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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA





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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

PREPARED BY MERITAS LAWYERS IN ASIA

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SUCCESSFUL STRATEGIES FOR DOING BUSINESS IN ASIA

This is the fourth revised edition of Successful Strategies for Doing Business in Asia, which was first published in 2006. Prepared by lawyers from 13 leading Meritas member law firms in the Asia region, this book targets foreign investors and business people looking to pursue investment opportunities throughout Asia. Each chapter contains general information and guidelines and offers practical insights as opposed to specific legal advice.

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The following currency notations are used throughout this book.

RMB	Chinese Renminbi	PHP	Philippine Peso
HKD	Hong Kong Dollar	SGD	Singapore Dollar
INR	Indian Rupee	TWD	New Taiwan Dollar
IDR	Indonesian Rupiah	THB	Thai Baht
JPY	Japanese Yen	USD	United States Dollar
KRW	Korean Won	VND	Vietnamese Đông
MYR	Malaysian Ringgit		

Please be aware that the information on legal, tax and other matters contained in this book is merely descriptive and therefore not exhaustive. As a result of frequent changes in legislation and regulations from country to country, the situations as described throughout this book do not remain the same. Meritas cannot and does not guarantee the accuracy or the completeness of information provided, nor the application and execution of laws as stated. Please do not rely solely on these materials without consulting with qualified legal advisors who are familiar with your particular areas of interest and geographic locations.

In 2008, the world experienced its worst financial crisis in 70 years. Today, while many countries and economic regions are still suffering, Asia continues to be a bright spot. Home to 3.8 billion people, Asia is playing a major role in driving the global economy back to healthier times. At first, China rebounded quickly, though this momentum has slowed somewhat recently. India exhibits signs of long-term growth potential, as do Singapore, Malaysia and others in Asia, but serious challenges remain.

For over 30 years I have worked on behalf of multinational companies in their pursuit of investment and business opportunities throughout Asia. What I have learned is that countries in the Asian region can appear similar and at the same time be remarkably different. While local legal systems and government regulations will vary, every country has universal opportunities and challenges that foreign investors will face. This book is designed to provide both practical and timely insights into the 12 most frequently-asked questions that potential investors in Asia should consider:

1. What role will the government play in approving and regulating opportunities for foreign direct investment?
 2. Is it possible for foreign investors to conduct business without involving a local partner? What corporate structure is most commonly used and best for foreign investors?
 3. How does the government regulate commercial joint ventures composed of foreign investors and local companies or individuals?
 4. What specific laws will influence the commercial relationship between local agents/distributors and foreign companies?
 5. In what manner does the government regulate merger and acquisition activities by foreign investors? Are there any specific areas or industries that are heavily restricted or completely prohibited to foreign investors?
 6. How do local labor statutes regulate the treatment of employees and expatriate workers?
 7. What role do local banks and government agencies play in regulating the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
 8. What types of taxes, duties and levies should a foreign investor expect to encounter in negotiating an inbound investment?
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9. Do comprehensive intellectual property laws exist, and do they provide the same levels of protection for foreign investors as local companies? Will local courts and tribunals enforce IP laws uniformly, regardless of the nationality of the parties?
10. If a commercial dispute arises, given the choice between local courts or an international arbitration venue, which would offer a more beneficial forum for fair dispute resolution for foreign investors?
11. What recommendations can you offer for how best to negotiate and conduct business in your country?
12. What practical advice can you share with investors who decide to do business in your country?

Thirteen Asian law firms within the Meritas alliance have generously contributed to this book. These firms are comprised of leading local lawyers who possess broad practical experience in advising international clients on how best to conduct business in their respective countries. Each law firm was presented with these “Twelve Questions” and invited to write a chapter providing an overview of the laws in their jurisdiction along with timely insights and advice. In a concise manner, this book hopes to provide readers with a clear understanding of the similarities and differences, strengths and weaknesses of countries in the Asian region.

One final thought: For those who are waiting for Asia to become more predictable or financially stable before pursuing business or investment opportunities, do not wait too long. Most successful multinationals are already actively conducting business throughout Asia. Those who delay will find themselves missing out on one of the greatest economic expansions in history. There are risks, certainly, but also great rewards for the savvy – and educated – investor.

