial statements have been relaxed for smaller private companies to prepare simplified accounts based on the Small and Medium-sized Entity Financial Reporting Standard. A small company is eligible for simplified reporting where it satisfies two of the following three conditions:

- (1) total annual revenue of not more than HK \$100 million;
- (2) total assets of not more than HK \$100 million;
- (3) no more than 100 employees.

Simplified financial statements are generally prepared on a simplified historical cost basis, and do not include assets or liabilities at fair value or deferred tax. The required disclosures on the affairs of the company are also less stringent than full financial statements, such as:

- (a) no requirement for an auditor to express a "true and fair" opinion on the financial statements,
- (b) no requirement to disclose the auditor's compensation on the financial statements,
- (c) undertaking a subsidiary may be excluded from consolidated financial statements,
- (d) no requirement to include business review in the director's report, and
- (e) miscellaneous exemptions from disclosures regarding a director's ability to acquire benefits from shares or debentures of the company.

XIV. CIVIL ACTIONS AND PROCEDURES

§ 22:61 In general

The courts of justice in Hong Kong are the Court of Final Appeal, the High Court (which comprises the Court of Appeal and the Court of

First Instance), the District Court, the Magistrates Court, the Coroner's Court, and the Juvenile Court. In addition, there are a number of tribunals which have jurisdiction to adjudicate on disputes relating to specific, defined areas. These include the Lands Tribunal, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal.

§ 22:62 Court of Final Appeal

The Joint Declaration and the Basic Law specifically guarantee the establishment on 1 July 1997 of a Hong Kong based Court of Final Appeal, and this replaced the Judicial Committee of the Privy Council in London as the final appellate court for Hong Kong. It has jurisdiction conferred on it by the Hong Kong Court of Final Appeal Ordinance.¹

Under the provisions in the Basic Law and the Hong Kong Court of Final Appeal Ordinance,² the judges of the Court of Final Appeal are appointed by the Chief Executive, in accordance with the recommendations of an independent commission, and those appointments must be endorsed by the Legislature.³

The Hong Kong Court of Final Appeal Ordinance provides that an appeal shall be heard and determined by:

- (a) the Chief Justice or a permanent judge designated to sit in his place under subsection (2);
- (b) 3 permanent judges nominated by the Chief Justice; and
- (c) 1 non-permanent Hong Kong judge or 1 judge from another common law jurisdiction selected by the Chief Justice and invited by the Court.⁴

§ 22:63 High Court¹

There shall be a High Court of the Hong Kong Special Administrative Region consisting of the Court of First Instance and the Court of Appeal.

Subject to the provisions of this Ordinance, the High Court shall be a court of unlimited civil and criminal jurisdiction.

[Section 22:62]

¹Cap 484.

²Cap 484.

³Chapter 484, Section 7.

⁴Chapter 484, Section 16.

[Section 22:63]

¹Chapter 4, Section 3.

§ 22:64 Court of Appeal

The Court of Appeal shall be a superior court of record. The civil jurisdiction of the Court of Appeal shall consist of:

- (a) appeals from any judgment or order of the Court of First Instance in any civil cause or matter;¹
- (b) appeals under section 63 of the District Court Ordinance;² and
- (c) any other jurisdiction conferred on it by any law.

The criminal jurisdiction of the Court of Appeal shall consist of:

- (a) appeals from the Court of First Instance or District Court under Part IV of the Criminal Procedure Ordinance;³
- (b) appeals from a judgment or order of the Court of First Instance given or made in the exercise of the powers conferred on it under section 21I(1) and relating to a criminal cause or matter;⁴
- (c) the consideration of questions of law reserved under section 81(1) of the Criminal Procedure Ordinance;⁵
- (d) the consideration of:
 - (i) applications by the Secretary for Justice for the review of any sentence under section 81A(1) of the Criminal Procedure Ordinance;⁶
 - (ii) references by the Secretary for Justice of questions of law under section 81D of the Criminal Procedure Ordinance;⁷
- (e) appeals by way of case stated from the District Court under section 84 of the District Court Ordinance;⁸ and
- (f) any other jurisdiction conferred on it by any law.

For the purposes of and incidental to:

- (a) the hearing and determination of any appeal to the Court of Appeal; and
- (b) the amendment, execution and enforcement of any judgment or order made on such an appeal,

the Court of Appeal shall have all the authority and jurisdiction of the court or tribunal from which the appeal was brought.

