

Baker McKenzie.

貝克·麥堅時律師事務所



**Doing Business in
Hong Kong**

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Table of Contents

| | |
|--|----|
| INTRODUCTION..... | 1 |
| ESTABLISHING A HONG KONG COMPANY..... | 3 |
| General overview..... | 3 |
| Formation of a company..... | 4 |
| Company administration..... | 9 |
| ESTABLISHING A BRANCH OF A NON-HONG KONG COMPANY..... | 16 |
| General overview..... | 16 |
| Registration as a branch..... | 18 |
| Business registration..... | 20 |
| Maintenance..... | 20 |
| Annual filing requirements..... | 21 |
| ESTABLISHING A REPRESENTATIVE OFFICE IN HONG KONG... | 23 |
| TAXES..... | 24 |
| IMMIGRATION..... | 27 |
| MANDATORY PROVIDENT FUND..... | 28 |
| LEASING..... | 30 |
| EMPLOYMENT CONTRACTS..... | 31 |
| HANDBOOK AND POLICIES..... | 33 |



INTRODUCTION

A person or corporation that wishes to establish a business presence in Hong Kong can do so in a number of different ways. The three most common forms of business presence in Hong Kong are:

- a Hong Kong company
- a Hong Kong branch of a non-Hong Kong company
- a Hong Kong representative office of a non-Hong Kong company

In cases where a foreign corporation intends to carry on substantial business activities in Hong Kong, the corporation will need to consider various factors before deciding whether to conduct the business through a branch or a subsidiary company. For example, the tax consequences (both in Hong Kong and overseas) of using each form might be significantly different. There are practical differences as well. The decision in each case depends on the particular facts of that case. The Hong Kong Office of Baker & McKenzie will be pleased to advise on this issue in each specific case.

A representative office, on the other hand, is appropriate only if the foreign corporation does not intend to enter into or perform contracts with customers in Hong Kong, but rather will limit its Hong Kong operations to merely dissemination and gathering of information and liaising with customers and potential customers - in other words, the promotion of the corporation's business carried on elsewhere.

This memorandum summarises the requirements for the establishment and maintenance of a Hong Kong company,

a branch and a representative office of a non-Hong Kong company. For the avoidance of doubt and unless otherwise specified, all references to a company in this memorandum refers to a private company limited by shares incorporated in Hong Kong under the Companies Ordinance (Cap 622 of the Laws of Hong Kong)(the “**Companies Ordinance**”).

The Hong Kong Office of Baker & McKenzie will be pleased to assist in establishing your presence in Hong Kong and provide ongoing corporate services to maintain its good-standing in Hong Kong.



ESTABLISHING A HONG KONG COMPANY

General overview

A company formed under Hong Kong law may be either limited by shares or by guarantee or unlimited. A company limited by shares can be either public or private. The usual form of a subsidiary company is a company limited by shares. This memorandum focuses only on a company limited by shares.

If a company is limited by shares, the liability of whose members (the term for “shareholders”) is limited to the amount, if any, unpaid on their shares. Such a company can be formed quickly, and requires little formality (see “Time required” below).

Briefly, a company requires at least one founder member who subscribes his name to the articles of association of the company. The articles of association must be filed with the Registrar of Companies (“**Registrar**”), who issues a certificate of incorporation certifying the company’s date of incorporation. All companies incorporated in Hong Kong must obtain a business registration certificate before it can commence business (see “Business registration” below).

Certain restrictions are imposed on a private company. Its articles of association must contain a restriction on the right of members to transfer their shares, limit the number of members to fifty (exclusive of any member who is current or past employee) and prohibit invitations to the public to subscribe for the shares or debentures of the company. However, a private company may be converted to a public company at any time by removing these restrictions from its articles of association.

Formation of a company

Time required

In addition to making a formal application with the Companies Registry in Hong Kong to incorporate a company, a company may now also be incorporated on-line on a website designated by the Companies Registry.

If the application for incorporation is made formally with the Companies Registry, the certificate of incorporation is usually issued after 4 working days from the date the application is filed. If the application is made on-line (or otherwise referred as E-incorporation), the certificate of incorporation will be generated electronically and available as soon as the on-line application is successfully completed.

Name

Where a company will be a wholly owned subsidiary of a foreign corporation, there is normally no objection to using the name of its parent with the addition of “(HK)” or “(Far East)” or the like before “Limited”, which must be specified in a company’s name. To expedite the approval process of a company’s name, the Registrar will usually accept for registration a company name if it satisfies certain preliminary requirements, namely, it is not the same as another name on the register of companies kept with the Registrar; and it does not give so misleading an indication of the nature of the company’s activities in Hong Kong as to be likely to cause harm to the public. If the company’s name is subsequently found to be objectionable, the Registrar is empowered to direct the company in question to change its name.



