



# ICLG

The International Comparative Legal Guide to:

## **Business Crime 2016**

**6th Edition**

A practical cross-border insight into business crime

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Business Crime*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of business crime.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting business crime, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in business crime laws and regulations in 31 jurisdictions.

All chapters are written by leading business crime lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Gary DiBianco and Ryan Junck of Skadden, Arps, Slate, Meagher & Flom LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# Hong Kong



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## Haldanes

### 1 General Criminal Law Enforcement

#### 1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The Hong Kong Police Force is generally responsible for maintenance of law and order in Hong Kong, and is bestowed with powers to conduct criminal investigations and commence prosecutions. There are specialist units within the Hong Kong Police Force that deal with business crimes. For example, the Commercial Crime Bureau (“CCB”) prosecutes serious and complex commercial fraud, and the counterfeiting or forgery of currency, commercial instruments and credit cards. The Cyber Security and Technology Crime Bureau (“CSTCB”), which used to be one of the CCB’s divisions, was recently established in January 2015 to specifically handle computer and technology crimes. On the other hand, the Organized Crime and Triad Bureau (the “OCTB”) prosecutes organised crimes and syndicated criminal activities including money laundering.

The Independent Commission Against Corruption (“ICAC”) is the independent investigative authority for prosecuting bribery and corruption offences both in the public and private sectors in Hong Kong. The Customs & Excise (“C&E”) prosecutes crimes concerning intellectual property rights infringement, illegal imports and exports as well as dutiable commodities.

With respect to offences in the financial market, the Securities and Futures Commission (“SFC”) has extensive powers to investigate, discipline and prosecute, financial institutions, licensed persons and market participants on various forms of market misconduct including insider dealing, price rigging, false trading, market manipulation together with other types of regulatory offences.

While Hong Kong is a Special Administrative Region of the People’s Republic of China, its legal system and legal enforcement authorities are entirely distinctive from that of Mainland China under the “one country, two systems” policy. As such, there is no distinction of enforcement authorities at the national and regional levels within Hong Kong.

#### 1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

The Department of Justice (“DOJ”) has the overall responsibility for conducting criminal prosecutions in Hong Kong, while the aforesaid authorities initiate investigation based on the nature of the business

crimes as described in question 1.1 above. The DOJ works with these investigative authorities by providing legal advice, making prosecution decisions and representing the government in legal proceedings, particularly on cases that are complex in nature or those that involve important points of law or public interest issues. In practice, prosecution at the summary level (i.e., at the Magistrates’ courts, which are the lowest level of criminal courts in Hong Kong) involve simple cases that are processed by the investigative bodies themselves and may not require the specific involvement of the DOJ.

In determining whether or not to prosecute, the DOJ and these investigative authorities generally consider two issues: first, is the evidence sufficient to justify the institution of criminal proceedings? Second, if it is, does the public interest require a prosecution to take place?

#### 1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

Some agencies mentioned in question 1.1 above have powers to impose civil and administrative penalties.

For example, the SFC enforces the provisions of the Securities and Futures Ordinance under a dual civil and criminal regime – it can either bring a market misconduct case before a civil tribunal named the Market Misconduct Tribunal (“MMT”) or commence prosecution in the criminal courts.

For matters before MMT, the SFC can seek civil sanctions against a person found to have engaged in market misconduct such as payment of restitution, disqualification as a director, liquidator, or receiver or manager of a corporation, “cold shoulder order” (i.e. prohibition from dealing directly or indirectly in the Hong Kong financial market) and “cease and desist order” (i.e. a form of permanent injunction against the misconduct in question).

For regulatory matters, the SFC can take out disciplinary actions by itself against licensed persons or corporations, such as revocation or suspension of licences, prohibition of application for licences, fine and reprimand.

### 2 Organisation of the Courts

#### 2.1 How are the criminal courts in Hong Kong structured? Are there specialised criminal courts for particular crimes?