[Section 22:64]

¹Amended 25 of 1998 s. 2.

²Cap 336.

³Cap 221; Amended 25 of 1998 s. 2.

⁴Added 2 of 1993 s. 3. Amended 25 of 1998 s. 2.

⁵Cap 221.

⁶Cap 221.

⁷Cap 221; Replaced 20 of 1979 s. 10. Amended L.N. 362 of 1997.

⁸Cap 336.

§ 22:65 Court of First Instance

The Court of First Instance shall be a superior court of record. The civil jurisdiction of the Court of First Instance shall consist of:

- (a) original jurisdiction and authority of a like nature and extent as that held and exercised by the Chancery, Family and Queen's Bench Divisions of the High Court of Justice in England; and
- (b) any other jurisdiction, whether original or appellate jurisdiction, conferred on it by any law.

The criminal jurisdiction of the Court of First Instance shall consist of:

- (a) original jurisdiction of a like nature and extent as that held and exercised in criminal matters by the High Court of Justice and the Crown Court in England respectively; and
- (b) any other jurisdiction, whether original or appellate jurisdiction, conferred on it by any law.

The Court of First Instance also exercises appellate jurisdiction in hearing appeals from Magistracies, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal.

§ 22:66 District Court

The District Court has limited jurisdiction in both civil and criminal matters. It has civil jurisdiction to hear monetary claims over \$50,000, but not more than \$1,000,000.¹ In the case of claims for recovery of land, or where the title to an interest in land comes in question, the annual rent or rateable value or the annual value must not exceed \$240,000.² Apart from its general civil jurisdiction, the District Court has exclusive jurisdiction over claims brought under the Employees' Compensation Ordinance,³ tax recovery claims under the Inland Revenue Ordinance⁴ and distress for rent under the Landlord and Tenant (Consolidation) Ordinance.⁵ Matrimonial causes and adoption applications must also be commenced in the District Court (the court which handles these types of cases is known as the Family Court).⁶

In its criminal jurisdiction, the court may try the more serious cases with the exception of a few very serious offences such as murder,

[Section 22:66]

¹Chapter 336, Section 32.

²Chapter 336, Section 35.

³Cap 282.

⁴Cap 112.

⁵Cap 7.

⁶Chapter 336, Section F.

manslaughter and rape.⁷ The maximum term of imprisonment it can impose is seven years. It also exercises limited appellate jurisdiction in hearing appeals from Tribunals and Statutory Bodies conferred on it under various ordinances, including the Stamp Duty Ordinance,⁸ the Pneumoconiosis (Compensation) Ordinance,⁹ and the Occupational Deafness (Compensation) Ordinance.¹⁰

§ 22:67 Magistrates Court

Magistrates exercise a criminal jurisdiction, which covers a wide range of indictable and summary offences. Their powers of punishment are generally restricted to a maximum of two years' imprisonment, or a fine of \$100,000, but in respect of certain offences their powers are greater.¹

All indictable offences originate before a magistrate. The Secretary for Justice may apply to have a case transferred to the District Court or committed to the Court of First Instance depending on the seriousness of the case.² Appeals are brought from a magistrate to a judge of the Court of First Instance.³

Special magistrates may be qualified lawyers or persons with substantial experience in the legal field. They deal with cases of a more routine nature, such as hawking and minor traffic cases. In general, their maximum power of sentencing is six months' imprisonment and a fine of \$50,000.⁴

§ 22:68 Coroner's Court

The Coroner's Court inquires into deaths which occur as a result of accident or violence, or under suspicious circumstances, when a person dies suddenly, or when a dead body is found in or brought into Hong Kong.

§ 22:69 Juvenile Court

The Juvenile Court, Under Chapter 226 of the Code, has jurisdiction to hear charges against children (aged under 14) and young persons (aged between 14 and 16) for any offence other than homicide.

⁷Under Chapter 221.

⁸Cap 117.

⁹Cap 360.

¹⁰Cap 469.

[Section 22:67]

¹Chapter 227, Section 92.

²Chapter 227, Section 88.

³Chapter 227, Section 113.

⁴Chapter 227, Section 91.

Children under the age of 10 are deemed not to have reached the age of criminal responsibility and accordingly no court, including the Juvenile Court, has jurisdiction over cases involving such young people. However, the Juvenile Court does have power to deal with care and protection cases involving young people aged up to 18.