A company may use an English name or a Chinese name or an English name as well as a Chinese name for the purpose of incorporation. If a company is incorporated with a Chinese name as well as an English name, the two names together will appear on the certificate of incorporation and constitute the full formal name of that company. A company may also additionally adopt a trade name either in English or in Chinese informally.

Please note that the registration of a company name with the Companies Registry does not confer any trade mark rights or any other intellectual property rights in respect of that company name or any part thereof.

Share capital

A company's share capital is represented by the total amount of its issued shares. There is no minimum share capital required by the Companies Ordinance of a company. Since the change of company law on 3 March 2014, a company's issued share is no longer required to have a par value. Effectively a company has a lot of flexibility to determine the price of the shares every time they are issued without having to confine itself to the par value. The issued share capital of a company may be denominated in any currency and the currency in which it is intended to keep the books of account is not necessarily required to be in the same currency as the issued share capital of the company. A company may also change the currency of its share capital at any time by following the statutory procedures.

There is no requirement that the issued shares must be fully paid up upon issue; but the member(s) will be liable to pay up the unpaid balance in the event of a call by the director(s) or in the event of insolvency. The paid-up capital represents the amount of money actually received by a company with respect to its issued share(s) or received as a result of calls on the

member(s). The monies received together with any monies unpaid in respect of the issued share(s) in turn represent the maximum amount that the member(s) is/are liable to pay.

Stamp duty at the rate of 0.1% is generally payable on any transfer of shares by each of the transferor and the transferee, with the amount being calculated by reference to the stated consideration or the underlying net value of the shares being transferred, whichever is higher.

Members

A company should at all times have at least one member of record, otherwise there are adverse consequences. The member(s) need not be resident(s) or citizen(s) of Hong Kong and may be corporation(s) registered in Hong Kong or overseas. If share(s) other than the share(s) of the founder member(s) is/are issued, a return of allotments must be filed with the Registrar, disclosing the member(s) and his/their shareholdings.

However, where nominee shareholder(s) is/are used, the beneficial shareholder(s) is/are not revealed.

Directors and secretary

A company must at least have one director. If the company has only one director, that director must be an individual and not a corporate director. In addition, it is mandatory to appoint as the company's secretary a Hong Kong resident individual or a company having its registered office or a place of business in Hong Kong. A private company having only one director cannot have its sole director to act as the secretary. Where any corporate action is required to be effected by a director and



the secretary, it cannot be effected by one person who is both a director and the secretary.

The first director(s) is/are appointed by a company's founder member(s). The articles of association usually provide for subsequent appointments and removals which can be made by either the director(s) or the member(s). A statutory return of directors and secretary stating their name, usual residential or correspondence address (where appropriate), Hong Kong Identity Card number or the number and issuing country of any passport, together with a signed consent to act by the relevant director (embedded in the statutory return), must be filed with the Registrar within 15 days of the appointment of the director(s).

Anyone who is over the age of 18, subject to certain other minor exception, can be appointed a director. However, no corporate director is allowed in the case of a public company or a private company which is a member of a group of companies of which a listed company is a member. A listed company is one whose shares are listed on The Stock Exchange of Hong Kong Limited. There are also other disclosure requirements for directors of a listed company.

Articles of Association

Since the commencement of the new company law on 3 March 2014, a company no longer has a memorandum of association. All the provisions in the memorandum of association are deemed automatically transferred to the articles of association of the company as from 3 March 2014. The articles of association of a company are the equivalent of the charter or governing statutes of a foreign company. As a company has the same capacity, powers, rights and privileges of a natural person under law, there is no practical need to have an objects clause

in its articles of association, although it may elect to do so if preferred.

If a company's objects are stated in its articles of association, it shall not carry on any business or do anything that is not authorised by the objects clause and if it does, a member of the company may bring proceedings to restrain it from doing so. However, any act of the company which contravenes the objects clause will not be invalidated by reason only that it is not authorised by its articles of association.

Generally, a company's articles of association can be amended at any time so long as there is agreement by at least a 75% vote of the members in general meeting entitled to vote thereat or a written resolution of all of its members.

Registered office

The Companies Ordinance requires a company to have a registered office in Hong Kong to which all official communications and notices (including service of process) may be addressed. The intended address of a company's registered office must be completed in the incorporation form of the company.