Criminal prosecutions can be brought at different levels of criminal

courts in Hong Kong depending on the gravity of the offences and the potential sentencing that the charges would attract.

Magistrates' Courts – For less serious offences, charges can be brought at Magistrates' Courts which can impose a maximum of two years' imprisonment for a single charge and three years' imprisonment for multiple charges.

District Court – For more serious cases, charges can be brought at the District Court, which can impose up to a maximum of seven years' imprisonment.

Court of First Instance of the High Court – For offences of a severe gravity or significant scale, the government enforcement agents can bring charges at the Court of First Instance at the High Court, which can impose a maximum sentence of life imprisonment (this is subject to the statutory maximum penalty of the particular offences concerned).

Criminal appeals are generally handled by the Court of First Instance, the Court of Appeal and the Court of Final Appeal.

There are no specialised criminal courts for particular crimes.

## 2.2 Is there a right to a jury in business-crime trials?

Trials are conducted before a jury in the High Court. However, there is no right to a jury trial at the Magistrates' Courts or the District Court.

## 3 Particular Statutes and Crimes

### 3.1 Please describe any statutes that are commonly used in Hong Kong to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

#### o Fraud and misrepresentation in connection with sales of securities

Under the Securities and Futures Ordinance, it is an offence for a person to employ any device, scheme or artifice in a transaction involving securities, futures contracts or leveraged foreign exchange trading, with intent to defraud or deceive. Similarly, it is an offence to engage in any act, practice or course of business that is fraudulent or deceptive, or would operate as fraud or deception.

Under the same Ordinance, a person is guilty of disclosure of false or misleading information inducing transactions if he discloses, disseminates or circulates information that is false or misleading as to a material fact in inducing securities or futures transactions, and that he knows that, or reckless as to whether, the information is misleading.

#### o Accounting fraud

Under the Theft Ordinance, a person is guilty of false accounting if he destroys, defaces, conceals or falsifies any account, record or document required for an accounting purpose, or where he produces or makes use of any such account etc., knowing it is or may be misleading, false or deceptive in a material particular. The offender must have acted dishonestly with a view to gain for himself or another, or with intent to cause loss to another.

#### o Insider trading

"Insider trading" is termed "insider dealing" in Hong Kong, and it is an offence under the Securities and Futures Ordinance. In general terms, it is an offence for a person who has insider information to deal in securities, encourage or procure another person to deal in such securities, or disclose insider information to another knowing or having

reasonable cause to believe that the other person will make use of information for the purpose of dealing, etc.

#### o Embezzlement

There is no specific offence of embezzlement in Hong Kong. Such conduct will likely be prosecuted as fraud or theft under the Theft Ordinance, or conspiracy to defraud under the common law.

A person commits fraud if he by any deceit and with intent to defraud induces another person to commit an act which results in benefit to any person other than the person being defrauded; or results in prejudice or a substantial risk of prejudice to any other person.

In respect of theft, a person commits an offence if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.

Further, under the common law, it is an offence for two or more persons to agree dishonestly with the purpose of causing economic loss to, or putting at risk the economic interests of another; or, with the realisation that the use of those means may cause such loss or put such interests at risk. While an intention to defraud is a necessary element, actual detriment need not be shown.

#### o Bribery of government officials

This is an offence under the Prevention of Bribery Ordinance which prohibits a person to offer any advantage to a public servant as an inducement to or reward for that public servant's performance or forbearance in performing any act in his capacity as a public servant. For the recipient side, it is also an offence for the public servant to accept any advantage as an inducement to or reward.

#### o Criminal anti-competition

Anti-competition conduct is not a criminal offence in Hong Kong. Such conducts are regulated under the Competition Ordinance, which was enacted in June 2012 but is not expected to come into force until at least late 2015. Only civil sanctions are available under the Competition Ordinance.