XV. RECOGNITIONS OF FOREIGN JUDGMENTS

§ 22:70 Power to extend the provisions of the ordinance to countries giving reciprocal treatment

The Governor in Council, if he is satisfied that, in the event of the benefits conferred by this Ordinance being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts of the Colony, may by order direct:

- (a) that the provisions of this Ordinance shall extend to that foreign country; and
- (b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that foreign country for the purposes of Foreign Judgments Ordinance.

Any judgment of a superior court of any foreign country to which the provisions of this Ordinance extend, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which the provisions of this Ordinance apply, if:

- (a) it is final and conclusive as between the parties thereto; and
- (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
- (c) it is given after the coming into operation of the order directing that the provisions of this Ordinance shall extend to that foreign country.

For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal is pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

The Governor in Council may by a subsequent order vary or revoke any order previously made under this section.

§ 22:71 Application for, and effect of, registration of foreign judgments

A person, being a judgment creditor under a judgment to which the provisions of this Ordinance apply, may apply to the Court of First Instance at any time within 6 years after the date of the judgment, or,

where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in the Court of First Instance, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Ordinance, order the judgment to be registered,¹ provided that a judgment shall not be registered if at the date of the application: (a) it has been wholly satisfied; or (b) it could not be enforced by execution in the country of the original court.

Subject to the provisions of this Ordinance with respect to the setting aside of registration:

- (a) a registered judgment shall, for the purposes of execution, be of the same force and effect; and
- (b) proceedings may be taken on a registered judgment; and
- (c) the sum for which a judgment is registered shall carry interest; and
- (d) the registering court shall have the same control over the execution of a registered judgment, as if the judgment had been a judgment originally given in the registering court and entered on the day of registration, provided that the execution shall not issue on the judgment so long as, under the provisions of this Ordinance and any prescribed rules, it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined.

Where the sum payable under a judgment which is to be registered is expressed in a currency other than the currency of the Colony, the judgment shall be registered as if it were a judgment for such sum in the currency of the Colony as, on the basis of the rate of exchange prevailing at the date of registration, is equivalent to the sum so payable.²

If at the date of the application for registration the judgment of the original court has been partly satisfied, the judgment shall not be registered in respect of the whole sum payable under the judgment of the original court, but only in respect of the balance remaining payable at that date.

If, on an application for the registration of a judgment, it appears to the registering court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that if those provisions had been contained in separate judgments and those judgments could properly have been registered, the

[Section 22:71]

¹Amended 25 of 1998 s. 2.

²Amended 8 of 1981 s. 2.

judgment may be registered in respect of the provisions aforesaid but not in respect of any other provisions contained therein.

In addition to the sum of money payable under the judgment of the original court, including any interest which by the law of the country of the original court becomes due under the judgment up to the time of registration, the judgment shall be registered for the reasonable costs of and incidental to registration, including the costs of obtaining a certified copy of the judgment from the original court.

§ 22:72 Rules of Court

The power to make rules of court under the High Court Ordinance¹ shall, subject to the provisions of this section, include power to make rules for the following purposes:²

- (a) for making provision with respect to the giving of security for costs by persons applying for the registration of judgments;
- (b) for prescribing the matters to be proved on an application for the registration of a judgment and for regulating the mode of proving those matters;
- (c) for providing for the service on the judgment debtor of notice of the registration of a judgment;
- (d) for making provision with respect to the fixing of the period within which an application may be made to have the registration of a judgment set aside and with respect to the extension of the period so fixed;
- (e) for prescribing the method by which any question arising under the provisions of this Ordinance whether a foreign judgment can be enforced by execution in the country of the original court, or what interest is payable under a foreign judgment under the law of the original court, is to be determined;
- (f) for prescribing any matter which under the provisions of this Ordinance is to be prescribed.

Rules made for the purposes of this Ordinance shall be expressed to have, and shall have, effect subject to any such provisions contained in orders made by the Governor in Council under section 3 as are declared by such orders to be necessary for the giving of effect to agreements made between Her Majesty and any foreign country in relation to matters with respect to which there is power to make rules of court for the purposes of the provisions of this Ordinance.

[Section 22:72]

¹Cap 4.

²Amended 92 of 1975 s. 58; 25 of 1998 s. 2.