Business registration

Any person who applies for incorporation of a company will be deemed to have made a simultaneous application for business registration. A company may elect for the issue of a business registration certificate which is valid for one year or for three years.

Upon approval of an application for company incorporation, the Companies Registry will issue a Certificate of Incorporation and the business registration certificate at the same time. By



law, the business registration certificate must be displayed at a company's place of business.

A separate business registration certificate must be obtained for each other place of business and each trade name of the company in Hong Kong.

Company administration

The corporate governing bodies of a company are its members (i.e. shareholders) and board of directors. There is no requirement that meetings of either the members or the directors be held in Hong Kong. Please also refer to "Meetings of members" and "Meetings of the board of directors" below.

Meetings of members

All meetings of members are called general meetings, including the annual general meeting. The Companies Ordinance gives a company, which is not a sole member company, the option of whether or not to hold an annual general meeting. A sole member company is not required to hold an annual general meeting. If a company has opted to hold an annual general meeting in every calendar year, the audited statement of comprehensive income and statement of financial position of the company, along with the director's/directors' and auditors' reports on such financial statements (the "**Annual Accounts**") are required to be laid before the member(s) at that time. If a company has opted not to hold an annual general meeting, it is still required to circulate the Annual Accounts to the members within the prescribed time.

There are essentially two kinds of resolutions by which a company may act in meetings of its member(s). An ordinary resolution is a resolution passed by a simple majority of those

voting at the meeting while a special resolution requires a 75% majority as well as 14 days' notice of the meeting to be given to the members entitled to vote at that meeting. The notice period can be reduced by members consenting to short notice.

Decisions made by the sole member must be memorialised and its terms recorded in the company's minute book.

Except for the removal of a director and/or auditor, a company may dispense with the holding of a general meeting (including the annual general meeting) if everything that is required or intended to be done at the meeting is done by written resolutions signed by all the members who at the date of the resolutions would be entitled to attend and vote at such meeting, provided that copies of all documents which are required to be laid before the meeting are given to each member prior to their signing the resolutions. The company's auditors must be provided with a copy of the proposed written resolutions and related documents. The company must also inform the auditors after the written resolutions have been passed and provide a copy thereof to the member within the specified time.

In addition, where a company has only one member, who is also a director of the company, it must record in a written memorandum the terms of any oral contract that it enters into with that member.

In the absence of special provisions in the articles of association of a company, the Companies Ordinance requires only a few matters to be dealt with by special resolution, such as amendments to the articles of the company, any change of name, or the winding up of the company. However, the articles of a company can be drafted to require other matters, such as



an increase in the share capital of that company, to be dealt with by special resolution or other qualified majorities.

Meetings of the board of directors

The board of directors is generally responsible for the general operations of a company, except those which must, by law or by its articles of association, be exercised by the members in general meeting. A resolution of the board can be passed at a physical meeting at which a quorum is present or, if the articles of association permit, by way of a written resolution of all the directors or by a telephone conference. There is no special requirement that meetings be held in Hong Kong or at any specific intervals. Decisions made by a single director must be memorialised and its terms recorded in a company's minute book.

The board of directors, in turn, is generally authorised to appoint a "managing director" who oversees day-to-day operations.

Changes in registered particulars

Changes to a company's registered office, the board of directors and the secretary must be reported within 15 days after the change to the Registrar. Certain other changes such as the increase of capital, change of articles of association, allotment of shares, creation of charge over certain types of assets of a company situate in or outside Hong Kong and passing of special resolutions must be reported to the Companies Registry within certain statutory time limits.

Shadow director

A shadow director includes someone who can influence a majority of the directors of a company. The Companies Ordinance also requires the particulars of a shadow director to be reported and certain penalties for a company's default which applies to a director also apply to a shadow director.

Reserve director

Where a company has only one member and that member is the sole director of the company, it may in general meeting nominate a natural person who has attained the age of 18 years as a reserve director of that company to act in the place of the sole director in the event of his death. The appointment of a reserve director must be reported to the Companies Registry within 15 days.

Annual return

Each company is required to file an annual return signed by a director or the secretary each year within 42 days after the anniversary of its dates of incorporation. The annual return contains such particulars as:

- all business names under which the company carries on business;
- the name(s) and address(es) of and number of shares held by all present member(s) and member(s) who has/have ceased to be member(s) since the last return;
- the date of registration of any transfer of shares since the date of the last return;
- the address of the registered office of the company;



- the addresses of the places at which the registers of members and of debenture holders are kept, if other than the registered office;
- particulars of company director(s) and secretary;
- particulars regarding the company's issued and paid-up capital; and
- any outstanding registrable charges created by the company over its assets, e.g. charges on land, on book debts of the company, on a ship, on goodwill, etc.