#### o Tax crimes

There are numerous revenue and customs related offences in Hong Kong. The most commonly prosecuted offence is tax evasion under the Inland Revenue Ordinance, whereby a person wilfully with intent evades tax in Hong Kong by, for instance, making any false statements in his tax return or in any answers to the questions raised by the Inland Revenue Department.

#### o Government-contracting fraud

There is no specific offence relating to government-contract fraud. Generally speaking, this can be prosecuted as fraud under the Theft Ordinance or bribery under the Prevention of Bribery Ordinance (see above).

#### o Environmental crimes

There are different types of environmental crimes in Hong Kong. For example, unauthorised land filling and fly-tipping activities are offences under the Waste Disposal Ordinance. A person commits an offence if he uses any land or premises for the disposal of waste without the necessary licence from the Director of Environmental Protection to use the land or premises for that purpose.

#### o Campaign-finance/election law

The election law is generally regulated under the Elections (Corrupt and Illegal Conduct) Ordinance.

Under this Ordinance, any person who provides, or meets all or part of the cost of providing any food, drink or entertainment for another person as an inducement to or a reward for that person or a third person to vote or not to vote at the election for particular candidate(s) shall be guilty of an offence.



Any person who solicits, accepts or takes food, drink or entertainment as an inducement or reward for performing the above act shall likewise be guilty of an offence.

In addition, only a candidate and election expense agent appointed by him can incur election expenses. Any person who incurs election expense without the candidate's authorisation is liable to commit an offence under this provision.

**o Market manipulation in connection with the sale of derivatives**

False trading and price rigging are offences under the Securities and Futures Ordinance regarding market manipulation in connection with the sale of derivatives.

False trading is essentially concerned with the creation of a false or misleading appearance of active trading in securities or futures contracts, or false or misleading appearance as to the price of or market in securities or futures contracts.

Price rigging prohibits any sort of fictitious or artificial transaction or device undertaken with the intention that, or being reckless as to whether or not it has the effect of maintaining, increasing, reducing, stabilising or causing fluctuations in the prices of securities and futures.

**o Anti-money laundering or wire fraud**

Under the Organized and Serious Crimes Ordinance, it is, in general terms, an offence to deal with proceeds of an indictable offence and the alleged offender knows or has reasonable grounds to believe that this is the case.

**3.2 Is there liability for inchoate crimes in Hong Kong? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?**

Yes, there is liability for inchoate crimes in Hong Kong.

Generally speaking, under the Crimes Ordinance, a person can be liable for attempting to commit a crime if, with intent to commit an offence, he does an act which is "more than preparatory" to the commission of the offence. A person may be guilty of attempt even if it would be impossible to commit the substantive offences.

## 4 Corporate Criminal Liability

**4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?**

Legislation such as the Companies Ordinance makes express provision for corporate liability. Further, a company is a "person" in the eyes of the Hong Kong law and is therefore capable of being prosecuted unless a statute indicates otherwise.

The common scenario is that companies can be prosecuted for strict liability offences where the employee's conduct is considered the act of the company.

In addition, with respect to offences involving a requisite mental element, a company can be liable if the act and state of mind of its director, manager or senior employee who is its "directing mind" can be attributed to the company.

**4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?**

Yes, personal liability for company officers is often specifically stipulated in statutory provision whereby a company commits

an offence with the consent or connivance of, or because of the negligence of, the officers concerned. The officers will be liable for the like offence provided that each and every element of an offence is proved beyond reasonable doubt by the prosecution.

**4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?**

The Prosecution Code is silent on this point. The government authorities generally have the discretion to decide whether to pursue an individual, an entity, or both. Such decisions are normally made on a case-by-case basis based on sufficiency of evidence and public interest.

## 5 Statutes of Limitations

**5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?**

There are no limitation periods for prosecuting indictable offences, which are generally more serious in nature. However, for offences which are triable in the Magistrates' Courts only, proceedings shall generally be commenced within six months from the time when offence arose.

**5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?**

Offences relating to conspiracy are generally indictable offences which are not subject to any limitation period.