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I. WHAT ROLE WILL THE GOVERNMENT OF HONG KONG PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

Hong Kong is always rated as one of the world's freest economies, one of the reasons being that the government has always adopted the approach of nonintervention.

Hong Kong strives to attract more foreign investors to set up their investment vehicles and even regional headquarters here by introducing various policies to minimize the hurdles of foreign investors setting up business in Hong Kong.

Besides some restrictive businesses such as electricity supply, transportation services, banking and telecommunications (which require special permits or licenses), foreign investment corporations can carry on business of any nature they desire in Hong Kong through various types of business vehicles without restrictions. Indeed, the restrictions imposed on the restrictive business aforementioned are generally applicable equally to both Hong Kong residents and foreign investors.

To establish companies to conduct unrestricted business activities in Hong Kong, no matter which form of business vehicle is selected, no government approval is required. The only requisite registration requirement is to file an application with the Business Registration Office of the Inland Revenue Department within one month upon commencement of business and once each year thereafter, to obtain a Business Registration Certificate which will be issued upon payment of HKD2,450. This fee is sometimes reduced or waived by the government as part of the financial assistance given to the Hong Kong business sector.

2. IS IT POSSIBLE FOR FOREIGN INVESTORS TO CONDUCT BUSINESS IN HONG KONG WITHOUT A LOCAL PARTNER? WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED AND BEST FOR FOREIGN INVESTORS?

Foreign investors have a wide choice of business vehicles in Hong Kong for conducting business. The most common ones are:

- Private Limited Companies
- Partnerships/Sole Proprietorships
- Branch Offices
- Representative Offices

PRIVATE LIMITED COMPANIES

A foreign company can incorporate a Hong Kong company as its wholly owned subsidiary. The company may be public or private and may be limited by shares or by guarantee. Most companies in Hong Kong are private company limited by shares.

Indeed, an individual of any nationality can also be the sole shareholder and sole director of a private company limited by shares.

The name of the limited company can be in English and/or Chinese. There is no required minimum or maximum of registered capital, and the liability of shareholders is limited to the share capital that they have subscribed.

A limited company in Hong Kong is required to appoint a Hong Kong resident or Hong Kong incorporated company as its company secretary and to have a Hong Kong address as its registered office.

A limited company is a separate legal entity. The constitution of a limited company in Hong Kong allows it to carry on any type of business it wishes unless, during incorporation of the company, the subscribers choose to limit its scope of business by defining clearly its objectives in its articles of association.

PARTNERSHIPS / SOLE PROPRIETORSHIPS

Two or more individuals of any nationality can form a partnership in Hong Kong by submitting an application to the Business Registration Office and thereby obtaining a business registration certificate, after which an unlimited company, the name that is commonly known in Hong Kong, is formed.

Business can be conducted in the name of the partnership, but its partners will be held responsible and liable, without limit, for all the debts and liabilities of the partnership.

The rights and obligations amongst the partners will be governed by the partnership agreement entered into by all the partners, but, as against outsiders, the partners' liabilities are joint and several. Yet, the advantage of a partnership is that it is quick and inexpensive to establish.

An individual person without any partners can also apply to the Hong Kong Business Registration Office for a business registration certificate in order to establish a sole proprietorship and so is able to carry on business in Hong Kong.

BRANCH OFFICES

An overseas company can register a branch office in the Hong Kong Companies Registry. Upon registration and after obtaining a business registration certificate, the overseas company can carry on business in Hong Kong through the branch office.

A branch office is generally subject to the same rights and liabilities in legal and tax aspects as a company incorporated in Hong Kong, including but not limited to obtaining a business registration certificate annually.

REPRESENTATIVE OFFICES

An overseas company can set up a representative office in Hong Kong to analyze the Hong Kong market or conduct research for its business planning, but it is prohibited from carrying on business in Hong Kong.

It is easy to set up a representative office in Hong Kong, as no registration requirement is needed. However, the representative office also has to obtain a business registration certificate during its presence in Hong Kong.

