

## Part 2 - Standard Clauses “Boilerplate” agreement: Hong Kong

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This Q&A provides country-specific commentary on *Checklist, Boilerplate clauses: Cross-border*, and forms part of *Cross-border contracts and boilerplate clauses*.

See also *Part 1 - Standard Clauses “Boilerplate” agreement: Hong Kong* and *Part 3 - Standard Clauses “Boilerplate” agreement: Hong Kong* for more country-specific commentary.

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## Commencement and Duration

**1. Does the law in your jurisdiction provide for contracts to become effective immediately on signing? Are there any exceptions to this, for example if the parties have expressly agreed a different Commencement Date?**

Whether a contract is effective immediately on signing depends on the wording of the contract terms. If there is an express term to this effect, the contract will become effective on signing. However, if the parties expressly agree on a commencement date of the contract that is different to the signing date, the contract will come into effect on the agreed commencement date. The parties may agree that their contract will take effect at a future time or an earlier time.

If there is no express term in the contract as to when it will come into effect, the contract becomes effective once the parties have agreed on its essential terms. The court will look at the parties' words and conduct overall and apply an objective test in deciding whether a contract has been concluded. In practice, since it is difficult to prove the presence of the agreed terms without documentary evidence, the date when the agreement is signed by the parties is presumed to be the date when the essential terms of the agreement are agreed, and so is the date that the contract comes into effect.

**2. Does the law in your jurisdiction recognise the concept of condition precedent, that is, a clause in a contract that provides that the contract, or certain obligations under the contract (such as the buyer obtaining a letter of credit), will only come into force if and when certain conditions are met?**

Parties can impose conditions precedent in their contracts, which stipulate that particular circumstances must occur (or a state of affairs must be achieved) before either:

- The contract itself comes into effect.
- Certain obligations under the contract take force.

In the first scenario, the condition may result in the contract not coming into effect until the condition is met.

**3. In your jurisdiction, if the parties agree, can a contract be deemed to be effective prior to the date on which it was signed? Is it a criminal offence to back date the agreement and provide a date of signature before the date on which it was actually signed?**

If the parties agree, a contract can be deemed to be effective before the date on which it is signed.

Generally, it is not a criminal offence to back date a contract as long as the parties agree to this. However, if the parties back date a contract for any of the following reasons, they may commit the offences of forgery, fraud, conspiracy to defraud or use of false documents:

- The illegal purpose of inducing somebody to do or not do some act that would harm/affect their interests, or those of another person.
- To deceive other persons.
- To exempt a party from any criminal liabilities.

In addition, back dating a contract may breach certain disciplinary rules. For example, back dating a backsheet to barristers by solicitors constitutes a breach of the professional conduct rules and may result in suspension of practice.

#### 4. Does any type of commercial agreement require approval or registration by a relevant authority before it can take effect in your jurisdiction? Is similar approval or registration required on renewal of the agreement too?

Commercial agreements in Hong Kong do not need approval or registration by any authority before they can take effect. However, some transactions (rather than the agreements themselves) require approval or registration from the relevant authorities. If this does not occur, the transactions will either be illegal or not binding on certain parties. For example:

- Transactions involving the transfer of insurance business must obtain prior approval from the Insurance Authority (*section 25D, Insurance Companies Ordinance (Cap. 41)*).
- All deeds, conveyances and other instruments in writing in relation to land (except for leases for any term of three years or less) must be registered with the Land Registry. If they are not registered, they will be absolutely null and void against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcels of ground, tenements or premises (*section 3(2), Land Registration Ordinance (Cap. 128)*).
- Mortgages or certain types of charges created by a Hong Kong company or a registered non-Hong Kong company must be registered with the Companies Registry. If they are not registered, the charges or mortgages will be void against the company's liquidator and creditors (*section 337(4), Companies Ordinance (Cap. 622)*).

A renewal of any of the above transactions must also meet relevant approval or registration requirements.

#### 5. If after expiry of a fixed term, the parties continue to act in accordance with the terms of the agreement, could the courts in your jurisdiction find that the parties intended the agreement to continue?

After the expiry of a fixed term, if the parties continue to act in accordance with the terms of the agreement, the court may find that the parties have entered into a new contract by conduct on the same terms as the expired agreement.

In determining whether there is a new contract by conduct or not and (if yes) whether the new contract is on the same terms as the expired agreement, the court will look at the extent to which the parties' behaviour is consistent with the terms of the expired agreement, as well as the parties' actions and communications to decide what a reasonable person would have understood as the parties' intentions.

#### 6. In your jurisdiction, can reasonable notice to terminate be implied by law for a fixed term or definite term contract?

Generally, a party cannot terminate a fixed-term contract by issuing reasonable notice.

However, contracts of employment or personal service may be subject to an implied term that they are terminable on reasonable notice. In determining whether such a term is implied into a contract, the court will look at the presumed intention of the parties in the light of the special circumstances of the case.

In determining what the reasonable notice period would be, the court will look at all the circumstances of the case (*Mimi Monica Wong v Mirko Saccani & Another [2006] HKEC 1662*). The chief purpose of notice for a reasonable period is to enable the parties to bring to an end in an orderly way a relationship that has existed for a reasonable period so that they will have a reasonable opportunity to enter into alternative arrangements and to wind up matters which arise out of their relationship.

#### 7. Are all the types of contract duration clauses included in *Standard clause, Commencement and duration: clause 2* recognised in your jurisdiction?

Yes. All of the contract duration clauses included in *Standard clause, Commencement and duration: Cross-border: clause 2* are recognised in Hong Kong.

## Indemnity

#### 8. Is the concept of indemnity recognised in your jurisdiction, that is, an express obligation to compensate for some defined loss or damage by making a payment? Are there any laws in your jurisdiction governing commercial indemnities?

The concept of indemnity is recognised in Hong Kong.