**5.3 Can the limitations period be tolled? If so, how?**

No, they cannot.

## 6 Initiation of Investigations

**6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.**

Government authorities can commence an investigation upon receipt of information from a complainant or other sources of information, or upon having reasonable suspicion of any form of crime or misconduct.

The CCB, ICAC and SFC investigations are commonly triggered by reports made by complainants, who are usually victims or aggrieved parties of the crime concerned.

The ICAC also accepts complaints that are made anonymously. Media reports and self-reporting by corporations or their employees concerning a particular crime may also trigger investigations by these agencies.

In addition, the SFC monitors the stock market through its Market Surveillance System, which contains real-time market transaction data, and proactively identifies any irregular and unusual market activities and commences investigations.

## 6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

The Hong Kong authorities co-operate with foreign prosecutors in investigation, prosecution and prevention of crimes and in the conduct of criminal proceedings pursuant to the terms of international treaties or other bilateral agreements of mutual legal assistance.

## 7 Procedures for Gathering Information from a Company

### 7.1 What powers does the government have generally to gather information when investigating business crimes?

The government generally has the powers to obtain search warrants to search suspicious premises and seize documents, arrest suspects and interview them under caution. In addition, the SFC also has the power to issue a notice compelling a person to produce documents or to answer questions relevant to the investigation, whereas the ICAC has the power to compel a suspect to produce a statutory declaration setting out particulars of his properties, expenditures and liabilities and provide all documents in that connection.

### Document Gathering:

#### 7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

As mentioned in question 7.1, certain authorities may issue a notice to demand a company to produce documents. The general criteria for issuing such a notice are that there are reasonable suspicions that an offence has been committed, and that the recipient of the notice is in possession of such information or documents.

The authorities can also apply to the courts for a search warrant to raid a company and seize documents, and this often occurs if they take the view that issuing a notice may likely prejudice the investigation or tip-off the suspects who are at large.

#### 7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Hong Kong recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Hong Kong's labour laws protect personal documents of employees, even if located in company files?

Yes. The company can assert the following to protect themselves against production or seizure:

- legal professional privilege ("LPP") – the concept of LPP is well-recognised in Hong Kong. The two main categories of LPP are:
  - (1) legal advice privilege, which applies to communications between clients and their lawyers made for the purpose of giving or receiving legal advice. Advice from in-house lawyers is also generally privileged, provided that the in-house lawyer was performing a legal function in entering into such communications; and

(2) litigation privilege, which applies to communications between lawyers (and in some circumstances their clients) and third parties made for the dominant purpose of obtaining legal advice or collecting evidence in respect of existing or contemplated litigation; and

- any public interest grounds that such materials should not be produced to the authorities.

In practice, when the company or its legal representatives claim LPP on certain documents, such materials will be placed in sealed envelopes by the authorities in the presence of the company's authorised representatives and shall not be used for investigation purposes in the interim. The target company is at liberty to take out an application to the Hong Kong courts to argue that such materials are covered by LPP and should not be disclosed to the authorities.

#### 7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The same principles stated in question 7.2 above shall apply.

#### 7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

The same principles stated in question 7.2 above shall apply.

### Questioning of Individuals:

#### 7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

If an employee, officer or director of a company is suspected of committing a criminal offence, he may be arrested by the authorities and thereafter subject to questioning by way of cautioned interview.

Alternatively, if the company is suspected of committing a crime, it can authorise an employee, officer or director to attend the cautioned interview and answer questions on its behalf.

The interview usually takes place at the offices of the government authorities concerned.

#### 7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Third parties (who are likely witnesses instead of suspects) cannot be arrested or compelled to attend interviews for questioning. However, the authorities can issue production notice mentioned in question 7.1 above to third parties to compel them to provide information.

#### 7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

The common law as well as the Hong Kong Bill of Rights Ordinance provide that a person has the right not to be compelled to testify against himself or to confess guilt, i.e., the right to silence. In

addition, a person in custody is also entitled to consult privately with a lawyer and have the lawyer's representation during questioning.

