

Part 1 - Standard Clauses “Boilerplate” agreement: Hong Kong

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Hong Kong - specific information concerning the key legal and commercial issues to be considered when drafting standard “boilerplate clauses” for cross-border agreements.

This Q&A provides country-specific commentary on [Checklist, Boilerplate clauses: Cross-border](#).

See also [Part 2 – Standard clauses “Boilerplate” agreement: Hong Kong](#) and [Part 3 – Standard clauses “Boilerplate” agreement: Hong Kong](#) for more country-specific commentary.

Parties

1. In your jurisdiction, what information needs to be included about the parties at the start of an agreement?

Companies are usually identified by their name, jurisdiction of incorporation and address of the registered office/principal office or business address. The company registration number is also often included, although it is not compulsory.

Individuals are usually identified by their name, Hong Kong identity card number (passport number for non-Hong Kong identity card holders) and residential address.

Partnerships can be identified by the name of the partnership, business address, name of all partners and their respective residential address. Larger partnerships can be identified by including the same information for just one or a few partners.

Interpretation

2. Is an interpretation section usually included at the start of contracts in your jurisdiction?

An interpretation section is typically included at the start of contracts. If the contract is comprised of special terms and general terms, the interpretation section may appear in the general terms of the contract. In either case, it is common practice for the defined terms to be listed in alphabetical order and to start with an upper case letter. The defined terms may also be put in bold typeface and double quotation marks.

If the contract is short, with a few defined terms, there may not be a separate interpretation section. In this case, the definition of a defined term is usually set out immediately after the term is first used in the contract.

3. If Schedules are used, should they be expressly stated to form part of the agreement as set out in [Standard clause, Interpretation: Cross-border: clause 1.4](#) so that they are given full contractual effect?

Parties are advised to include a clause expressly stating that the Schedules form part of the agreement as a matter of good practice and for the sake of clarity. However, this clause is not required, as long as the Schedules are expressly and clearly referred to in the main body of the agreement, and the references do not give rise to a dispute as to whether the Schedules form part of the agreement.

A Schedule does not need to be signed or initialled separately, although it is good practice to do this to ensure that no pages will subsequently be added to the signed agreement.

In addition, while it is common to find Schedules appearing after the execution page of the agreement, this practice is undesirable as it may give rise to dispute as to whether the Schedules form part of the agreement. Any Schedules to an agreement should be placed before the execution page of the agreement to be effective.

4. In your jurisdiction, can an interpretation section be set out in a Schedule attached to the main agreement?

Yes. There is no prohibition on setting out an interpretation section in a Schedule. However, it is more common to set out the interpretation section in the body of agreement.

5. If non-technical terms are not defined in the agreement, will the court interpret them in accordance with their ordinary and natural meaning?

Yes. As a starting point, the court will look at the context of the agreement and interpret non-technical terms that are not defined in the agreement with their ordinary and natural meaning. The terms will be understood to have the meaning that they would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of concluding the contract.

When ascertaining the parties' knowledge at the time of concluding the contract, extrinsic evidence regarding the circumstances surrounding the conclusion of the contract may be admitted.

Expert evidence may be called to explain technical terms.

6. Are holding company and subsidiary defined under the laws of your jurisdiction?

A body corporate is a holding company of another body corporate if any of the following apply:

- It controls the composition of that other body corporate's board of directors.
- It controls more than half of the voting rights in that other body corporate.
- It holds more than half of that other body corporate's issued share capital.

(Section 13(1), Companies Ordinance (Cap. 622) (CO).)

A body corporate is also a holding company of a body corporate if it is a holding company of the holding company of that body corporate (section 13(2), CO).

A body corporate is a subsidiary of another body corporate if the latter is a holding company of the former (section 15, CO).

The wording of [Standard clause, Interpretation: Cross-border: clause 1.6](#) could be used to define holding company and subsidiary in Hong Kong if it includes a reference to the definition in section 13(1) and section 15 of the CO.

7. Is it common in your jurisdiction to define "Business Day" for notice provisions by reference to days when banks are closed/open?