3. HOW DOES THE GOVERNMENT OF HONG KONG REGULATE COMMERCIAL JOINT VENTURES COMPOSED OF FOREIGN INVESTORS AND LOCAL COMPANIES OR INDIVIDUALS?

The Hong Kong government generally does not regulate commercial joint ventures or business cooperation between foreign investors and their local partners.

Foreign investors can collaborate with Hong Kong partners to conduct projects and business in various forms:

- They can simply enter into a cooperation agreement providing details of how the business is to be conducted through a designated intermediary.
- They can jointly form and own the equity interest in a limited company in the pre-agreed ratio, under which circumstance a shareholders' agreement may be useful to define the rights and obligations of the parties.
- The parties can enter into a partnership agreement to form a partnership to conduct business in Hong Kong.

In each of these cooperation structures, the government will not be involved in the choice of partners, approval of the business operation or model, or the terms of cooperation.

4. WHAT SPECIFIC LAWS WILL INFLUENCE THE COMMERCIAL RELATIONSHIP BETWEEN LOCAL AGENTS/DISTRIBUTORS AND FOREIGN COMPANIES?

Unlike other places throughout Asia, Hong Kong contract law and agency law primarily govern the relationship between local agents and distributors and foreign companies. The government's approval is not required and there are no statutory rules or regulations governing the appointment of agents and distributors, unless the specific business activity is a regulated business (such as the import and supply of petroleum or dangerous drugs).

5. IN WHAT MANNER DOES THE HONG KONG GOVERNMENT REGULATE PROPOSED MERGER AND ACQUISITION ACTIVITIES BY FOREIGN INVESTORS? ARE THERE ANY SPECIFIC AREAS OR INDUSTRIES THAT ARE HEAVILY RESTRICTED OR COMPLETELY PROHIBITED TO FOREIGN INVESTORS?

Subject to certain exceptions, it is relatively easy to acquire business and shareholding interest in Hong Kong. Below is a brief introduction to the relevant regulations on merger and acquisition in Hong Kong from the perspective of a (i) private company; (ii) listed company; and (iii) regulated company.

PRIVATE COMPANY

There is minimal regulatory interference concerning the merger and acquisition activities over private companies, except in certain industries which will be discussed in the section headed Regulated Company below.

Generally speaking, merger and acquisition activities over private companies in Hong Kong are subject to contract law and company law. There are no restrictions on foreign ownership or management of private companies in Hong Kong. That means shareholders and directors of private companies may be individuals or business entities of any nationality.

The Companies Ordinance (Cap. 622) applies to all companies formed and registered under that ordinance. The Companies Ordinance sets out the general rules and regulations governing Hong Kong companies and the conduct of their affairs. It also contains a number of specific provisions relating to matters which may have an impact upon mergers and acquisitions, in particular, the legal and compliance requirements on a company giving financial assistance for the purchase of its own shares.

Stamp duty is payable to the Hong Kong government before the transfer of Hong Kong stock is effective. The current rate is 0.2% on the higher of the amount of the consideration paid and the value of the shares being transferred.

LISTED COMPANY

There is greater regulatory control over the merger and acquisition activities involving listed companies, including the requirement to comply with the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the Listing Rules), the Codes on Takeovers and Mergers and Share Repurchases, and legislation overseeing insider dealing and disclosure of interests.

In particular, the requirement of disclosure of price sensitive information used to be governed by the Listing Rules. The Securities and Futures Ordinance (Cap. 571) imposes further statutory requirements on disclosure of inside information (information of similar nature but is newly defined); failure to do so is an offense of the company and its officers punishable by imprisonment and fine.

While the Stock Exchange of Hong Kong Limited is concerned with issues such as transparency, avoidance of conflict of interest and due compliance with the Listing Rules, it does not normally take a substantive role in relation to the contractual provisions of the sale or purchase of shares in listed companies. It does, however, look into the suitability for listing of the subject listed company following the takeover or merger. In addition, the Stock Exchange will also scrutinize reverse takeovers or back-door listings.

When the investors acquire or dispose of the shares in listed companies, the investors shall seek advice from professional lawyers whether or not there are any compliance issues to note or otherwise comply with.