Generally, parties are free to agree on indemnity clauses, subject to the following exceptions:

- **Consumer contracts:** a person who deals as a consumer cannot be bound by a term to indemnify another party for liability that may be incurred by that other party (whether through negligence or breach of contract) unless that term satisfies the reasonableness test (*section 9(1), Control of Exemption Clauses Ordinance (Cap. 71)*).
- **Contracts between a company and its director:** a company can indemnify a director against liabilities incurred by the director to a third party as long as specific conditions are met, namely, certain liabilities and costs must not be covered by the indemnity (*section 469, Companies Ordinance (Cap. 622)*). The liabilities and costs that cannot be covered include:
  - criminal fines;
  - penalties imposed by regulatory bodies;
  - the defence costs of criminal proceedings where the director is found guilty; and
  - the defence costs of civil proceedings brought against the director by or on behalf of the company or an associated company in which judgment is given against the director.

**Trust agreements:** although trustees can be indemnified against liabilities incurred in the execution, management and administration of the trust from the trust fund, professional trustees cannot exclude or indemnify against their liabilities for fraud, wilful misconduct and gross negligence (*section 41W, Trustee Ordinance (Cap. 29)*). In addition, trust assets cannot be used to indemnify an Occupational Retirement Schemes Ordinance Scheme's trustee against any fraud, misfeasance or breach of trust (*Schedule 1, Occupational Retirement Schemes Ordinance (Cap. 426)*).

### 9. In your jurisdiction, are any indemnities implied into certain types of contracts? Can indemnities be assigned in your jurisdiction? If so, can implied indemnities and assignment be restricted under the contract?

Indemnities are implied into certain types of contracts by statutory provisions.

In relation to copyright licensing, the operator of a scheme for licensing or a licensing body must indemnify a person granted a licence under the scheme or a licensee against any liability incurred by that person, where the licensee has infringed copyright by making or authorising an act restricted by the copyright in a work in circumstances within the apparent scope of their licence. However, a scheme or licence may contain reasonable provision to restrict the manner in which and time within which indemnity claims are to be made or enable the operator or the licensing body to take over the conduct of any proceedings affecting

the amount of its liability to indemnity (*section 168, Copyright Ordinance (Cap. 528)*).

In relation to partnerships, a partnership firm must indemnify every partner in respect of payments made and personal liabilities incurred by its partners either:

- In the ordinary and proper conduct of the business of the firm.
- In or about anything necessarily done for the preservation of the business or property of the firm.

(*Section 26(b), Partnership Ordinance (Cap. 38)*.)

Indemnities, being choses in action, are also assignable by an indemnitee, provided the following conditions are fulfilled:

- The assignment is absolute.
- The assignment is in writing.
- Express notice in writing has been given to the indemnitor.

(*Section 9, Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)*.)

### 10. In your jurisdiction, are indemnities limited to specific categories of loss (as in English practice) or do they cover all contractual breaches (as in US practice)? Is there any wording that could be included to limit liability under the indemnity?

Indemnities can cover all types of breaches specified in the indemnity clause, subject to certain exceptions (see *Question 8*).

From the indemnitor's point of view, wording could be included to limit liability under the indemnity, such as providing for an express duty on the indemnitee to mitigate (see answer to *Question 14* and *Standard clause, Indemnity: Cross-border: clause 1.6*) or specifying that loss or damage unforeseen by indemnitee will not be indemnified (see *Question 11*).

### 11. Does the loss or damage need to be foreseeable (even if the express wording in the contractual indemnity doesn't state that it does)? Can an indemnity be unenforceable due to the remoteness of loss or damage sustained?

If the indemnity is in relation to a debt claim (that is, a definite sum of money payable on the occurrence of a debt) then remoteness of loss or damage would not affect the validity of the indemnity.

However, if the indemnity relates to a claim for damages, the court will look at the wording of the indemnity clause. If the scope of the indemnity is not stated to be subject to or conditioned on the foreseeability of the loss or damage, the indemnitor will be liable to indemnify the loss or damage of the indemnitee in accordance with the indemnity clause.

In practice, it is not uncommon that an indemnity clause will specify that the indemnity applies regardless of the foreseeability of the loss or damage.

**12. In your jurisdiction, can a party claim under an indemnity clause for damages or loss suffered as a result of their own negligence in the absence of express provision in the agreement to do so?**

This depends on whether the language of the indemnity clause excludes its application to damage or loss suffered as a result of the indemnitee's own negligence. For example, an indemnity clause which covers "all liability whatsoever arising out of or in connection with the contract at any time or from any cause whatsoever except for fraud" will be sufficient to cover negligence of the parties.

The first half of *Standard clause, Indemnity: Cross-border: clause 1.3* expressly covers indemnity against damages or loss suffered as a result of the parties' own negligence, and is therefore suitable to cover such circumstances.

**13. Is it permissible in your jurisdiction to make the indemnity conditional as set out in *Standard clause, Indemnity: Cross-border: clause 1.4*?**

Yes. It is permissible in Hong Kong to make the indemnity conditional as set out in *Standard clause, Indemnity: Cross-border: clause 1.4*.

**14. Do the parties have a duty to take reasonable steps to mitigate their losses when seeking to rely on an indemnity in your jurisdiction?**

If the indemnity is in relation to a debt claim (that is, a definite sum of money payable on the occurrence of a debt) the duty to mitigate does not arise. However, if the indemnity relates to a claim for damages, the court will look at the wording of the indemnity clause. If the clause specifies that the parties have no duty to mitigate the losses, the court will give effect to the clause.

The wording in *Standard clause, Indemnity: Cross-border: clause 1.6* is suitable to cover such circumstances and the party relying on the indemnity clause is subject to a duty to mitigate.