It is quite common to define "Business Day" by reference to days when banks are closed/open but there are many variations of such clauses. For example, the definition of "Business Day" may:

- Specify the jurisdiction and the type of banks (for example, commercial banks, licensed banks or banks in certain places).
- Explicitly exclude Saturdays, Sundays, public holidays or even black rainstorm or gale warning days.
- The wording in [Standard clause, Interpretation: Cross-border: clause 1.1](#) could be used to define business day.

8. Are moral rights recognised in your jurisdiction? If so, can moral rights be assigned or licensed in your jurisdiction? If so, can they be included in the definition of "Intellectual Property Rights" in Standard clause, Interpretation: Cross-border?

Moral rights are recognised in Hong Kong and are conferred on:

- An author of a copyright literary, dramatic, musical or artistic work.
- A director of a copyright film.
- A performer of a live aural performance or sound recording.
- Moral rights include the right to be attributed as author, director or performer of the work and the right not to have the work treated in a derogatory way (sections 89, 92 and 272A, Copyright Ordinance (Cap. 528)), and the right not to be falsely attributed as author or director (section 96, Copyright Ordinance (Cap. 528)).
- But note that some moral rights are subject to exceptions. For example, the right to be identified as author or director and the right to object to derogatory treatment do not apply to a computer programme, any computer-generated work, and any work made for the purpose of reporting current events (sections 91 and 93, Copyright Ordinance (Cap. 528)).

In Hong Kong, moral rights cannot be assigned (section 105, Copyright Ordinance (Cap. 528)), but can be waived by an instrument in writing signed by the person giving up the right (section 98, Copyright Ordinance (Cap. 528)) and can be transmitted on death (section 106, Copyright Ordinance (Cap. 528)).

There is no express prohibition on the licensing of moral rights under the Copyright Ordinance. Also note that a moral rights user will not infringe the moral rights if a

person entitled to the moral rights has given consent (*section 98(1), Copyright Ordinance (Cap. 528)*).

Moral rights can be included in the definition of “Intellectual Property Rights” in [Standard clause](#), [Interpretation: Cross-border: clause 1](#).

9. Are warranties understood and commonly used in your jurisdiction? If not, is there any other legal concept or wording that is used to similar effect? Can the definition of “Intellectual Property Rights” in [Standard clause](#), [Interpretation: Cross-border](#) be used in a warranty that intellectual property (IP) rights have not been infringed?

Yes, warranties are understood and commonly used in agreements in Hong Kong. A warranty is a promise in an agreement, a breach of which would normally entitle the aggrieved party to claim damages for loss sustained by the breach. A breach of warranty might also trigger the right to terminate the agreement by the innocent party if the agreement specifically provides for such a termination right.

The definition of “Intellectual Property Rights” in [Standard clause](#), [Interpretation: Cross-border: clause 1](#) would normally be adopted in a warranty that IP rights have not been infringed.

10. Is value added tax (VAT) or another service tax payable in your jurisdiction? Please state the name of the service tax, if any.

There is no VAT, sales tax or service tax in Hong Kong.

11. What is the legal definition of “a person” in your jurisdiction? Does the wording in [Standard clause](#), [Interpretation: Cross-border: Clause 1.3](#). cover this or does it need to be amended in any way?

The term “person” is defined in various Hong Kong laws. For instance, the Interpretation and General Clauses Ordinance (Cap. 1) provides that “person” includes any public body and any body of persons, whether corporate or unincorporated (*section 3*).

However, this legislation only provides a standard meaning of the term used in the legislation and does not have to be used in agreements in Hong Kong. Parties are free to define the term in their agreements. The wording in [Standard clause](#), [Interpretation: Cross-border: clause 1.3](#) is acceptable.

12. Does the wording in [Standard clause](#), [Interpretation: Cross-border: clause 1.5](#) provide an effective definition of “company” in your jurisdiction?