XVI. WRITS OF EXECUTION**§ 22:73 In general**

Before 2007, This section of the code was split into numerous sections. However, upon the 2007 updates, the entire process of writs of execution was consolidated into a single piece of legislation, which follows.

§ 22:74 Definition¹

In this Order, unless the context otherwise requires, “writ of execution” includes a writ of *feri facias*, a writ of possession, a writ of delivery, a writ of sequestration and any further writ in aid of any of the aforementioned writs.²

§ 22:75 When leave to issue any writ of execution is necessary¹

A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:

- (a) where 6 years or more have elapsed since the date of the judgment or order;
- (b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;
- (c) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;
- (d) where under the judgment or order any person is entitled to relief subject to the fulfillment of any condition which it is alleged has been fulfilled;
- (e) where any goods sought to be seized under a writ of execution are in the hands of a receiver appointed by the Court or a sequestrator.

Paragraph (1) is without prejudice to any written law or rule by virtue of which a person is required to obtain the leave of the Court for the issue of a writ of execution or to proceed to execution on or otherwise to the enforcement of a judgment or order.

Where the Court grants leave, whether under this rule or otherwise,

[Section 22:74]

¹O. 46, r. 1.

²See App. A of the Law, Form 69.

[Section 22:75]

¹O. 46, r. 2.

for the issue of a writ of execution and the writ is not issued within one year after the date of the order granting such leave, the order shall cease to have effect, without prejudice, however, to the making of a fresh order.

§ 22:76 Leave required for issue of writ in aid of other writ¹

A writ of execution in aid of any other writ of execution shall not issue without the leave of the Court.

§ 22:77 Application for leave to issue writ¹

An application for leave to issue a writ of execution may be made ex parte unless the Court directs it to be made by summons. Such an application must be supported by an affidavit:

- (a) identifying the judgment or order to which the application relates and, if the judgment or order is for the payment of money, stating the amount originally due thereunder and the amount due thereunder at the date of the application;
- (b) stating, where the case falls within rule 2(1)(a), the reasons for the delay in enforcing the judgment or order;
- (c) stating where the case falls within rule 2(1)(b), the change which has taken place in the parties entitled or liable to execution since the date of the judgment or order;
- (d) stating, where the case falls within rule 2(1)(c) or (d), that a demand to satisfy the judgment or order was made on the person liable to satisfy it and that he has refused or failed to do so;
- (e) giving such other information as is necessary to satisfy the Court that the applicant is entitled to proceed to execution on the judgment or order in question and that the person against whom it is sought to issue execution is liable to execution on it.

The Court hearing such application may grant leave in accordance with the application or may order that any issue or question, a decision on which is necessary to determine the rights of the parties, be tried in any manner in which any question of fact or law arising in an action may be tried and, in either case, may impose such terms as to costs or otherwise as it thinks just.

[Section 22:76]

¹O. 46, r. 3.

[Section 22:77]

¹O. 46, r. 4.

§ 22:78 Application for leave to issue writ of sequestration¹

Notwithstanding anything in rules 2 and 4, an application for leave to issue a writ of sequestration must be made to a judge by summons.

Subject to paragraph (3), the summons, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person against whose property it is sought to issue the writ.

Without prejudice to its powers under Order 65, rule 4, the Court may dispense with service under this rule if it thinks it just to do so.

The judge hearing an application for leave to issue a writ of sequestration may sit in private in any case in which, if the application were for an order of committal, he would be entitled to do so by virtue of Order 52, rule 6, but, except in such a case, the application shall be heard in open court.²

§ 22:79 Issue of writ of execution¹

Issue of a writ of execution takes place on its being sealed by the Registrar. Before such a writ is issued a *praecipe* for its issue must be filed. The *praecipe* must be signed by or on behalf of the solicitor of the person entitled to execution or, if that person is acting in person, by him.

No such writ shall be sealed unless at the time of the tender thereof for sealing

- (a) the person tendering it produces:
 - (i) the judgment or order on which the writ is to issue, or an office copy thereof,
 - (ii) where the writ may not issue without the leave of the Court, the order granting such leave or evidence of the granting of it; and
- (b) the Registrar is satisfied that the period, if any, specified in the judgment or order for the payment of any money or the doing of any other act thereunder has expired.

Every writ of execution shall bear the date of the day on which it is issued.

[Section 22:78]

¹O. 46, r. 5.