## Interest

**15. Please specify:**

- **If there is a rate of statutory interest in your jurisdiction and what it is;**
- **the usual rate of interest in commercial transactions where both parties are located in your jurisdiction;**
- **the usual rate of interest used in cross border transactions involving a party located in your jurisdiction;**
- **the rate of interest that can be implied where no rate of interest is specified in the contract terms;**
- **any other interest that may be payable on any delay or non-payment.**

## Rate of statutory interest

There is a statutory interest rate in Hong Kong. The interest on judgment debts is determined by the Chief Justice from time to time and is currently 8.125% per annum (*section 49(1), High Court Ordinance (Cap. 4)* and *section 50(1), District Court Ordinance (Cap. 336)*). However, this statutory interest rate only applies to judgment debts and it does not apply to commercial contracts.

There is no statutory interest rate for commercial contracts in Hong Kong. Late payment interest is not regulated by law and remains a matter of negotiation between the contractual parties.

In the context of employment contracts, if an employer does not pay wages or termination payments to an employee within seven days of the date on which such payments become due, the employer will be liable to pay interest on the outstanding amount at the statutory interest rate, that is, currently 8.125% per annum (*section 25A, Employment Ordinance (Cap. 57)*).

## Usual rate of interest

Parties usually agree on a certain rate above the prevailing Prime Lending Rate/Best Lending Rate published by a bank such as the Hong Kong and Shanghai Banking Corporation (HSBC), Hang Seng Bank and so on.

However, a loan with an interest rate exceeding 48% per annum will be presumed to be a transaction which is extortionate, unless the court is satisfied that such rate is not unreasonable or unfair (*section 25(3), Money Lenders Ordinance (Cap. 163)*).

In determining whether a transaction is extortionate, the court will consider factors including:

- The interest rate prevailing at the time it was made.
- The debtor's age, experience, business capacity and state of health.
- The degree to which, at the time of entering into the transaction, the debtor was under financial pressure, and the nature of that pressure.
- The degree of risk accepted by the lender, having regard to the nature and value of any security provided.
- The lender's relationship to the debtor.

(Sections 25(4)-(6), *Money Lenders Ordinance (Cap. 163)*.)

If the court is satisfied that the transaction is extortionate, it may reopen the transaction so as to do justice between the parties having regard to all the circumstances (section 25(1), *Money Lenders Ordinance (Cap. 163)*). A loan with an interest rate over 60% per annum will be illegal and unenforceable, any person offering such a loan commits a criminal offence (section 24, *Money Lenders Ordinance (Cap. 163)*).

The above limit on contractual interest rates does not apply to contracts made by authorised institutions, but authorised institutions should not charge extortionate interest rates unless they have sufficient justification (section 12.3, *Code of Banking Practice*).

### Usual rate of interest in cross-border transactions

See above, *Usual rate of interest*.

### Implied rate of interest

If there is no rate of interest specified in the contract terms, subject to the discretion of the court, the usual commercial rate should apply. According to case law, the proper implied interest rate is 1% above the best lending rate of HSBC (*Li Wai Keung v Federal Steel Works Engineering Ltd [2014] HKEC 755*).

### Other interest

There is no other interest payable except for the statutory or contractual interest mentioned above.

**16. In your jurisdiction, can contractual interest be payable from the date of default until an actual payment date that is after a court judgement has been obtained? Could a contractual interest rate that is too high be considered to be a penalty and therefore unenforceable?**

Generally, interest accrued between the date of default and the date of judgment is calculated based on the contractual interest rate. As to interest accrued between the date of judgment and the date of actual payment, the statutory interest rate (8.125% per annum) is usually adopted by the court.

However, if a contract specifically states that any judgment obtained for recovery of the debt will carry interest at a specified contractual rate, the interest can be calculated according to that rate until the date of actual payment.

Just as a liquidated damages clause, a clause on contractual interest payable upon default is unenforceable if it amounts to a penalty. A clause will be considered a penalty clause (thus unenforceable) if it is not a genuine pre-estimate of the likely loss.

### Set-off

**17. Is set-off permitted in your jurisdiction, that is a right to allow a party to deduct one liability from the other, therefore avoiding a breach of contract for non-payment? If not, is there any concept which is broadly similar or equivalent and could be included?**

Set-off is permitted in Hong Kong.

The wording used in *Standard clause, Set-off: Cross-border: clause 1* is suitable for use in Hong Kong.

However, the wording used in *clause 2* and *clause 3*, namely, "all amounts due under this agreement shall be paid in full without any set-off, counterclaim, deduction or withholding" may not always be effective. In a standard form contract with consumers, if the consumer's right of set-off is excluded or restricted, the clause will be *prima facie* unreasonable (section 5, *Control of Exemption Clauses Ordinance (Cap. 71)*). The party seeking to rely on it has the burden of proving that the clause is reasonable. In determining whether the clause is unreasonable, the entire clause will be considered.

A similar concept is a counter-claim. However, while a counter-claim is a cross-action, a set-off is a defence. Sometimes parties to a contract may also use the word "reconciliation".

### 18. Does the law in your country provide any general rights of set-off? Do these rights exist even if there is no express provision in the contract?

Unless expressly disallowed in the contract, a party has a general right to set-off.

The defence of set-off may be raised in respect of debt or damages, whether the amount is ascertained or not and whether it is also added as a counterclaim.

Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer may set off the breach of warranty in diminution or extinction of the price or maintain an action for damages (*section 55, Sale of Goods Ordinance (Cap. 26)*).

### 19. Does set-off against obligations in your local currency raise any foreign exchange control issues?

There are no restrictions on capital flows into and out of Hong Kong and there are no exchange controls. As a result, set-off against obligations in Hong Kong dollars does not raise any foreign exchange control issues in Hong Kong.

## Liquidated Damages

### 20. Would Standard clause, Liquidated damages: Cross-border be permissible under the laws of your jurisdiction? If not, is there any other wording that could be used to specify the amount of damages payable in the event of a default/specified breach?