The CO defines the following types of company:

- **Company limited by shares.** The liability of its members is limited by the company’s articles to any amount unpaid on the shares held by the members (*section 8, CO*).
- **Company limited by guarantee.** A company limited by guarantee refers to a company that does not have a share capital. The liability of its members is limited by the company’s articles to the amount that the members undertake, as set out in the articles, to contribute to the assets of the company if it is being wound up (*section 9, CO*).
- **Unlimited company.** An unlimited company refers to a company where there is no limit on the liability of its members (*section 10, CO*).
- **Private company.** A private company refers to a company that is not a company limited by guarantee whose articles:
 - restrict a member’s right to transfer shares;
 - limit the number of members to 50; and
 - prohibit any invitation to the public to subscribe for any shares or debentures of the company.(*Section 11, CO*)
- **Public company.** A public company is a company that is neither a private company nor a company limited by guarantee (*section 12, CO*).
- **Listed company.** A listed company is a company that has any of its shares listed on a recognised stock market (*section 2, CO*).
- **Body corporate.** A body corporate includes a company inside and outside Hong Kong but excludes a corporation sole (*section 2, CO*).
- **Non-Hong Kong company.** A non-Hong Kong company is a company incorporated outside Hong Kong that has established a place of business in Hong Kong (*section 2, CO*).

“Unincorporated association” is not defined in the CO. This term is referred to in some Hong Kong legislation, but none of these statutes define it. As such, interpretation of the term will be determined by the courts in the case of a dispute, presumably based on the context in which the term is used.

Parties are free to define “company” in their agreements. In general, the proposed definition of “company” in

Standard clause, Interpretation: Cross-border: clause 1.5 is acceptable.

13. If an agreement is silent on whether fax or email or other forms of electronic communication is to be treated as writing (for example, for the purpose of giving written notice), do the laws in your country infer that fax and email are included?

Yes. In the absence of any express terms addressing fax, email or electronic communication, these modes of communication will be treated as writing in Hong Kong, as long as words are represented in a visible form (section 3, Interpretation and General Clauses Ordinance (Cap. 1)). Section 3 also states that the definition of writing covers printing, lithography, photography, typewriting and any other mode of representing words in a visible form.

In addition, if a piece of information is required or permitted to be or is given in writing, an electronic record will suffice if the information contained in that record is accessible so as to be usable for subsequent reference (section 5, Electronic Transactions Ordinance (Cap. 553) (ETO)). An electronic record is a record generated in digital form by an information system, which can be transmitted within that information system or from one information system to another, and stored in an information system or other medium (section 2, ETO).

Standard clause, Interpretation: Cross-border: clause 1.12 would be effective in Hong Kong.

14. Standard clause, Interpretation: Cross-border: clause 1.19 seeks to address the risk of the *ejusdem generis* rule. Does your jurisdiction apply the *ejusdem generis* (or *eiusdem generis*) rule (that is, where a general provision is qualified in any way by confined examples, the court will interpret the general words only to relate to matters of the same class as the examples given)?

The *ejusdem generis* rule cannot be applied unless there is a class to which the general words can be restricted. The test is whether the specified things (possessing some common and dominant feature) which precede the general words can be placed under some common category.

The courts of Hong Kong normally apply the *ejusdem generis* rule when interpreting an agreement, unless the parties have agreed otherwise in that agreement.

The parties are free to include a clause such as Standard clause, Interpretation: Cross-border: clause 1.19 in their agreement if they wish to.

Conflicts

15. In your jurisdiction, where a contract is based on a standard form, but the parties have added special conditions, if any conflict arises between the standard terms and the special conditions, will the standard terms or the special conditions prevail in the absence of specific wording in the agreement (Standard clause, Conflict: Cross-border: Option 1)?

Where there is an inconsistency between the standard terms and the special conditions, the Hong Kong courts have held that the special conditions prevail over standard terms, as a matter of common sense (*Penta-Ocean Construction Co Ltd v CWF Piling & Civil Engineering* [2007] 3 HKLRD 233 and *Luen Fat Engineering and Construction Co v Hung Yip (HK) Engineering Co Ltd* [2015] HKEC 247).

16. Where there is a genuine discrepancy between the contractual documents before the court, how does the court approach the order of precedence?