The annual return attracts a progressive filing fee (i.e. HK\$105 if filed within 42 days and up to the maximum of HK\$3,480 if filed after nine months). The Companies Ordinance has empowered the Registrar to compound offences for late filing of the annual return.

Statutory records and accounts

A company must keep its registers of charges, members, directors, secretary and minute books. Minutes evidencing all corporate actions taken in meetings and signed resolutions must be filed in a company's minute books. The books containing the minutes of proceedings of any general meeting of a company (but not minutes of directors' meetings) are open for inspection by any member without charge.

A company is also required to keep proper accounting records which must be open for inspection by the director(s) at all times. If the accounting records are kept outside Hong Kong, certain accounts and returns with respect to the business must be sent to and kept at a place in Hong Kong and open for inspection by the director(s). Please refer to "Meetings of members" above

for presentation of audited financial statements to member(s) of a company.

Auditor

Every company is required by law to appoint an auditor each year. The first audit of a company's financial statements must be completed within a sufficient period of time to permit the members to receive such financial statements in accordance with the statutory requirement. If the auditors resign, a company is required to file a specified form with the Companies Registry within 15 days.

Tax compliance

Subject to application exemptions, a company is required to file a profits tax return annually with the Inland Revenue Department. Typically, a company's financial statements will have to be filed with the return.

A general discussion of Hong Kong profits tax is contained in the "Taxes" section, below.

Dormant status

A company which has been formally placed into dormant company status will be exempt from the requirement of filing annual returns, holding annual general meetings (where appropriate), and preparing annual audited financial statements. A company will become dormant if it has filed with the Registrar a special resolution which states the date on which it will become dormant, which may be the date of delivery of the declaration to the Registrar or a specified later date.

A company is considered dormant if during the relevant period it refrains from entering into an "accounting transaction"



which, in essence, means any form of transaction which would need to be reflected in the accounting records of the company. However, the payment of fees by a company in order to comply with ordinances is excluded from the definition of an accounting transaction. It follows from this that a company can only become dormant and be registered as such if it is not carrying out any trading activities or any transactions giving rise to the need for entries in its accounting records.

Companies that have officially become dormant must still notify the Registrar of any change in their registered offices, secretaries, directors or other registered particulars.

To exit from its dormant status, it is necessary for the directors of a company to declare and file with the Registrar a further special resolution stating that it intends to enter into an accounting transaction. In addition, entry into an accounting transaction will automatically terminate the dormant status of that company and any of its shareholders who knew or ought to have known about the transaction and all of its directors may be held personally responsible for the transaction if they have not previously notified the Registrar of the cessation of its dormant status.

ESTABLISHING A BRANCH OF A NON-HONG KONG COMPANY

General overview

In order to establish a branch of a non-Hong Kong company in Hong Kong, an application for registration with the Registrar of Companies and the Commissioner of Inland Revenue should be submitted within one month of the non-Hong Kong company having establishing a place of business in Hong Kong. Registration with the Registrar may not even be necessary if the office of the branch is not used to transact business which creates legal obligations in Hong Kong. Representative offices are discussed separately below.

It is common for non-Hong Kong companies to register a branch using the address of a professional firm as a temporary measure prior to establishing an actual place of business in Hong Kong for various reasons, including obtaining the evidence of registration necessary to facilitate the lease of premises, to expedite visa applications for employees coming from overseas, and to enable the opening of bank accounts.

The branch will normally be registered in Hong Kong under the name of the non-Hong Kong company. However, a branch may be directed to change its corporate name for Hong Kong purposes if it is the same as or too similar to the name of an existing Hong Kong company or branch already on the Register of Companies (provided it is so directed within six months of registration) or if its corporate name is so misleading as to the nature of the activities which the branch carries on in Hong Kong as to be likely to cause harm to the public. Please note that the registration of a company name with the Companies Registry does not confer any trade mark rights or any other



intellectual property rights in respect of the company name or any part thereof.