*Standard clause, Liquidated damages: Cross-border* is permissible under the laws of Hong Kong, as long as the damages amount is a genuine pre-estimate of the likely loss at the time of contract formation.

The concept of "liquidated damages" is understood in Hong Kong.

### 21. In your jurisdiction, can a party apply to the court to modify or vary the amount of liquidated damages set in the contract?

No. A party cannot apply to the court to modify or vary the amount of liquidated damages payable on the ground that the actual loss suffered is different from what has been agreed on. Hong Kong courts are reluctant to rewrite the contracts of the parties or interfere with the freedom of contract if:

- The liquidated damages specified in the contract is a genuine pre-estimate of the loss that would occur through breach at the time of contract formation.
- The nature of the damages is compensatory rather than punitive.

### 22. Is a penalty clause, that is, a clause imposing an excessive or disproportionate payment of damages or compensation as a deterrent to breach, enforceable in your jurisdiction? Does any rule against penalties only apply where the trigger for payment is breach of contract?

No. While the courts will uphold an agreed liquidated damages clause, they will not uphold those clauses that amount to a "penalty" (that is, a clause that provides for payment of a sum that is disproportionate to the loss likely to be suffered by the non-breaching party as a result of the breach assessed as at the time of contract formation).

The UK Supreme Court recently held that the rule against penalties applies only in the context of a breach of contract (*Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Limited v Beavis [2015] UKSC 67*). This case draws a distinction between primary and secondary obligations in a contract. The rule against penalties would only apply if the payment in question is a secondary obligation (which only arises out of a breach of contract); and the test to be adopted by the court is whether the clause in question imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party. If the payment is a primary obligation (for example, a "price adjustment clause" by which the price payable under a contract varies in accordance with the quantity of goods delivered), the rule against penalties would not apply and the court would be prepared to enforce such payment clause as agreed between the parties. Note, however, that this UK case is yet to be considered or adopted by Hong Kong courts; so it remains to be seen if the new test introduced by the UK Supreme Court will apply to Hong Kong.

### 23. Are there any ways that the parties can draft their contract to get around any rule against penalties, for example:

- Could wording be included in the contract that limits the parties' remedies for breach of contract to a genuine pre-estimate of the loss?
- Could a bonus for early or enhanced performance rather than a penalty for late performance be valid and enforceable?
- Any other?

Even if the parties include an express clause in their agreement that the liquidated amount represents a genuine pre-estimate of loss, the court will still look at the circumstances to decide whether that is the case. The court will look into the background of the deal and determine whether the clause is unconscionable or oppressive by reason of its being extravagant, exorbitant or excessive (to the extent that it amounts to a penalty) and will not be enforceable.

On the other hand, even where the parties contract for liquidated damages in sums which they know are unlikely to be sufficient to cover the actual loss if the foreseen breaches occur, so that the liquidated damages agreed could not be said to be a genuine pre-estimate of likely loss, the clause is likely to be upheld as a valid agreement to limit liability rather than a penalty (*Polyset Ltd v Panhandat Ltd (2002) 5 HKCFAR 234, [79]*).

For this reason, the second sentence in *Standard clause, Liquidated damages: Cross-border* is not decisive and will not oust the court's power to decide whether the liquidated amount is a genuine pre-estimate of loss or not.

A clause that gives a bonus for early performance rather than a penalty for late performance would likely be held enforceable. The prohibition on penalty clauses does not apply because there is no penalty per se.

After the UK decision in *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Limited v Beavis [2015] UKSC 67*, it may be possible to get around the rule against penalties by, for example, rephrasing a penalty clause to a price adjustment clause.

### Inadequacy of Damages

**24. Is Standard clause, Inadequacy of damages: Cross-border beneficial and recognised in your jurisdiction as an effective means to assist a non-defaulting party obtain alternative remedies to damages?**

*Standard clause, Inadequacy of damages: Cross-border* does not guarantee that a non-defaulting party will obtain alternative remedies to damages, but it might assist a non-defaulting party's application to the court for alternative remedies.

Equitable relief such as specific performance and injunctions can only be granted by orders of the court. They are available only at the discretion of the court. Even if the parties recognise in their contract that damages will not be adequate, this will only be a factor considered by the court in determining whether equitable relief should be granted. The clause might improve the chance for the non-defaulting party of obtaining equitable relief but it does not guarantee the award of any equitable relief.

**25. In your jurisdiction, is the term "equitable relief" understood as a concept that is a judicial remedy that is awarded at the discretion of the court on the basis of fairness and justice?**

Yes, the concept of equitable relief is recognised in Hong Kong. Available equitable relief includes, but is not limited to:

- Specific performance.
- Injunctions (prohibitory or mandatory).
- Account of profits.
- Restitution.
- Rescission.
- Constructive trust.
- Subrogation.
- Declaration.
- Tracing and recovery of property from a trustee.

### Termination

**26. Is there a presumption in your jurisdiction that unless the agreement contains clear, express provisions to the contrary, a party cannot rely on its own breach of obligation to bring the agreement to an end, or to take advantage of its own breach as against the other party?**

Yes, there is such a presumption in Hong Kong. A party cannot rely on its own breach to terminate a contract. Where there has been a breach, the contract will subsist until the non-breaching party chooses to treat the contract as repudiated and have it terminated. The non-breaching party may choose to affirm and continue with the contract by doing so clearly and unequivocally, in which case the contract will not be terminated despite the breach.

**27. In your jurisdiction, can the parties terminate the agreement for all the reasons set out in Standard clause, Termination: Cross-border: clause 1.1; specifically, are the insolvency related events in clauses 1.1(d) and 1.1(e) recognised in your jurisdiction? Are there any equivalent insolvency wording, triggers or processes in your jurisdiction that should be included instead or as well?**

Yes. The parties are allowed to terminate their contract for all the reasons set out in *Standard clause, Termination: Cross-border: clause 1.1*, including clause 1.1(d) and clause 1.1(e).