The general principle is that the courts of Hong Kong would give effect to the real intention of the parties revealed in the contractual documents. The courts would first look at the contractual documents as a whole, to try to give effect to every provision in the contractual documents. The courts will not find the provisions among the contractual documents to be inconsistent if there is any way of reading them consistently.

If two provisions are manifestly inconsistent with each other, or if a provision would defeat the commercial purposes of the transaction, as set out in the rest of the contractual documents, the court might reject the inconsistent provision (*Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep 342; *Ko Hon Yue v Chiu Pik Yuk* (2012) 15 HKCFAR 72). However, if there is a conflict between a standard term (printed or boilerplate term that is commonly used for the same kind of contracts) and a special term (term that is negotiated on a case-by-case basis or bespoke term specific to the deal) of the contractual documents, the special term would generally prevail. In addition, the *contra proferentem* rule might be applied, where the court adopts an interpretation against the interest of the party that drafted the provision in question.

Variation

17. In your jurisdiction, are there any specific barriers to the effectiveness of this variation, Standard clause, Variation: Cross-border? Can the conduct of the parties override the contractual requirement for a variation to be agreed in writing?

There is no Hong Kong authority on whether an agreement can be varied by the parties' conduct (instead of writing) even though the agreement contains a term specifically providing for variation by written amendments only.

In a recent UK case, the Supreme Court of the United Kingdom held that the law should give effect to a contractual provision requiring specified formalities to be observed for a variation. For example, if the contract contains a "No Oral Modification" clause, the court should give effect to and uphold this clause. However, the conduct of the parties may override the contractual reliance under the doctrine of "estoppel", when there is unjust reliance on the "No Oral Modification" clause. This would depend on the circumstances and the parties' conduct. In general, the court will not depart from a clause that limits acts of a variation, unless the court considers that upholding the clause would contravene legitimate purposes of businessmen or cause mischief or conflict with overriding public policy (*MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 2 W.L.R. 1603).

While this case is not binding on the courts of Hong Kong, it is of persuasive value. [Standard clause, Variation: Cross-border](#) clearly states that no amendments will be effective unless written and signed, this would presumably make it difficult or even impossible to successfully argue that the agreement can be varied by actions, words or conduct. However, the Hong Kong court will take into account the overall circumstances and actions of the parties.

18. What are the requirements in your jurisdiction for a valid variation of an agreement?

Unless otherwise stated in the agreement, an agreement can only be varied with the consent of the parties. The consent can be given explicitly (in writing or orally) or by implication (by course of conduct). However, proving consent without documentary evidence is difficult. As such, it is advisable to include a provision in the agreement that amendments can only be made if they are in writing and signed by the parties.

Alternatively, an agreement can be amended or superseded by a subsequent agreement. To prove the existence of a subsequent agreement (which could be in writing or oral), the existence of the common law elements of the contract must be proven, including the consideration. (The principle that consideration is not necessary for a deed also applies to a subsequent agreement.)

Note that if the law requires an agreement to be made in or evidenced by writing (for example, agreements for the sale or other disposition of land), that agreement can only be varied by writing.

If disputes as to whether the parties have agreed to vary the contract terms arise, the court will examine all relevant circumstances to ascertain the parties' intention, including the character of the proposed varied terms and the nature of the document containing the proposed varied terms (*Chong Cheng Lin Courtney v Cathay Pacific Airways Ltd* [2011] 1 HKLRD 10).

Severance

19. Does illegality render a contract valid but unenforceable or would the contract become invalid for illegality in your jurisdiction?

"Illegal contracts" have all the essential elements of a valid contract, but the courts do not enforce them because of illegality. A contract may be illegal at common law or declared illegal by legislation.

There are five types of contract that have been declared illegal at common law on grounds of public policy:

- Contracts involving sexual immorality.
- Contracts to commit crimes, tort or fraud.
- Contracts promoting corruption.
- Contracts prejudicial to the administration of justice.
- Contracts designed to defraud the revenue.

If a contract is illegal as formed, that is, the making of the contract itself is forbidden, the contract is *void ab initio* and cannot be enforced by either party to it, even if a party is ignorant of the illegality.