Once established, the non-Hong Kong company must in each year file an Annual Return together with its latest published accounts. However, the filing of accounts will not be required if the non-Hong Kong company is neither required by the law of the place of its incorporation, the laws of any other jurisdictions where the company is registered as a company, nor the rules of the stock exchange or similar regulatory bodies in any of those jurisdictions to publish its accounts or to deliver copies of its accounts to any person in whose office they may be inspected as of right by members of the public. It must also inform the Registrar from time to time of changes in its corporate structure, statutes or management (e.g. amendments to its charter or governing statutes, changes in its corporate name and changes in the particulars of directors and secretary) in order for the branch to maintain its good standing under the laws of Hong Kong.

Special obligations imposed on a branch include the requirement that it conspicuously states, on its letterhead and in the place(s) it carries on business in Hong Kong, the non-Hong Kong company's name, the country of its incorporation and whether the non-Hong Kong company is a limited liability company.

Ceasing business in Hong Kong for a branch requires a notice of that fact in the specified form to the Registrar within 7 days after cessation. The non-Hong Kong company shall also inform the Commissioner of the cessation of business at the same time. However, any outstanding taxes or returns will need to be finalised and an authorised representative for service of process will need to be maintained for a period of at least 11 months after such cessation.

Registration as a branch

Within one month of the establishment of a place of business by the non-Hong Kong company in Hong Kong, the necessary documents for the application for registration of the branch must be submitted to the Registrar for filing. The branch may carry on business in Hong Kong pending its registration.

In order to register a branch with the Registrar, it is necessary for the non-Hong Kong company to file the following documents at the Companies Registry:

- A copy of the charter, statutes or memorandum and articles (or like documents) of the non-Hong Kong company, certified as a true and correct copy by an officer (director or secretary) or authorised representative in Hong Kong.
- A specified form which lists:
 - the name and place of incorporation of the non-Hong Kong company;
 - the date when the non-Hong Kong company established its place of business in Hong Kong;
 - the name and address of at least one person resident in Hong Kong who is authorised to accept on behalf of the non-Hong Kong company service of process and any notice required to be served on the non-Hong Kong company (the “**authorised representative**”);
 - the address of the principal place of business of the non-Hong Kong company in Hong Kong;
 - the addresses of the principal place of business, if any, and the registered office (or its equivalent) of the non-Hong Kong company in the place of its incorporation; and



- the following particulars of the directors and secretary:
 - full names;
 - any former names;
 - any aliases;
 - usual residential address (where appropriate);
 - passport number and issuing country of passport or, if the relevant person holds a Hong Kong Identity Card, the Hong Kong Identity Card number; and
 - date of their appointment.
- A copy of the certificate of incorporation of the non-Hong Kong company certified as a true and correct copy in the manner above-mentioned.
- A copy of the latest published accounts of the non-Hong Kong company or a statement in the specified form stating the fact that it is not required to publish accounts or that the non-Hong Kong company was only newly incorporated and accounts are not available.

If any of the original documents is not written in English or Chinese, a certified translation in English or Chinese in the prescribed manner must be filed instead. As for the certificate of incorporation, a certified copy of the original document together with its English or Chinese translation must be filed.

The prescribed form regarding business registration has to be filed with the above documents to the Companies Registry at the same time.

The non-Hong Kong company has to file with the Registrar within one month after the date on which it establishes the

place of business, particulars of charges created on certain types of properties situated in Hong Kong, if any.

Timing

The registration process normally takes about 8 working days from the date of filing the relevant registration documents at the Companies Registry.

Business registration

The Business Registration Ordinance requires every person (including a non-Hong Kong company) carrying on business in Hong Kong to register with the Commissioner of Inland Revenue. Any person who applies for registration of a non-Hong Kong company under the Companies Ordinance will be deemed to have made a simultaneous application for business registration. The branch may also elect for the issue of a business registration certificate which is valid for one year or for three years. A separate business registration certificate must be obtained for each place of business and each trade name used in Hong Kong by the non-Hong Kong company .

Upon approval of an application for registration, the Companies Registry will issue a Certificate of Registration and the business registration certificate to the non-Hong Kong company at the same time.

Maintenance

Maintenance of a branch of a non-Hong Kong company requires the routine updating of the various documents filed with the relevant authority.

The non-Hong Kong company must deliver a return to the Registrar within one month after any change in the following:



- its charter or governing statutes;
- the list of directors and secretary;
- the name or address of an authorised representative;
- the addresses of its registered office and its principal place of business;
- its place of business in Hong Kong; and
- its corporate name.

The non-Hong Kong company must also report to the Registrar within one month of the creation of charge over certain types of assets of the company situated in Hong Kong and within 15 days of the commencement of liquidation deliver to the Registrar for registration a notice in specified form.

Any change in the particulars filed under the Business Registration Ordinance must be submitted to the Commissioner within one month after the change.