The concepts of voluntary liquidation and compulsory liquidation are recognised in Hong Kong. Shareholders of a company can pass a special resolution to wind up the company (*section 228(1)(b), Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)*). Alternatively, a creditor, a shareholder or the company itself may apply to court to wind up the company (*section 179, Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)*).

**28. In your jurisdiction, are there any non-contractual termination rights that arise in law that either party could seek to rely on? Can any such non-contractual termination rights be excluded expressly in the agreement between the parties?**

There are many non-contractual termination rights which arise in law that a party can seek to rely on. For instance:

- If there is a misrepresentation, namely, a false statement of fact made by a party during the pre-contractual negotiations which induced the other party to enter into the contract, the innocent party can choose to terminate the contract.
- If a party was under duress or undue influence when entering into a contract, the contract is voidable and the victim has a right to terminate the contract.
- If there is a breach of the conditions of a contract, or a serious breach of innominate terms in a contract, the non-breaching party can choose to terminate the contract.

Such non-contractual termination rights cannot be excluded expressly in an agreement. It is not common practice to specify in the contract all the circumstances that would give rise to termination.

**29. How is the concept of material breach as set out in *Standard clause, Termination: Cross-border: clause 1.2* understood in your jurisdiction? Is there any other wording that would permit termination for a serious breach?**

There is no strict definition of material breach in Hong Kong, it is up to the parties to define this term in their contract. It usually means a substantial failure in the performance of a contract, which would give the affected party the right to sue for damages and terminate the contract, as well as release the aggrieved party from its obligations.

Another phrase used in Hong Kong is "event of default", the occurrence of which entitles a party to terminate a contract. However, the scope of event of default is usually wider than "material breach", as an event of default is often explicitly defined in an agreement, which could include the breach of or non-compliance with seemingly minor obligations under an agreement.

The definition of "material breach" as set out in *Standard clause, Termination: Cross-border: clause 1.2* makes reference to "a substantial portion of this agreement", which is not sufficiently clear. As a common practice, "material breach" is usually defined as one of the following:

- A breach of any major obligations under the agreement.
- A breach of any obligations under the agreement that is not reasonably capable of being remedied.

A breach that subsists or recurs over a certain period of time.

**30. Is breach of warranty recognised in your jurisdiction? Does a party have a right to terminate for breach of warranty if the contract expressly states that it can do so?**

The concept of breach of warranty is recognised in Hong Kong.

Contract terms in Hong Kong are categorised as conditions, warranties and innominate terms. A warranty is a term of less importance, a breach of which only entitles the non-breaching party to damages, but no right to terminate the contract. A party may have the right to terminate for breach of warranty if the contract expressly states that it can do so.

**31. Is termination for convenience (without cause) on written notice as set out in *Standard clause, Termination: Cross-border: clause 1.3* understood in your jurisdiction? Are there any special categories of contract in your jurisdiction where *Standard clause, Termination: Cross-border: clause 1.3* would not be permissible?**

Termination for convenience (without cause) on written notice is understood in Hong Kong.

However, in relation to consumer contracts, if a party to the contract is dealing as a consumer, the clause allowing the other party to terminate by notice may not be enforceable if the court is of the view that the clause is unconscionable in the circumstances relating to the contract at the time it was made (*section 5, Unconscionable Contracts Ordinance (Cap. 458)*).

## Survival

**32. In your jurisdiction, is it necessary to specifically state the contractual provisions that continue in force after termination of the agreement as in *Standard clause, Survival: Cross-border: clause 1.1*?**

Not necessarily, although as a matter of good practice and for the sake of clarity, parties are advised to specifically state the contractual provisions that continue in force after termination as in *Standard clause, Survival: Cross-border: clause 1.1*, or specifically state at the end of the particular contractual provisions that they would continue in force after termination.



As a general rule, from the time of discharge, both parties would be excused from further performance of the primary obligations falling due after the date of discharge. Those that have accrued due at the time may still be enforceable. In addition, obligations for the resolution of disputes and clauses having a contractual function that is ancillary or collateral to the subject matter of the agreement (such as an obligation of confidence) may remain in force after termination of the agreement.

Whether a clause may survive the termination of agreement would depend on the nature of the clause and the intention of the parties to be gathered from the agreement and the admissible facts of the case. Clauses specifically stating the contractual provisions that continue in force after termination of the agreement would be clear evidence of the parties' intention.

### 33. In the absence of an express survival clause, what clauses will survive termination by implication and/or under your national laws and case law?

See answer to *Question 32*.

### 34. What consequences of termination may occur by operation of your national law?

The consequences of termination of an agreement should be covered in most properly drafted agreements in Hong Kong. In the absence of such provisions, the usual principles of contract law apply. For instance, if an agreement is terminated and the innocent party has suffered losses as a result of the breach by the other party, the innocent party would be entitled to claim damages, subject to the mitigation rule and remoteness rule.

In addition, the Hong Kong legislation sets out the consequences of termination of certain agreements, such as employment contracts and agreements for the sale of goods to consumers, under particular circumstances:

- The Employment Ordinance (Cap. 57) provides that if the court or Labour Tribunal finds that an employer has not shown valid reason for dismissal of an employee, the court or Labour Tribunal may make an award of terminal payments or an order for reinstatement or re-engagement as it considers just and appropriate in the circumstances.
- The Sale of Goods Ordinance (Cap. 26) provides that if a seller breaches the implied conditions as to quality or fitness of goods, consumers are entitled to reject the goods and demand a full refund.

### 35. What steps with regard to government approvals, notifications or filings may need to be taken on termination of an agreement in your jurisdiction?