If a contract is illegal as performed, that is, the contract is legal at the time of formation but the mode of performance is illegal, or it is performed for an illegal purpose, the contract will be unenforceable by the party who has performed it illegally, but enforceable by the party that did not assist or participate or acquiesce in the illegal performance. For example, where a party enters into a contract to hire a car from another party to

transport goods (a legitimate purpose) and the lender knows that the car will be used by the borrower to carry smuggled goods (an illegal purpose), if the borrower fails to pay the lender under the contract, the lender will not be able to enforce that contract against the borrower as it acquiesced in the illegal performance. However, if the lender does not assist, participate or acquiesce in the illegal performance, it can enforce the contract.

An exception to the above rule is where the illegality is not material but only incidental to the performance of a contract. For example, in the example described in the preceding paragraph, if the goods in question are legitimate but the driver exceeds the speed limit during their transportation, the speeding (which is incidental to the performance of the contract) would not render the contract illegal as performed. In this case, the contract can still be enforced by both parties. The test is whether there is a connection between what is prohibited and the subject matter of the contract.

If only part of a contract is unenforceable by virtue of illegality but the other parts, if stand alone, would be unobjectionable, the illegal part of the contract can be severed, provided that:

- A new contract is not made by rewriting the existing contract or altering its nature.
- The severance accords with public policy.

20. In your jurisdiction is some degree of severance applied by the courts even if no severance clause is expressly written into the contract? If so, in what circumstances.

The courts have the power to sever a clause from an agreement, even in the absence of any severance clause. In determining whether to sever a clause, the courts take into account the following factors:

- Whether the unenforceable provision is capable of being removed without adding or modifying the remaining terms (commonly known as the “blue pencil” test).
- Whether the remaining terms continue to be supported by adequate consideration.
- Whether the removal of the unenforceable provision changes the character of the contract, making it “not the sort of contract that the parties entered into at all”.
- Whether the severance is consistent with public policy.

For example, if the court finds that an exemption clause is unreasonable as a whole, even if that exemption clause contains a part that is not unreasonable, the entire exemption clause (including the reasonable part) will be rendered unenforceable.

Although the court has jurisdiction to sever a clause from an agreement without a severance clause, it is still advisable for the parties to include an express severance clause in their commercial contract for the sake of certainty.

21. Is an obligation to negotiate a substitute of an equivalent but valid clause enforceable in your jurisdiction (Standard clause, Severance: Cross-border: clause 1.2)? Is it only enforceable if the substitute wording is easily ascertainable?

If there is a clause requiring the parties to negotiate a substitute of an equivalent but valid clause where any provision is found invalid, illegal or unenforceable (such as [Standard clause, Severance: Cross-border: clause 1.2](#)), that clause will be enforceable and the parties will be required to negotiate a substitute in those circumstances. [Standard clause, Severance: Cross-border: clause 1.2](#) only requires the parties to negotiate a substitute; and that contractual obligation arises regardless of whether any substitute wording is easily ascertainable.

If no substitute can be agreed by the parties, the invalid, illegal or unenforceable provision will be deemed deleted pursuant to [Standard clause, Severance: Cross-border: clause 1.1](#).

A clause such as [Standard clause, Severance: Cross-border: clause 1.1](#) does not provide leverage to any particular party, as both parties are obliged to negotiate under it.

22. Are there any legal provisions in your jurisdiction that deal with severance of certain terms?

Depending on the term in question, the following legislation may apply:

- **Control of Exemption Clauses Ordinance (Cap. 71).** This provides that any exemption clause must satisfy the “reasonableness” test ([section 3](#)). If it does not, the clause will be regarded as not part of the contract. In determining whether a clause is reasonable, the court will look at all the circumstances of the case. In addition, note that a provision will not exempt a party’s liabilities for the other party’s death or personal injury flowing from the former party’s negligence ([section 7](#)).
- **Misrepresentation Ordinance (Cap. 284).** This provides that a contract excluding liability for misrepresentation must satisfy the “reasonableness” test, or that clause will be of no effect ([section 4](#)). In determining whether a clause is reasonable, the court will look at all the circumstances of the case.