Annual filing requirements

A non-Hong Kong company must within 42 days after each anniversary of the date of registration in Hong Kong deliver a return in specified form together with a certified copy of its latest published accounts to the Registrar for registration.

In the case of a non-Hong Kong company which has been incorporated for less than 18 months prior to the date of delivery of the return and the accounts of the non-Hong Kong company that are required to be published have not been made up, a statement stating that fact should be made in the annual return. Published accounts need not be filed with the Companies Registry if the non-Hong Kong company is neither

required by the law of the place of its incorporation, the laws of any other jurisdictions where the company is registered as a company, nor the rules of the stock exchange or similar regulatory bodies in any of those jurisdictions to publish its accounts or to deliver copies of its accounts to any person in whose office they may be inspected as of right by members of the public.

Tax compliance

A non-Hong Kong company which has a Hong Kong branch is, like a Hong Kong company, required to file a profits tax return annually with the Inland Revenue Department.

Generally, the accounts to be filed with the branch's tax return need only relate to the trade or business carried on in Hong Kong. These branch accounts do not need to be audited. The amount of profits subject to tax will generally be calculated on the basis of these branch accounts (as adjusted according to Hong Kong's tax rules). However, where the accounts do not disclose the true profits arising in or derived from Hong Kong, a formulaic assessment can be made by the Inland Revenue Department. The same proportion of the non-Hong Kong company's total profits as its turnover in Hong Kong bears to its total turnover will be treated as profits arising in or derived from Hong Kong and taxed accordingly. Where this is impracticable or inequitable, however, the Assessor may assess profits tax as a fair percentage of the turnover in Hong Kong.

A general discussion of Hong Kong profits tax is contained in the "Taxes" section below.



ESTABLISHING A REPRESENTATIVE OFFICE IN HONG KONG

A non-Hong Kong company that wishes to establish an office in Hong Kong for the purpose of promoting its business carried on elsewhere and liaising with customers and potential customers in Hong Kong can set up a representative office. This involves the obtaining of a business registration certificate in the similar manner described above as a non-Hong Kong company establishing a Hong Kong branch.

Registration of a representative office with the Registrar of Companies is not necessary as a representative is not meant to carry on business in Hong Kong. If the foreign corporation is going to carry on business beyond the scope of a representative office in Hong Kong, registration of its establishment in Hong Kong as a branch with the Companies Registry will be necessary. Baker & McKenzie's Hong Kong office will be pleased to provide advice in this regard in particular cases.

In the case of a representative office, the application for a business registration certificate should state that the business carried on in Hong Kong is that of a "representative/liaison office". A copy of the certificate of incorporation of the company is required for registration purpose.

The Commissioner of Inland Revenue will normally permit a Hong Kong representative office to file an initial profits tax return with no accounts and a simple statement of nil profits. After the first filing, the Commissioner will normally grant the non-Hong Kong company an exemption from filing further returns provided its Hong Kong office's activities continue to be restricted to promotional and liaison work.

TAXES

Every company carrying on business in Hong Kong is subject to profits tax (16.5%) on its Hong Kong sourced profits.

The tax position of branches and subsidiaries is generally the same. The reporting position of branches has been described above. The starting point with respect to a Hong Kong company is the company's audited profit and loss statement, adjusted to reflect Hong Kong's tax rules.

To be subject to profits tax, the company must both (i) carry on business in Hong Kong and (ii) earn profits from that business which are sourced in Hong Kong.

To determine where profits are sourced, the broad guiding principle is that one looks to see what the taxpayer has done to earn the profit in question, and where it has done it. If the profit-generating activities are in Hong Kong, then the resulting profits are taxable even if not received in Hong Kong. Broadly speaking, different tests apply to determine the source of different types of income.

With regard to profits from trading transactions, the primary test in determining where such profits arise is where the taxpayer's contracts of purchase and sale are "effected". There is no authoritative view as to the exact meaning of "effected". The Commissioner of Inland Revenue's published view is that it includes the actual steps leading to the existence of the contracts, including the negotiation and "in substance, conclusion" of the relevant contracts. Over time, the tax authorities have been taking a more expansive view of the circumstances in which profits can be said to have a Hong Kong source, and now tend to look also at the "totality of facts"



(besides merely where the “effecting” of contracts occur). The courts, on the other hand, have tended more recently to disregard more antecedent or incidental activities. However, the Commissioner has expressly conceded that a pure local buying office (that is, a purchasing branch) of a non-Hong Kong company is not subject to profits tax if that buying office only performs procurement functions and is not involved in any selling activities.