The steps with regard to government approvals, notifications or filings which may need to be taken on termination of an agreement vary depending on the type of the agreement. For instance:

- On termination of employment contracts, employers and employees are required to notify different government organisations, in particular:
  - employers must send a written notification of the employee's employment termination date to the Mandatory Provident Fund (MPF) trustee by the tenth day of the following month after an employee ceases employment;
  - employers must also notify the Inland Revenue Department of the employee's termination one month before the date of employment termination; and
  - on premature termination of employment contracts for domestic helpers in Hong Kong on working visas, both the employer and the domestic helper must give the Director of Immigration notice in writing within seven days of the date of termination.
- A listed company may need to consult The Stock Exchange of Hong Kong Limited (Exchange) and make announcements under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Listing Rules) following termination of an agreement. For instance, if, in the view of the Exchange, following termination of an agreement, there is or there is likely to be a false market in the securities of a listed company, the listed company must as soon as reasonably practicable after consultation with the Exchange, announce the information necessary to avoid a false market in its securities (*rule 13.09, Listing Rules*).

### 36. Where an agreement provides for certain obligations to be performed by the parties on termination and the agreement is silent as to who bears the costs of those obligations, who will bear those costs under the laws of your jurisdiction?

Generally, in the absence of express provisions, who bears the costs of certain obligations on termination of an agreement depends on the intention of the parties. This is evidenced from the language of the agreement and all the circumstances, in particular, whether it is intended that the costs of those obligations are to be paid by a particular party. If no such term can be implied, it is normally presumed that each party will pay its own costs incurred in connection with those obligations.

### Costs

**37. Is Standard clause, Costs: Cross-border commonly used in your jurisdiction? Is it usual practice to state "costs and expenses"?**

*Standard clause, Costs: Cross-border* and the standalone "costs and expenses" clauses are included in some agreements but they are not necessary if the agreement contains clear provisions as to who bears the costs of a particular obligation. If a "costs and expenses" clause is included, parties may expressly limit its scope to costs and expenses "incurred in the course of exercising the rights and responsibilities under the agreement".

**38. If the agreement is silent as to costs, is the normal rule in your jurisdiction that each party will bear its own costs of negotiating, preparing and executing the agreement?**

If it cannot be implied that the costs of negotiating, preparing and executing the agreement are to be paid by a particular party, it is normally presumed that each party will pay its own costs (see answer to *Question 36*).

**39. In arbitration and litigation in your jurisdiction, is it usual for the court to order the losing party to pay the winner's costs?**

The court has a wide discretion on how to award costs. The general principle is that costs should "follow the event", meaning the losing party should pay the winner's costs (*Order 62, rule 3(2), Rules of the High Court*). The court will consider the conduct of the parties and all relevant circumstances to see if there are reasons to depart from the general principle. Most often the court will order the costs to be taxed on a "party and party" basis, which means the winning party will have approximately 60 to 70% of its legal costs paid by the losing party.

Similarly, the losing party in arbitration typically must bear the costs reasonably incurred by the winning party and the arbitrator's fees. The award of costs of arbitration is made by the arbitrator who will consider all relevant circumstances, including the fact that a written offer of settlement has been made (*section 74(2), Arbitration Ordinance*).

**40. If registration of the agreement is required in your jurisdiction, which party usually bears the cost of registration?**

The issue of which party bears the cost of registration is a matter of negotiation between the parties. In a sale and purchase context, the buyer usually bears the cost of registration.

### Waiver

**41. In your jurisdiction, can a party indicate to another party that it does not intend to enforce its contractual rights or remedies? If so, is this recognised as a "waiver" of that party's rights?**

Yes, a party can refrain from enforcing or relying on a term in an agreement to be performed or observed by the other party. This is recognised as a "waiver" in Hong Kong. A waiver can be oral, written or inferred from conduct as long as it is clear and unambiguous.

**42. Is a "no waiver" Standard clause, Waiver: Cross-border understood in your jurisdiction? If not, is there a similar or equivalent concept that it is common to include in contracts in your jurisdiction?**

Yes, "no waiver" clauses such as *Standard clause, Waiver: Cross-border* are understood and quite commonly used in Hong Kong.

**43. Can it be difficult in your jurisdiction to rely on a no waiver clause if a party continued to perform its obligations under a contract for a significant period of time despite being aware of the other party's breach?**

Yes, potentially. It will depend on the facts of each case, in particular, how long the party continued to perform its obligations and whether the party did any acts that would amount to affirming the agreement.

In the UK, there is case law holding that a non-waiver clause in an agreement did not prevent the breaching party from raising the defence of waiver when the innocent party served a notice of termination almost a year after the breach (*Tele2 International and others v Post Office Limited [2009] EWHC Civ 9*). (UK court decisions are not binding on Hong Kong courts but are persuasive.)

In Hong Kong, the court has held that a landlord's act of accepting rent constitutes waiver of the breach and may presumably constitute a waiver of their reliance on the "no waiver" clause (*Po On Auto Accessory Co Ltd v Grand Faith Holdings Ltd HCA 180/2010 (unreported, 10 August 2010)*).

Accordingly, an innocent party is advised to expressly reserve its rights in writing as soon as it becomes aware of a breach and make sure that its subsequent conduct is consistent with that reservation.

### Rights and Remedies

**44. Is it common practice to include this *Standard clause, Rights and remedies: Cross border in contracts in your jurisdiction to record the parties' intention that the rights and remedies set out in the agreement are in addition to those provided by general law?***

Yes.

**45. In your jurisdiction, what remedies will only be available to the extent that the parties have included them in the agreement (as opposed to being available under general law)?**

The following are some examples of the remedies that are only available to the extent that the parties have included them in the agreement:

- An agreement can provide that in the event of a breach, the party in breach will pay to the other party a specified sum of money, that is, liquidated damages. This would only be enforceable if it does not exceed a genuine attempt to estimate in advance the loss that the claimant would be likely to suffer from a breach of the obligation in question.
- Sale and purchase agreements of property often provide for forfeiture of the deposit by the vendor on a breach by the buyer. The forfeiture of deposit would be unlawful unless it could be justified as a genuine pre-estimate of loss. The Hong Kong Court of Final Appeal has held that:
  - where the amount of an agreed deposit matches or is less than 10% of the purchase price, forfeiture would not attract judicial scrutiny; and
  - where the deposit exceeds 10% of the purchase price, forfeiture would only be permitted if the party seeking to forfeit could show exceptional circumstances justifying that higher amount.