- **Unconscionable Contracts Ordinance (Cap. 458).** This provides that, if any part of a contract is found to be unconscionable in light of the circumstances at the time of contract formation, the court may strike out the whole or the relevant part of the contract, or limit the application of the unconscionable part to avoid any unconscionable result (*section 5*).
- **Law Amendment and Reform (Consolidation) Ordinance (Cap. 23).** This provides that, if a part of a contract is frustrated, and another part of the contract has already been performed, the court will treat the part of the contract that has been performed as a separate contract that is not frustrated (*section 17(4)*).

Counterparts

23. Is a document signed in counterpart validly executed in your jurisdiction? Are the counterparts treated as a single document? Is each copy of the agreement signed in counterpart considered to be an original?

A document signed in counterpart is validly executed in Hong Kong. All signed counterparts form a single agreement.

In theory, an agreement may be deemed to be concluded in the absence of a written document, as long as the court is satisfied (for example, by circumstantial evidence) that an agreement has been reached between the parties. As such, even in the absence of a counterparts clause, an agreement may still be found validly executed so long as the court is satisfied that an agreement has been reached between the parties. In this sense, signed counterparts might be treated as strong documentary evidence in support of the parties' agreement if there is no controversy over the agreement to which these counterparts belong.

That said, it is still advisable for the parties to include an express counterparts clause in their commercial contract for the sake of certainty.

24. In your jurisdiction, are there any limitations to the methods of electronic delivery of counterparts? Is delivery of the whole counterpart required or can only delivery of the signature page be acceptable (see [Standard clause, Counterparts: Cross-border, clause 1.2](#))?

There are no limitations in Hong Kong on how counterparts should be delivered, electronically or physically.

The issue of whether the whole counterpart or only the signature page needs to be delivered has yet to be tried by the courts of Hong Kong. In 2008, the English courts held that a signature page must be delivered as a discrete physical entity together with the main body of the contract (*R (on the application of Mercury Tax Group Limited and another) v HMRC [2008] EWHC 2721*). As UK decisions after 1997 are persuasive in Hong Kong, it is advisable to follow the English law requirements and deliver the signature page together with the main body of the contract.

25. Where an agreement provides for the agreement not to take effect until each party has executed one counterpart, as set out in [Standard clause, Counterparts: Cross-border, clause 1.3](#), could this create a risk that the parties do not intend to be bound by the written agreement until it is executed by each party?

The principle is that an agreement does not take effect unless and until all parties to that agreement sign it. As such, if the agreement is to be executed in counterpart, it will not take effect unless and until all counterparts are signed. [Standard clause, Counterparts: Cross-border, clause 1.3](#) reinforces this common law position by making it clear that the parties also intend that the agreement will not take effect until each counterpart is signed.

However, in Hong Kong this does not mean that the agreement is "subject to contract". "Subject to contract" means that the parties have reached a consensus, which is, however, subject to (and could be superseded by) a (written) contract to be entered into by the parties in the future. The fact that the counterparts are yet to be executed does not mean that the deal is subject to re-negotiation. It only means that the agreement has yet to take effect.

26. Is a duty or other tax payable on counterparts or duplicates of contracts in your jurisdiction?

No, unless taxes are chargeable on the contract in question. Stamp duty is chargeable on certain types of documents in Hong Kong, including:

- A conveyance on the sale of immovable property in Hong Kong.
- An agreement for the sale of immovable property in Hong Kong.
- The lease of immovable property in Hong Kong.
- The transfer of Hong Kong stock.
- The issue of Hong Kong bearer instruments.

(*First Schedule, Stamp Duty Ordinance (Cap. 117)*.)

Stamp duty of HKD5 is payable on any duplicates or counterparts of documents chargeable to stamp duty (provided that the original document has been duly stamped).

Language

27. Is there any requirement in your jurisdiction that commercial contracts be written in the local language to be valid and enforceable?

There is no requirement in Hong Kong that commercial contracts be written in the local language to be valid and enforceable.

However, if a contract is written in a language not fully understood by a party, the contract may not be enforceable against the party who does not understand the language, on the ground of unreasonableness (section 3(4), *Control of Exemption Clauses Ordinance* (Cap. 71)).