It should be noted that an Interview at the SFC is fundamentally different from that of other law enforcement agencies such as the police or the ICAC. Given the SFC's role as the regulator and gatekeeper of the financial market, the right to silence in SFC interviews is taken away by virtue of the Securities and Futures Ordinance. The interviewee is under a strict duty to answer all the questions raised by the SFC, failing which it would constitute a criminal offence.

Nevertheless, the interviewee can protect himself by making a "section 187 declaration" under the Ordinance if he considers that his answer to a particular question might tend to incriminate him. Once the declaration is made, any answer in that connection shall not be admitted as evidence in criminal proceedings against him save for a number of limited exceptions. The effect of such declarations, however, cannot be extended to disciplinary or civil and administrative proceedings.

## 8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

### 8.1 How are criminal cases initiated?

Generally speaking, the government authorities initiate criminal prosecutions by laying charges against the individual defendants, or issuing summonses to summon them to attend court. For company defendants, criminal proceedings are initiated by way of summonses.

After charging an accused, the authorities are required to bring him before a magistrate at the earliest opportunity. In practice, this would be done within 48 hours of laying the charge.

### 8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

In deciding whether to bring criminal charges, the DOJ has to abide by the Prosecution Code (latest version dated 2013) which stipulates two requisite components: sufficiency of evidence; and public interest.

In assessing the sufficiency of evidence, the DOJ has to consider whether there is admissible and reliable evidence to support a prosecution and, together with any reasonable inferences able to be drawn from it, the offence will likely be proven. The test is, therefore, whether the evidence demonstrates a reasonable prospect of conviction.

The DOJ will also consider the following non-exhaustive list of factors in evaluating whether a prosecution would be in the public interest:

- The nature and circumstances of the offence, including any aggravating or extenuating circumstances.
- The seriousness of the offence.
- Any delay in proceeding with a prosecution and its causes.
- Whether or not the offence is trivial, technical in nature, obsolete or obscure.
- The level of the suspect's culpability.
- Any cooperation from the suspect with law enforcement or demonstrated remorse: the public interest may be served by not prosecuting a suspect who has made admissions, demonstrated remorse, compensated a victim and/or cooperated with authorities in the prosecution of others.

- Any criminal history of the suspect.
- The attitude, age, nature or physical or psychological condition of the suspect, a witness and/or a victim.
- The prevalence of the offence and any deterrent effect of a prosecution.

### 8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

The defence cannot agree with the government to resolve a criminal matter by pre-trial diversion or deferred prosecution.

For the less serious offences concerning individuals, the defendant or his lawyer can make a written application to DOJ to negotiate a bind-over *in lieu* of a criminal conviction. However, this very rarely applies to business crimes such as fraud, bribery or financial crimes.

According to the Prosecution Code, the DOJ has to consider the following before granting a bind-over:

- (a) whether the public interest requires the prosecution to proceed;
- (b) whether the consequences to the offender would be out of all proportion to the gravity of the offence;
- (c) the likely penalty in the event of conviction;
- (d) the age of the offender, his or her record, character, mental state (at the time of offending and presently);
- (e) the views of the victim; and
- (f) the attitude of the offender to the offence.

### 8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

The criminal courts have powers to make a compensation order to a victim in respect of personal injury, loss or damage which results from the offence in question. This compensates the victim in a summary way, which avoids the need for civil proceedings. It should be noted that a compensation order cannot be made alone, and it must be done at the same time as the sentence or other order.

In particular, there are mandatory restitution orders against the accused who is convicted of corruption or bribery offence under the Prevention of Bribery Ordinance. The restitution order may be enforced in the same manner as a civil judgment of the High Court.