(*Polyset Ltd v Panhandat Ltd* [2002] 3 HKLRD 319.)

Shareholders' agreements often provide that in the event of a material breach by a shareholder, the defaulting shareholder may be compelled to transfer its shares to the non-defaulting shareholders. The execution of the transfer of shares would depend on the actual terms of the shareholder agreement.

**46. In your jurisdiction, is an express term in the agreement required to exclude contractual terms implied by law?**

Yes. However, not all contractual terms implied by law can be excluded. For instance, when dealing with a consumer, liability for breach of the obligations arising from section 15, 16 or 17 of the Sale of Goods Ordinance (Cap. 26) (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose) cannot be excluded or restricted by reference to any contract term (*section 11, Control of Exemption Clauses Ordinance (Cap. 71)*). Likewise, when dealing with a consumer in a contract for services, the other party cannot exclude its liability arising from sections 5, 6 or 7 of the Supply of Services (Implied Terms) Ordinance (Cap. 457) (seller's implied undertaking as to care and skill, time for performance or consideration) (*section 8, Supply of Services (Implied Terms) Ordinance*).

### Further Assurance

**47. Is this *Standard clause, Further Assurance: Cross-border commonly used in your jurisdiction?***

Yes.

**48. In your jurisdiction, does this *Standard clause, Further Assurance: Cross-border:***

- **a) seek to cover any omissions in the agreement that have not been noticed before signing and which would change the way the agreement was intended to work if they were not remedied? And**
- **b) deal with a situation where completion of the entire transaction does not take place when the main agreement is signed?**

As *Standard clause, Further assurance: Cross-border* is drafted quite broadly, it is likely to cover the situations in (a) and (b). However, it should be noted that the clause provides for the parties to use "all reasonable endeavours" only. In other words, the obligation that parties would procure any third party to perform acts to give full effect to the agreement is not absolute; and such clause may not be of much assistance if the omission in question cannot be remedied despite the parties' reasonable endeavours.

**49. In your jurisdiction, is "all reasonable endeavours" understood as a concept?**

It is not uncommon to find references to "all reasonable endeavours" in agreements in Hong Kong. However, the precise meaning and extent of the obligations of "all reasonable endeavours" are not certain.

A "best endeavours" obligation requires a party to take all those steps in its power which can produce the desired result that a prudent, determined and reasonable person, acting in their own interests and desiring to achieve that result, would take. A "reasonable endeavours" obligation is less onerous, however. It only requires a party to take a reasonable course of action and may not require the party to sacrifice its own commercial interests.

It is not clear whether "all reasonable endeavours" amounts to "best endeavours" or lies somewhere in between this and "reasonable endeavours".

### 50. If under this clause a party is authorised to execute any documents or take any action that the other party fails or refuses to do, what are the execution formalities for a power of attorney in your jurisdiction?

An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power (*section 2(1), Powers of Attorney Ordinance*). Where such an instrument is signed and sealed by a person by direction and in the presence of the donor of the power, two other persons must be present as witnesses and attest the instrument (*section 2(2), Powers of Attorney Ordinance*).

A power of attorney given by a foreign corporation to or in favour of any person not under seal is as valid as if such authority had been given under seal, if the power of attorney is valid as a power of attorney under the laws of the place where the corporation is incorporated (*section 26(1), Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)*). For section 26(1) to apply, expert evidence will be required to establish that common seals are not used in the relevant foreign jurisdiction (*Li Yuen Ling v Tang Kwok Wai Thomas [2010] 1 HKC 550*).

## Time is of the essence

### 51. Is the concept of "Time is of the essence" understood and does *Standard clause, Time is of the essence: Cross-border: clause 1* have the necessary legal effect in your jurisdiction to give a party the right to terminate for delay?

Yes, clauses providing that "time is of the essence" have been held to be conditions, so that either party's failure to perform any contractual duty in time would entitle the other party to terminate the contract for repudiatory breach, irrespective of the magnitude of the breach.

Although not strictly necessary, parties can expressly provide a right to terminate for delay in the termination clause for the sake of clarity.

### 52. If *Standard clause, Time is of the essence: Cross-border: clause 1* does have effect in your jurisdiction, are there any limitations to it?

The right to terminate may be lost where the innocent party affirms the contract or waives the right to terminate.

### 53. For this clause to be effective in your jurisdiction, does the relevant time for performance need to be ascertainable?

There is no requirement to ascertain the relevant time for performance for this clause to be effective. However, the use of words such as "within a reasonable time", "promptly" or "as soon as practicable" in place of a specific date might make it more difficult for the parties to ascertain whether the clause has been breached.

## Notices

### 54. Is service by email or other electronic means permitted in your jurisdiction? Is it common practice now for service of notices to be by email?

In the absence of an agreement, service by email or other electronic means are currently not permitted for the service of originating process or any other court documents. It has been held that email is "still not regarded as and considered to be a safe and secure means of communication in the formal and proper sense for obvious reasons" (*Deacons v Wu Chen Kuo Stanley [2010] 6 HKC 153*).

Despite that, parties are free to agree on a mode of service. Parties can agree to receive notices, demands, originating processes or any other court documents by email or other electronic means. It is quite common now to deliver notices by email pursuant to an agreement.

### 55. Is deemed receipt recognised in your jurisdiction so that the party serving the notice does not need to prove that the notice arrived or when it arrived (*Standard clause, Notices: Cross-border: clause 1.5*)?