In addition, note that all legal proceedings in Hong Kong must be conducted in either or both of the official languages, namely, English and traditional Chinese. As a result, all documents used in the legal proceedings must also be in English or traditional Chinese. Any contract in another language must be translated into English or traditional Chinese before it can be used in Hong Kong courts.

28. Under the laws of your jurisdiction, will the local language version of any agreement prevail or can the parties agree which version will prevail over the other (Standard clause, Language: Cross-border: clause 1.3)?

There is no legal requirement that the local language version of an agreement will prevail over a version in another language. The parties can agree on the prevailing version in the case of dispute.

29. If a commercial agreement needs to be submitted for government approval in your jurisdiction, in what language should it be submitted? Could an English version of the document be approved?

Any agreement (or other document) that needs to be submitted to the government must be in English or traditional Chinese, the official languages of Hong Kong. An English version of the document can be approved.

Governing law and jurisdiction

30. Does the law in your jurisdiction dictate (a) which governing law will apply to commercial agreements and (b) in which jurisdiction any dispute will be heard?

Jurisdiction

In general, if the parties have agreed on the exclusive jurisdiction in which any dispute will be heard, the Hong Kong courts will give effect to the agreement, except:

- Where a party has a statutory right to bring an action in Hong Kong courts, the courts may disregard the exclusive jurisdiction clause of the agreement. For example, a shareholder has a statutory duty to present an unfair prejudice petition in Hong Kong regardless of the exclusive jurisdiction clause in the shareholders' agreement (*Joseph Ghossoub v Team Y&R Holdings Hong Kong Ltd* [2017] HKEC 1532).
- Where the courts decide that they have very strong reasons to disregard the exclusive jurisdiction clause, which are outside of the parties' reasonable contemplation at the time of entering into the agreement.

However, if the parties have not agreed on the exclusive jurisdiction in which any dispute will be heard, or have only agreed on the non-exclusive jurisdiction in which any dispute will be heard, then the *forum conveniens* principles apply. The essential issue to be determined is which court is the most appropriate for the matter to be tried in, in the interests of all the parties and of justice. The test of appropriateness is an objective one. All circumstances will be taken into account, including the existence of a non-exclusive jurisdiction clause.

Governing law

If the parties have agreed on the governing law applicable to the commercial agreement, the Hong Kong courts will generally give effect to the agreement, except:

- Where the governing law stated is the law of a state that is not recognised by Hong Kong and the application of that law to the contract contravenes public policy.
- Where the choice of governing law was made involuntarily, or with misrepresentation or fraud.

In addition, the *Control of Exemption Clauses Ordinance* (Cap. 71) (CECO) applies regardless of the governing law clause of the contract in question, where either:

- The clause appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the CECO (*section 17(2)(a), CECO*).
- A consumer who habitually resides in Hong Kong enters into a contract in Hong Kong (*section 17(2)(b), CECO*).

In the absence of a governing law clause, the courts will determine the applicable law in the following ways:

- For procedural issues, if the dispute is submitted to a Hong Kong court, Hong Kong law will apply.
- For substantial issues in relation to the contract, the courts will look to the law that has the “closest and most real connection” with the parties’ transaction. The court will consider:
 - the subject matter of the contract;
 - the place of intended performance;
 - the place of making or negotiating the contract;
 - the domicile of the parties;
 - any related transactions (the court may infer that related contracts are to be governed by the same legal system; similarly, other dispute resolution clauses indicating a choice of law may be relevant); and
 - the adoption of particular legal terminology, language of the agreement and related transactions
- For most property issues, the law is *lex in situs*, namely, where the property is, except in the case of succession, where the place of domicile of the deceased may prevail.

31. Are jurisdiction clauses that are for the benefit of one party (as in **Standard clause, Jurisdiction: Cross-border, Option 2 of clause 1.1**) enforceable in your jurisdiction?

The issue of validity of asymmetric jurisdiction clauses, that is, jurisdiction clauses that benefit only one of the parties to a contract, has not been decided by a Hong Kong court yet.