If the subsidiary or branch of a non-Hong Kong company engages in activities which give rise to services income, such income will generally be viewed as arising where the activities which generated such income were performed. The fact that the commissions or service fees are paid as a result of a sale producing foreign sourced profits does not in itself mean that the commissions or fees themselves are sourced outside Hong Kong. To the extent that the relevant activities are performed outside Hong Kong, however, the subsidiary or branch of the non-Hong Kong company should not be liable to Hong Kong profits tax.

There is no tax in Hong Kong on accumulated earnings and profits, and there is no requirement that dividends be paid. Dividends are in practice not subject to tax. Hong Kong does not impose withholding taxes on dividends or interest. There is no capital gains tax.

Losses can be carried forward indefinitely and set off against future profits. There are no “grouping” provisions to enable tax losses to be transferred to other entities. Where it is anticipated that a new business venture will generate start-up losses, it is often advisable to commence such a business through a branch, thereby (in some cases) enabling such losses to be deducted in the investor’s home country. When the local operations become

profitable, they can then be transferred to a local subsidiary company.

Apart from profits tax, there are also salaries tax (on employees, with associated reporting obligations imposed on employers) and property tax (ie, tax on property rental income) in Hong Kong, both of which could have implications for companies wishing to do business in Hong Kong.



IMMIGRATION

In conjunction with the establishment of a branch, subsidiary, or representative office in Hong Kong, a non-Hong Kong company generally wishes to post one or more of its senior employees to Hong Kong to oversee the operations here. To be authorised to work in Hong Kong, individuals must obtain a Hong Kong employment visa unless they have the Right of Abode or unconditional stay status in Hong Kong by virtue of either being born in Hong Kong or have otherwise resided in Hong Kong for a substantial period of time. Working in Hong Kong is defined as discharging one's normal duties of employment in Hong Kong regardless of the actual length of stay in Hong Kong, regardless of whether the employment is based in Hong Kong or overseas, and regardless of whether one is paid in Hong Kong.

Having a Hong Kong branch or representative office allows a company to sponsor foreign national employees for Hong Kong employment visas. In the case of a subsidiary, the Hong Kong company normally acts as the sponsor. If the company is not yet established, another person in Hong Kong (such as a professional services company) may sponsor the employee. As the application process for a Hong Kong employment visa can take up to six weeks, consideration should be given to an early lodgement.

Baker & McKenzie will be pleased to provide further advice on the necessary procedures and required documentation.

MANDATORY PROVIDENT FUND

The mandatory provident fund (“**MPF**”) system came into operation on 1 December 2000 under which all employers and employees are required to make contributions based on 5% of employees’ relevant income, subject to the minimum and maximum monthly income levels. The minimum monthly income level is HK\$7,100 effective 1 November 2013, and the maximum monthly income level is HK\$30,000 effective 1 June 2014.

Certain persons, employers and members of MPF-exempted occupational retirement schemes are exempt from compliance with MPF requirements. Failure to comply with MPF requirements by employers constitutes an offence and is subject to heavy penalty.

With rising public expectation towards investor protection and members’ autonomy in choosing MPF schemes in recent years, the following changes have been implemented in the fourth quarter of 2012:

- (a) the Employee Choice Arrangement (“**ECA**”) – whereby an employee will be allowed to elect, at least once every year, to have their accrued benefits derived from the employee’s mandatory contributions made during their current employment transferred to an MPF scheme (that is a master trust scheme or industry scheme) of their choice; and
- (b) MPF intermediaries’ regulations – whereby the existing administrative and regulatory arrangement in relation to MPF intermediaries will be strengthened by statute, so as to enhance the MPF intermediaries’ compliance with the



conduct requirements governing the sales and marketing of MPF products.

Baker & McKenzie will be pleased to give advice in relation to various aspects of the MPF system.

LEASING

Baker & McKenzie can advise on all aspects of leasing retail spaces, offices and residential accommodations in Hong Kong and can put you in touch with local property agents to assist with your search for suitable premises. Landlords frequently ask prospective tenants to sign a contractually binding offer or booking form for the premises before the lease itself is negotiated. It is generally advisable to take legal advice before signing any preliminary agreement, particularly in relation to commercial premises.



EMPLOYMENT CONTRACTS

Apart from limited exceptions, the Employment Ordinance applies to every employee working in Hong Kong or hired by a Hong Kong entity, regardless of whether or not the contract is oral or in writing and irrespective of the amount of earnings. The rights of employees are governed by the provisions of the Employment Ordinance, any other applicable statutes, their contracts of employment and common law principles.