REGULATED COMPANY

In Hong Kong, some industries such as telecommunications, banking, securities, and insurance are subject to additional regulation from their respective regulatory bodies. The telecommunications industry will be discussed under this section.

All telecommunication services in Hong Kong are regulated under the Telecommunication Ordinance (Cap. 106) (the TO) and its subsidiary legislation. Under the TO, no person shall establish or maintain any means of telecommunication unless an appropriate license from the Governor in Council or the Communications Authority (CA) is first obtained.

The TO regulates certain mergers and acquisitions involving telecommunications carrier licensees. There is no requirement that merger proponents notify the CA of their intentions prior to consummating their deal. However, the CA can investigate a merger after it is completed and, if the CA concludes that it has or is likely to have the effect of substantially lessening competition and does not have outweighing public benefit, the CA can order that the merger be reversed or that other remedies be implemented to overcome the identified competitive detriment. Merger proponents may however request the formal or informal consent of the CA before proceeding with the merger.

It should also be noted that under the Competition Ordinance (Cap. 619) (the CO), which is expected to come into effect later in 2015, mergers

involving telecommunications carrier licensees which have, or are likely to have, the effect of substantially lessening competition in Hong Kong are prohibited. The CA will be given concurrent jurisdiction with the Competition Commission to enforce the CO in this respect.

In relation to companies licensed to provide audio broadcasting services, there is a limit under the TO on the foreign ownership of such companies up to 49%.

In short, subject to the foregoing and unless specifically restricted by the relevant regulator of the relevant sector, Hong Kong does not impose restrictions which are applicable only to foreign investors in relation to their merger and acquisition activities in Hong Kong.

6. HOW DO LOCAL LABOR STATUTES REGULATE THE TREATMENT OF EMPLOYEES AND EXPATRIATE WORKERS?

In 2014, Hong Kong had a population of roughly 7.3 million, of which 3.9 million comprise the total labor force. Unemployment rate is about 3.3%, and underemployment rate is about 1.6%. Local employees and expatriates are treated alike under labor statutes, except for the requirement of work visas. Every year the government issues about 30,000 work/investment visas and more than 280,000 extensions of stay visas. Long-term expatriates who have lived in Hong Kong for over seven years may apply for permanent residence.

Statutory labor protection is not as comprehensive as one may find in the West. There is no law on standard working hours, although there are ongoing discussions on this issue in the legislature. The statutory minimum wage is HKD30 per hour, which will be revised to HKD32.5 effective 1 May 2015. There is no collective bargaining right, nor is there any right to involve trade unions in negotiation of employment contracts. Statutory annual leave varies from seven to 14 days, depending on the length of service as set out in legislation. Employees are entitled to at least 12 statutory holidays (e.g., National Day, Labour Day, etc.), but many employers contractually agree to give five more "general holidays" (e.g., Good Friday, the day following Easter Monday, the first weekday after Christmas, etc.). In addition, there is one statutory "rest day" per week (usually but not necessarily Sunday). Most local employers in practice offer a five-day week to office staff, but a five-and-a-half or six-day week to those in the front line or in the industry and construction sectors. Pregnant employees are entitled to paid maternity leave of 10 weeks (at the

statutory minimum rate of 80% of normal wage, although many employers offer to pay in full), and three days of paternity leave. Office hours average approximately 40 to 48 hours per week (including a lunch hour per day), and are usually contractually longer in the service, industry and construction sectors and also often longer unofficially in many other private sectors.

The law generally requires that employment should not be terminated without due notice (normally one month, although longer periods may be provided in contracts, usually in senior posts) or payment in lieu of notice, except in the case of misconduct that warrants summary dismissal. The law also prohibits an employer from dismissing an employee for her pregnancy, for trade union activities, or during statutory sick leave. An employee who has been employed under a continuous contract for a period of not less than 24 months can make a claim for unreasonable dismissal unless the employer can show a valid reason defined in the legislation (e.g., redundancy or conduct of the employee). However, even if a claim for unreasonable dismissal is established, an order for reinstatement or re-engagement will only be made by the court/tribunal if both the employer and the employee agree to it, which means that an employee's successful claim will result in compensation only.