²L.N. 152 of 2008.

[Section 22:79]

¹O. 46, r. 6.

§ 22:80 Duration and renewal of writ of execution¹

For the purpose of execution, a writ of execution is valid in the first instance for 12 months beginning with the date of its issue.

Where a writ has not been wholly executed the Court may by order extend the validity of the writ from time to time for a period of 12 months at any one time beginning with the day on which the order is made, if an application for extension is made to the Court before the day next following that on which the writ would otherwise expire or such later day, if any, as the Court may allow.

Before a writ the validity of which has been extended under paragraph (2) is executed either the writ must be sealed with the Seal of the Court showing the date on which the order extending its validity was made or the applicant for the order must serve a notice (in Form No. 71 in Appendix A), sealed as aforesaid, on the bailiff to whom the writ is directed informing him of the making of the order and the date thereof.²

The priority of a writ, the validity of which has been extended under this rule, shall be determined by reference to the date on which it was originally delivered to the bailiff.

The production of a writ of execution, or of such a notice as is mentioned in paragraph (3), purporting in either case to be sealed as mentioned in that paragraph, shall be evidence that the validity of that writ or, as the case may be, of the writ referred to in that notice, has been extended under paragraph (2).³

If, during the validity of a writ of execution, an interpleader summons is issued in relation to an execution under that writ, the validity of the writ shall be extended until the expiry of 12 months from the conclusion of the interpleader proceedings.⁴

§ 22:81 Return to writ of execution¹

Any party at whose instance or against whom a writ of execution was issued may serve a notice on the bailiff to whom the writ was directed requiring him, within such time as may be specified in the

[Section 22:80]

¹O. 46, r. 8.

²L.N. 363 of 1990.

³L.N. 363 of 1990.

⁴L.N. 404 of 1991.

[Section 22:81]

¹O. 46, r. 9.

notice, to endorse on the writ a statement of the manner in which he has executed it and to send to that party a copy of the statement.²

If a bailiff on whom such a notice is served fails to comply with it the party by whom it was served may apply to the Court for an order directing the bailiff to comply with the notice.³

XVII. ARBITRATION

§ 22:82 In general

On July 10, 2011, the Legislative Council of Hong Kong passed an amendment to the Arbitration Bill of 2011, aimed at ensuring the practice of arbitration remains congruent with international standards.

Before 2008, Hong Kong had its own unique set of arbitration rules utilizing a system like that of the Common Law United Kingdom Arbitration Laws. However, in 2008 and 2011, the Code was updated to reflect the most recent developments of law under the auspices of The United Nations Commission on International Trade Law (UNCITRAL).

The most important incorporations of UNCITRAL'S Uniform Arbitration Measures and the new Hong Kong Arbitration Ordinance, Cap. 609, are outlined in the following sections.

§ 22:83 Article 7 UNCITRAL Model Law: Definition and form of arbitration agreement

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

The arbitration agreement shall be in writing.

An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

²L.N. 363 of 1990.

³Paragraph (3) of the Law was repealed by L.N. 404 of 1991.

Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.

The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Without affecting subsection (1), an arbitration agreement is in writing if:

- (a) the agreement is in a document, whether or not the document is signed by the parties to the agreement; or
 - (b) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties to the agreement.
- A reference in an agreement to a written form of arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

§ 22:84 General responsibilities of arbitral tribunal

In section 46(3)(b) of Cap. 609, the duty of an arbitral tribunal is to give each party a “reasonable opportunity” to present their cases and attempt to refute their opponents’. Previously, in Article 18, each party was to be given a “full opportunity,” and thus, the amendment serves to afford the tribunal more control over how the arbitral proceedings are to be conducted.

Cap. 609 has abolished the distinction between domestic and international arbitration. All arbitrations in Hong Kong, foreign and domestic, will be governed by a single unified regime based on the UNCITRAL Model Law.

When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required:

- (a) to be independent;
- (b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
- (c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

§ 22:85 Article 19 of UNCITRAL Model Law: Determination of rules of procedure

If or to the extent that there is no such agreement of the parties,

the arbitral tribunal may, subject to the provisions of this Ordinance, conduct the arbitration in the manner that it considers appropriate.

When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings.