All employment in Hong Kong is contractual and there is no concept of employment “at-will”. Although it is not mandatory, a written contract is recommended, as it helps to avoid a dispute over the terms of employment. The usual practice is for employers to issue comprehensive offer letters with accompanying standard terms and conditions that set out the key terms of employment. Offer letters could invariably be long or short subject to each employer’s preference but should include certain mandatory terms. In areas where the contract is silent, the Employment Ordinance will supply the terms. Issues of general concern provided for under the Hong Kong legislation include wages, bonuses, annual leave, maternity leave, sick leave, termination, data privacy, equal opportunities and employees’ protection.

It is also a common practice for employers to supplement the offer letter and standard terms with an employment handbook that expands on certain aspects of the employment relationship and includes company policies and rules.

Employers in Hong Kong typically grant shares or options to reward top management and key employees. There is no restriction for the operation of share or option plans in Hong Kong for private companies in so far as the terms are not in

contravention with the general laws of Hong Kong. Stock option plans of listed companies are governed by the listing rules. When considering the terms of a stock option plan, special attention should be paid to issues relating to securities, employment law, data privacy law, tax and those arising from the Occupational Retirement Schemes Ordinance and the Mandatory Provident Fund Schemes Ordinance. Regulated companies should also be aware of obligations imposed by the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions Ordinance) which came into force in April 2012.

Baker & McKenzie will be pleased to provide further information or to advise on any existing contract, incentive plan, stock option arrangement or benefits plan. We regularly advise on all aspects of the employment relationship including drafting or reviewing non-competition provisions, confidentiality and intellectual property agreements, secondment arrangements and expatriate related issues.



HANDBOOK AND POLICIES

Employment handbooks are typically used to govern employee behaviour and are generally non-contractual although breaches of policies and procedures may give rise to termination depending on the wording of the policy and/or whether the situation warrants such action.

Employment handbooks usually comprise of policies on a wide range of matters including grievance, disciplinary, data privacy, equal opportunities, occupational safety and health, codes of conduct and conflicts of interest. There are a number of key pieces of legislation which employers should be aware of including the Personal Data (Privacy) Ordinance and the anti-discrimination laws. Highlights are set out below.

Under the Personal Data (Privacy) Ordinance, employers have obligations to ensure strict compliance in the course of collecting, retaining and using personal data of employees and anyone from whom they obtain personal data. Where the Personal Data (Privacy) Ordinance applies, data users must comply with principles governing the collection, holding, processing and use of personal data. Employers typically discharge their information obligations by providing a Personal Information Collection Statement (“**PIC**”) to those people from whom they collect personal data at the time of first collection. Employers are recommended to formulate and develop data privacy policies and codes of practice for implementation in the workplace.

Anti-discrimination law is founded on the Sex Discrimination Ordinance, the Family Status Discrimination Ordinance, the Disability Discrimination Ordinance and Race Discrimination Ordinance. Under these laws, it is unlawful to discriminate

on the grounds of sex, marital or family status, pregnancy, disability or race in Hong Kong. Sexual, disability and racial harassment are also prohibited. There is currently no legislation prohibiting discrimination on the grounds of religion, age, sexual orientation and no legislation governing equal pay. An employer who is found guilty of discrimination will be liable for damages, including injury to feelings. The various ordinances protect against direct and indirect discrimination, victimization, hostile work environment, harassment and vilification. It should be noted that not all these protections apply to all the ordinances.

The Equal Opportunities Commission of Hong Kong issues codes of practice on employment and recommends that employers implement policies to eliminate discrimination and harassment in the workplace. An employer has a defence against a claim brought by an employee on the basis of discrimination or harassment if it has taken all reasonably practicable steps to prevent discrimination and harassment from occurring in the workplace. Employers must be able to demonstrate that policies have been implemented and that employees are aware of and receive training in respect of these policies in order to provide a basis for such defence.

The use of social media, internet and emails by employees in the workplace has substantially exposed employers to liabilities for offences committed by their employees. Employers are recommended to formulate and implement effective policies to reduce their liabilities in this respect.

Employers should consider issuing, if they have not already done so, an employee handbook that sets out detailed policies to address the full range of employment law challenges and legal obligations imposed upon them including issues relating



to data privacy, equal opportunities, social media and internet use.

Baker & McKenzie will be pleased to review any existing policies or provide draft policies for reference. We could also provide a sample PIC statement and advice on general data protection compliance obligations.



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