Note that the validity of asymmetric jurisdiction clauses was confirmed by the High Court of England and Wales recently (*Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc., Commerzbank Aktiengesellschaft v Pauline Shipping Limited Liquimar Tankers Management Inc. [2017] EWHC 161 (Comm); 2017 WL 00430746*). However, the reasoning by the judge in this case was largely based on the Recast Brussels

Regulation (Regulation 1215/2012/EU), to which the UK is subject (Hong Kong is not). As a result, it remains unclear whether such clauses will be upheld by the Hong Kong courts.

32. In your jurisdiction, would the courts give effect to **Standard clause, Jurisdiction: Cross-border, Option 3 of clause 1.1**, where the parties set out a reciprocal agreement to bring proceedings in the court wherever the defendant is domiciled?

The validity of such a domicile-based jurisdiction clause has yet to be disputed before a Hong Kong court. However, there is no reason why a Hong Kong court would not give effect to arrangements such as **Standard clause, Jurisdiction: Cross-border: Option 3 of clause 1.1** that are agreed between the parties.

Execution and other formalities

33. How does this agreement need to be executed to ensure it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

If a party to the contract is an individual, they only need to sign it.

A company can execute a deed by:

- Affixing the common seal in accordance with its articles of association.
- In the case of a company with one director, that director signing it.
- In the case of a company with more than one director, signing by two directors or one director and the company secretary.
- Signing by a person appointed under a duly executed power of attorney.

(*Sections 121, 127 and 129, CO.*)

A company may execute a written agreement by having any person acting with the company’s express or implied authority sign it (*section 121, CO*).

There are special formalities requirements for certain types of agreements. For example:

- A deed must be expressed to be executed as a deed, and must be signed, sealed and delivered.

- A power of attorney must be either:
 - signed and sealed by the donor of the power; or
 - signed and sealed at the direction, and in the presence, of the donor of the power and witnessed and attested by two witnesses.
 - (*Section 2, Powers of Attorney Ordinance (Cap. 31.)*)
- An enduring power of attorney must be signed by the donor of the power and witnessed and certified by a registered medical practitioner and a solicitor (*section 5, Enduring Powers of Attorney Ordinance (Cap. 501)*). An enduring power of attorney is a legal instrument which allows a person, while they are still mentally capable, to appoint attorney(s) to take care of their financial matters if they subsequently become mentally incapacitated.

Contracts do not have to be notarised or apostilled to be effective.

Registration formalities

Only contracts relating to the following must be registered:

- All deeds, conveyances and other instruments in writing in relation to land (except for leases for any term not exceeding three years). These must be registered with the Land Registry or they will be null and void against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcel of ground, tenement 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. These must be registered with the Companies Registry or the charges or mortgages will be void against the company's liquidator and creditors (*section 337(4), CO*).

General

34. Are there any standard clauses in Cross-border contracts and boilerplate clauses that are not legally valid or not standard practice in your jurisdiction?

The standard clauses in [Cross-border contracts and boilerplate clauses](#) are generally standard practice in Hong Kong.

However, a standard clause may not be legally valid in Hong Kong if, for example, it is:

- An indemnity clause in a consumer contract that is unreasonable (see [Country Q&A, Part 2 - Standard Clauses "Boilerplate" agreement: Hong Kong: Question 8](#)).
- A termination by notice clause in a consumer contract that is unconscionable (see [Country Q&A, Part 2 - Standard Clauses "Boilerplate" agreement: Hong Kong: Question 31](#)).
- An exclusion clause that excludes or restricts liability for breach of the obligations arising from the Sale of Goods Ordinance (Cap. 26) and Supply of Services (Implied Terms) Ordinance (Cap. 457) when dealing with a consumer (see [Country Q&A, Part 2 - Standard Clauses "Boilerplate" agreement: Hong Kong: Question 46](#)).

35. Are there any other standard clauses that would be usual to see in an agreement and/or that are standard practice in your jurisdiction?

Cross-border contracts and boilerplate clauses generally include all standard boilerplate that would be usual to see in an agreement and that are standard practice in Hong Kong.

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