Under Section 75 and 80 of the new Arbitration Bill of 2011, an arbitral tribunal is now authorized to award the payment of interest and costs to a party involved in the proceedings. Under provisions of the old Arbitration Ordinance, an arbitral tribunal did not have such express powers.

Preliminary and interim measures are also addressed within the new Bill. Unless otherwise agreed by the parties, an arbitration tribunal may grant interim orders at the request of a party, including injunctions. The scope of interim powers an arbitral tribunal now enjoys under the new Bill is considerably wider than before, but remains flexible as parties have the opportunity to opt out.

§ 22:86 Enforcement of decisions of arbitral tribunal

An order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.

Leave to enforce an order or direction made outside Hong Kong is not to be granted, unless the party seeking to enforce it can demonstrate that it belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal.

If leave is granted under subsection (1), the Court may enter judgment in terms of the order or direction.

A decision of the Court to grant or refuse to grant leave under subsection (1) is not subject to appeal.

An order or direction referred to in this section includes an interim measure.

§ 22:87 Commencement of arbitration

Article 21 of the UNCITRAL Model Law, the text of which is set out below, has effect unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

A request referred to in Article 21 of the UNCITRAL Model Law, given effect to by subsection (1), has to be made by way of a written communication as referred to in section 10.

§ 22:88 Settlement agreements

Article 30 of the UNCITRAL Model Law, the text of which is set out below, has effect if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

An award on agreed terms shall be made in accordance with the provisions of Article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

If, in a case other than that referred to in Article 30 of the UNCITRAL Model Law, given effect to by subsection (1), the parties to an arbitration agreement settle their dispute and enter into an agreement in writing containing the terms of settlement (“settlement agreement”), the settlement agreement is, for the purposes of its enforcement, to be treated as an arbitral award.

XVIII. BANKRUPTCY AND CREDITORS’ RIGHTS**§ 22:89 Proceedings from bankruptcy petition to discharge**

A petition for a bankruptcy order to be made against a debtor may be presented to the court:

- (a) by one of the debtor’s creditors or jointly by more than one of them;
- (b) by the debtor himself;
- (c) by the nominee of, or any person (other than the debtor) who is for the time being bound by, a voluntary arrangement proposed by the debtor and approved by his creditors; or
- (d) where a criminal bankruptcy order has been made against the debtor, by the Official Petitioner.

Subject to the following provisions of this Part, the court may make a bankruptcy order on any such petition.

§ 22:90 Conditions to be satisfied in respect of debtors

A bankruptcy petition shall not be presented to the court under section 3(1)(a) or (b) unless the debtor:

- (a) is domiciled in Hong Kong;
- (b) is personally present in Hong Kong on the day on which the petition is presented; or
- (c) at any time in the period of 3 years ending with that day: (i) has been ordinarily resident, or has had a place of residence, in Hong Kong; or (ii) has carried on business in Hong Kong.

The reference in subsection (1)(c) to a debtor carrying on business includes:

- (a) the carrying on of business by a firm or partnership of which the debtor is a member; and
- (b) the carrying on of business by an agent or manager for the debtor or for such a firm or partnership.

§ 22:91 Creditor's petition—Grounds of creditor's petition

A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.

Subject to sections 6A to 6C, a creditor's petition may be presented to the court in respect of a debt or debts if, but only if, at the time the petition is presented:

- (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds \$10,000 or a prescribed amount;
- (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured;
- (c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and
- (d) there is no outstanding application to set aside a statutory demand served under section 6A in respect of the debt or any of the debts.

A debt is not to be regarded for the purposes of subsection (2) as a debt for a liquidated sum by reason only that the amount of the debt is specified in a criminal bankruptcy order.

Notwithstanding subsection (2)(c) and (d), a creditor's petition may be presented if there are reasonable grounds for believing that the debtor intends to depart, or has departed, from Hong Kong and the debtor knows or ought reasonably to know that his departure would result in defeat or delay for his creditors, and this subsection applies irrespective of the reason for his departure.

The Financial Secretary may, by regulation, prescribe an amount greater than \$10,000 for the purposes of subsection (2)(a).

§ 22:92 Creditor's petition—Creditor with security

A debt which is the debt, or one of the debts, in respect of which a creditor's petition is presented need not be unsecured if either:

- (a) the petition contains a statement by the person having the right to enforce the security that he is willing, in the event of a bankruptcy order being made, to give up his security for the benefit of all the bankrupt's creditors; or

- (b) the petition is expressed not to be made in respect of the secured part of the debt and contains a statement by that person of the estimated value at the date of the petition of the security for the secured part of the debt.