## 9 Burden of Proof

### 9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

According to the Hong Kong Bill of Rights Ordinance, any person charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law. The burden of proof is upon the prosecution - it is for the prosecution to establish the accused's guilt by proving every element of the crime charged. The defendant has the burden to prove every element of any affirmative defence raised on a balance of probabilities.



### 9.2 What is the standard of proof that the party with the burden must satisfy?

The general rule is that the prosecution must prove the accused is guilty “beyond reasonable doubt”. Where the burden lies with the defence, the standard of proof is on a balance of probabilities.

### 9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

In the Magistrate’s Court and the District Court, the magistrate or judge are arbiters of both fact and law. In the High Court, the jury is the arbiter of fact while the judge is the arbiter of law.

## 10 Conspiracy / Aiding and Abetting

### 10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

The general foundation of secondary party liability in Hong Kong is the Criminal Procedure Ordinance, which states that any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence. To establish this liability, it is necessary both to ascertain the substantive offence alleged to have been committed by the parties, and also to identify the party who is to be treated as the principal.

Further, under the Crimes Ordinance, where two or more persons agree to commit a criminal act, they may be liable for conspiracy to commit a substantive offence.

## 11 Common Defences

### 11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Yes. Where the law defines an offence as requiring a particular state of mind by the defendant, the prosecution has to prove beyond reasonable doubt that the defendant possessed the required state of mind to commit a crime.

### 11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant’s knowledge of the law?

No, ignorance of the law is not a defence.

### 11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant’s knowledge of the facts?

This defence is available when the defendant’s honest and reasonable mistake of fact negates the requisite state of mind for the offence. It is a defence which the defendant bears the onus of establishing to the standard of the balance of probabilities. If the defendant only adduces some evidence of such a defence, but not sufficient to establish it on the balance of probabilities, then the defence fails.

For example, in bribery offences, if the defendant can adduce evidence on a balance of probabilities that he has reasonable and honest belief (albeit erroneous) that the acceptance of gifts as an employee is permitted due to particular circumstances, he should be acquitted since this mistake prevented him from forming the requisite intent to commit the crime.

## 12 Voluntary Disclosure Obligations

### 12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

The general rule is that a person is not under any positive obligation to report crimes or provide assistance in any criminal investigations to the government in Hong Kong. Failure to report crimes do so does not generally attract any criminal liability.

However, for certain offences, a person may be under positive duty to report crimes. According to the Organised and Serious Crimes Ordinance, when a person knows or suspects that, any property represents (a) the proceeds of drug trafficking or other indictable offences or was, or is intended to be, used in connection with such offences, or (b) terrorist property, he or she should, as soon as reasonably practicable, report his or her knowledge or suspicion to the Joint Financial Intelligence Unit or compliance officer designated by his or her employer for anti-money laundering purposes. Failing to do so would constitute a criminal offence.

## 13 Cooperation Provisions / Leniency

### 13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government’s ability to offer leniency in exchange for voluntary disclosures or cooperation?

If a person voluntarily discloses his criminal conduct to the government by way of self-reporting or cooperates with the authorities in a criminal investigation against him, it would operate

as a powerful mitigating factor if he is eventually prosecuted and convicted. He may receive as much as two thirds discount in sentence. Further, it would facilitate the prosecution's authorities' decision on whether immunity should be granted, although this is not guaranteed.

The decision to grant immunity and the balancing process involved will be strongly influenced by:

- (a) the nature of the evidence the witness may be able to give and its significance to the prosecution of the case;
- (b) the antecedents of the witness;
- (c) his perceived credibility (including the fullness of his disclosure of facts and matters within his knowledge) and any discernible motive for not telling the whole truth (including the receipt, promise or expectation of a benefit);
- (d) his level of involvement in the offence being prosecuted (which should generally be lower than that of the offender being prosecuted); and
- (e) the presence of any supporting evidence.

**13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Hong Kong, and describe the favourable treatment generally received.**

There are no formal voluntary disclosure programmes in place in Hong Kong that can qualify an entity for amnesty or reduced sanctions. It will be determined by the authorities on a case-by-case basis. However, full and frank disclosure of all circumstances of the case is expected.