Yes, deemed receipt is recognised in Hong Kong, but parties are free to agree on the conditions for deemed receipt of a notice given to a party under or in connection with an agreement. The wording in *Standard clause, Notices: Cross-border: clause 1.5* is acceptable.

On the other hand, service of court documents is deemed to have been effected if it is proved that the documents were served in the manner stipulated by the relevant provisions of the Rules of the High Court (RHC) and Practice Direction 19.2 (PD 19.2), unless the court document is in fact shown not to have reached the person to be served. The position with respect to different means of service is:

- **Personal service.** Personal service of a court document is effected by leaving a copy of the court document with the person to be served (*Order 65, rule 2, RHC*). It has been held that it is sufficient for the process server to inform the person to be served of the nature of the document and throw it down in their presence.
- **Service by leaving the court document at the proper address of the person to be served.** Service of a court document may be effected by leaving the court document at the proper address of the person to be served or in the letter-box at that address (*Order 65, rule 5, RHC*). Service is duly effected when the proceedings are brought to the notice of the person to be served.
- **Service by registered post.** Service by registered post will be deemed, subject to proof to the contrary, to have been effected on the fourth working day after posting (*PD 19.2*).
- **Service by ordinary post.** Service by ordinary post will be deemed, subject to proof to the contrary, to have been effected on the second working day after posting (*PD 19.2*).
- **Service by leaving the court document at a document exchange.** Service by leaving the court document at a document exchange will, unless the contrary is proved, be deemed to have been served on the business day following the day on which it is left (*Order 65, rule 5, RHC*).
- **Service by email or fax.** There are no provisions with respect to service by email or fax.

**56. In your jurisdiction, if a change of address notice is quickly delivered and received, could it overtake and invalidate a notice already sent by a slower method to the previous address?**

Yes, potentially. This would depend on the provisions of the agreement as to the deemed effective date and time of the change of address notice and the date and time of the deemed receipt of other notices.

**57. In your jurisdiction, does the notice need to be in the local language in order for it to be valid? Does the notice need to be signed? Are there any other formalities with regards to the execution or delivery of the notice in your jurisdiction?**

No, the parties to an agreement are free to agree on the language and the formalities with regard to the execution or delivery of any notices under or in connection with the agreement, including whether any notice needs to be signed to take effect. In the absence of express provisions, the construction of the agreement and the circumstances of the case determine whether a notice written in a particular language or executed or delivered in a certain way would be valid.

### [Joint and] Several Liability

**58. Are the following options (as set out in Standard clause, Joint and several liability: Cross-border) available in your jurisdiction for setting liability of parties who owe the same obligations:**

- a) Joint where each party is fully liable for the performance of the relevant obligation.
- b) Several where two or more parties make separate promises to another.
- c) Joint and several where two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing.
- d) Any other?

Yes, options (a) to (c) are available for, and are common ways of, setting the liability of parties under an agreement.

**59. Where one of the contracting parties is an individual what is the effect on joint obligations in your jurisdiction on the death of that party:**

- Joint
- Several
- Joint and several where two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing.
- Any other?

If a joint contractor dies, that person's obligation would cease and be passed to the surviving party or parties.

If a several contractor dies, that person's several liability would be passed to the contractor's personal representatives.

If a joint and several contractor dies, that person's several liability would also be passed to the contractor's personal representatives.

### 60. Is joint liability common in your jurisdiction? Does your national legislation address enforcement of joint liability?

Joint liability is common in Hong Kong.

Any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise) (*section 3(1), Civil Liability (Contribution) Ordinance (Cap. 377)*).

Judgment obtained against any person liable in respect of any debt or damage will not be a bar to an action, or to the continuance of an action, against any other person who is jointly liable with the first-mentioned person in respect of the same debt or damage (*section 5, Civil Liability (Contribution) Ordinance (Cap. 377)*).

These provisions make available the right to contribution wherever two or more joint contractors are liable in respect of the same damage and abolish the restriction against suing the other joint contractor(s) when a claimant sued a joint contractor successfully but did not receive the damages ordered by the court.

### 61. If the contract is silent, what liability would apply in your jurisdiction:

- **Joint where each party is fully liable for the performance of the relevant obligation.**
- **Several where two or more parties make separate promises to another.**
- **Joint and several where two or more persons jointly promise to do the same thing and also severally make separate promises to do the same thing.**
- **Any other?**

If two or more parties make a promise and the contract is silent, the presumption is that the liability will be joint in nature, unless there are express words making it joint and several (*White v Tyndall (1883) 13 App. Cas.263*).

Please also note that, the Civil Liability (Contribution) Ordinance (Cap.377) allows a defendant who has incurred liability, for which one or more other parties is partly responsible (whether jointly with the defendant or otherwise), to recover from those parties according to the degree of responsibility for the liability that each of them bears (*sections 3(1) and 4(1), Civil Liability (Contribution) Ordinance (Cap.377)*).

### 62. In your jurisdiction, if liability can be joint or joint and several, does releasing one co-obligor from performance release all the other co-obligors, unless the contract provides otherwise?

No. A release of, or accord with, a person liable in respect of any debt or damage, granted or made by a person to whom the debt is due or by whom the damage is suffered, does not discharge another person who is jointly liable in respect of the debt or damage unless the release or accord so provides (*section 7, Civil Liability (Contribution) Ordinance (Cap. 377)*). The legislation does not specify whether such principle also applies where the parties are liable on a joint and several basis; but logically it would appear that the same principle should apply.

It has been held that, in a situation where D1 and D2 are liable for the same damage, the claimant(s) will be entitled to continue the claim against D1 after having settled with D2, and the settlement with D2 will be taken into account when awarding damages against D1 (*Leung Yung Chun & Anor v Chan Wing Sang & Ors [2000] 1 HKLRD 456*).

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