In a case falling within subsection (1)(b) the secured and unsecured parts of the debt are to be treated for the purposes of sections 6 to 6C as separate debts.

§ 22:93 Creditor's petition—Proceedings on creditor's petition

The court shall not make a bankruptcy order on a creditor's petition unless it is satisfied that the debt, or one of the debts, in respect of which the petition was presented is either:

- (a) a debt which, having been payable at the date of the petition or having since become payable, has been neither paid nor secured nor compounded for; or
- (b) a debt which the debtor has no reasonable prospect of being able to pay when it falls due.

In a case in which the petition contains such a statement as is required by section 6C, the court shall not make a bankruptcy order until at least 3 weeks have elapsed since the service of any statutory demand under section 6A.

The court may dismiss the petition if it is satisfied that the debtor is able to pay all his debts or is satisfied:

- (a) that the debtor has made an offer to secure or compound for a debt in respect of which the petition is presented;
- (b) that the acceptance of that offer would have required the dismissal of the petition; and
- (c) that the offer has been unreasonably refused,

and, in determining for the purposes of this subsection whether the debtor is able to pay all his debts, the court shall take into account his contingent and prospective liabilities.

In determining for the purposes of this section what constitutes a reasonable prospect that a debtor will be able to pay a debt when it falls due, it is to be assumed that the prospect given by the facts and other matters known to the creditor at the time he entered into the transaction resulting in the debt was a reasonable prospect.

Nothing in sections 6 to 6C or this section prejudices the power of the court, in accordance with the rules, to authorize a creditor's petition to be amended by the omission of any creditor or debt and to be proceeded with as if things done for the purposes of those sections had been done only by or in relation to the remaining creditors or debts.

§ 22:94 Creditor's petition—Order thereon

A creditor's petition shall be verified by affidavit of the creditor or of

some person on his behalf having knowledge of the facts, and shall be served in the prescribed manner.¹

At the hearing the court shall require proof of the debt of the petitioning creditor and of the service of the petition, and, if satisfied with the proof, may make a bankruptcy order in pursuance of the petition.²

If the court is not satisfied with the proof of the petitioning creditor's debt or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts or has a reasonable prospect of being able to pay them, or considers that for other sufficient cause no order ought to be made, the court may dismiss the petition.³

Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

Where proceedings are stayed the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a bankruptcy order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.⁴

§ 22:95 Effect of bankruptcy order

On the making of a bankruptcy order, the Official Receiver shall thereby become the provisional trustee of the property of the bankrupt, and thereafter, except as directed by this Ordinance, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, nor shall proceed with or commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.¹

In the case of a debtor's petition, the Official Receiver as the provisional trustee may at any time appoint any person to act as the provi-

[Section 22:94]

¹Amended 39 of 1987 s. 2.

²Amended 76 of 1996 s. 6.

³Amended 45 of 1986 s.2; 76 of 1996 s. 6.

⁴Amended 76 of 1996 s. 6.

[Section 22:95]

¹Amended 76 of 1996 ss. 8 and 72; 18 of 2005 s. 3.

sional trustee of the property of the bankrupt in his place if he considers that:

- (a) the value of the property of the bankrupt is unlikely to exceed \$200,000; and
- (b) the person has the qualifications prescribed in Schedule 3.²

The power of the Official Receiver to appoint a person as provisional trustee includes power to appoint 2 or more persons as joint provisional trustees; but such an appointment must make provision as to the circumstances in which the provisional trustees must act together and the circumstances in which one or more of them may act for the others.³

This section shall not affect the power of any secured creditor to realize or otherwise deal with his security.

XIX. ONLINE RESOURCES

§ 22:96 In general

Legislation and courts:

<http://www.doj.gov.hk/eng/laws/>
<http://www.hklii.org/hk/other/hklrc/cp/>
<http://library.ust.hk/guides/legal/hk.html>
<http://www.clic.org.hk/ch/index.shtml>
<http://www.legislation.gov.hk/chi/home.htm>

Further information about Hong Kong:

CIA World Factbook: <https://www.cia.gov/library/publications/the-world-factbook/geos/hk.html>

²Added 18 of 2005 s. 3.

³Added 18 of 2005 s. 3.