## 14 Plea Bargaining

**14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?**

Yes. The defendant can agree with the prosecution to plead guilty to reduced number of charges or charges of lesser gravity on the basis of a set of agreed facts to resolve the criminal proceedings expeditiously.

However, plea bargains in the sense of reaching an agreement with the prosecution as to sentence are not permitted.

**14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?**

Pursuant to the Prosecution Code, three tests must be satisfied before entering into a plea bargain: (a) there is admissible evidence available to prove the charges to which pleas have been offered; (b) the charges adequately reflect the criminality of the conduct alleged against the accused; and (c) the charges give to the court adequate scope to impose penalties appropriate to address that criminality.

Further, in all cases where negotiations are under way, the prosecutor should consult where appropriate with the investigator-in-charge of the case and any victim of crime, so as to inform them of the action

being contemplated and of the reasons for it. The prosecutor must receive their views and take them reasonably into account when decisions are being made – not by way of instructions but as another means of informing such decisions.

The Court is generally not involved in the plea bargain process, but the basis of plea is always subject to the approval of the court.

## 15 Elements of a Corporate Sentence

**15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.**

The sentencing process is an overall assessment of the available evidence and legal issues, and is by no means a pure mathematical exercise. The court will first of all ascertain the maximum penalty that may be imposed for the offences, and determines if there is any statutory minimum or mandatory sentence. Secondly, the court will consider any tariff or sentencing guidelines laid down by higher courts which are binding. Thirdly, the court will assess the gravity of the offence and take into account any aggravating (such as breach of trust, premeditation, etc.) or mitigating factors (such as restitution) in the facts.

The court will then turn to consider the defendant's personal background, such as his education, employment history, any contribution to the society and whether he is of clear record. His motive for committing the crime and his behaviour since the commission of the offence will also be evaluated, for example, whether he fully co-operates with the investigation authorities, pleads guilty at the first available opportunity and takes remedial measures after the offence.

Generally speaking, a one-third discount is available for a plea of guilty.

**15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.**

The principles stated in question 15.1 shall also apply to sentencing on a corporation in a similar way.

## 16 Appeals

**16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?**

Yes. The defendant can appeal a guilty verdict after trial. While the prosecution cannot appeal a non-guilty verdict, it can do so by way of "case stated" where the trial judge has erred in law or acted in excess of jurisdiction.

**16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?**

Yes. The defendant can lodge an appeal against sentence and the prosecution can apply for a review of sentence.

### 16.3 What is the appellate court's standard of review?

The principles applied by the appellate court are as follows:

Appeal against conviction – the court must allow an appeal against conviction if it takes the view: (a) that the conviction is unsafe or unsatisfactory; (b) that there is a wrong decision on a point of law; or (c) that there was material irregularity in the course of the trial.

Appeal against sentence – in allowing an appeal against sentence, the appellant must show that the sentence was wrong in principle, that it was manifestly excessive, that it was based on a wrong factual premise or matters were wrongly taken into account, or that

circumstances have changed significantly since the sentence was imposed which warrant a different sentence.

### 16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

For an appeal against conviction, the appellate court may quash the conviction and enter a verdict of acquittal. The appellate court may also order a re-trial.

For an appeal against sentence, the appellate court may uphold the original sentence, increase or decrease the sentence imposed by the lower court.



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She has also been involved in employment disputes in the Labour's Tribunal, various high profile defamation cases and property disputes in New Territories.

# Haldanes

Established in 1975, Haldanes is a Hong Kong-based law firm which specialises in criminal defence, commercial litigation, commercial & entertainment and matrimonial law. The firm has a strong reputation across all of its practice areas, and its excellence has been acknowledged by various awards bodies including Asian Legal Business Awards, Chambers & Partners Global, Chambers & Partners Asia-Pacific and the Legal 500.

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