The privacy law in workplace and the statutes against sex, disability, race and family status discrimination are, to a certain extent, modeled on the equivalent English laws in the pre-Equality Act (2010) regime.

7. WHAT ROLE DO LOCAL BANKS AND GOVERNMENT AGENCIES PLAY IN REGULATING THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT, AND OTHER BASIC FINANCIAL TRANSACTIONS?

Hong Kong is a renowned financial centre currently with over 150 banks and financial institutions worldwide operating in Hong Kong. The local currency in Hong Kong is the Hong Kong dollar (HKD), which is a freely convertible currency. There is no foreign exchange control in Hong Kong. This is entrenched in Article 112 of the Basic Law.

Hong Kong has no restriction on repatriation of funds overseas but there are regulations in place that may apply where it involves large sums of money. This includes the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) (AMLO) which

requires remittance agents and money-changers to verify and keep records of customers' identities and particulars of transactions of HKD8,000 or more or of an equivalent amount in any other currency.

In addition, the Hong Kong Monetary Authority and Hong Kong Association of Banks regulate money laundering by incorporating similar customer identification and record keeping requirements of the AMLO into the latest *Guideline for Prevention of Money Laundering and Counter-Terrorist Financing* for financial institutions. The Guideline provides guidance on customer due diligence and record-keeping measures under the AMLO and assists authorized institutions to meet their legal and regulatory obligations.

Loans and trade facilities (including letters of credit) are generally provided by banks in Hong Kong, though licensed money-lenders are also permitted to advance loans to customers subject to the control of the mandatory terms as contained in the Money Lenders Ordinance (Cap. 163). When banks process loan applications, there are no business or nationality restrictions or preferences. Banks in Hong Kong provide loans on commercial principles in accordance with the prevailing market conditions subject to the guidelines (such as guidelines on Corporate Governance and Risk Management Controls) from time to time issued by the Hong Kong Monetary Authority, which is the regulatory authority over banks and other financial institutes in Hong Kong.

The Hong Kong government does not generally provide financial assistance to companies doing business in Hong Kong but it provides assistance to small and medium enterprises (SME) through various funding schemes, such as the SME Loan Guarantee Scheme, SME Export Marketing Fund, SME Training Fund and SME Development Fund.

8. WHAT TYPES OF TAXES, DUTIES, AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER IN NEGOTIATING AN INBOUND INVESTMENT IN HONG KONG?

Hong Kong adopts a simple corporate and personal tax system with low tax rates.

BUSINESS REGISTRATION

All companies which carry on business in Hong Kong are required to apply for business registration within one month from the date of commencement of the business, and to display a valid business registration

certificate at the place of business. The business registration fee and levy for a one-year certificate is currently HKD2,250.

CAPITAL DUTIES

With effect from 1 June 2012, no capital duty is chargeable on the issued share capital of companies set up in Hong Kong.

PROFITS TAX

Profits tax is levied on individuals, partnerships, corporations and bodies of persons carrying on business in respect of assessable profits arising in or derived from Hong Kong. Hong Kong adopts a territorial source principle so that only income which has a source in Hong Kong is taxable. The profits tax rate is the same for foreign and local companies (corporation rate is 16.5% and unincorporated business rate is 15%). In general, all business expenses incurred in the production of assessable profits are fully deductible. Allowances or deductions are given to investment in plant and machinery, buildings and structures, and capital expenditure on research and development, refurbishment, etc.

In relation to the double taxation issue, Hong Kong has concluded various double taxation agreements with other jurisdictions including Canada, Japan, the Mainland of China, the United Kingdom, etc.

SALARIES TAX

Salaries tax is charged on all incomes earned by an employee arising in or derived from Hong Kong from any office, employment or pension, subject to deductions and allowances. It is charged at progressive rates, with the current maximum rate at 17% subject to an overriding cap that the tax payable shall not exceed the amount based on the standard rate of 15% on the net total income (i.e., assessable income after deductions but before allowances). For directors of a company resident in Hong Kong, the incomes derived from such office are chargeable to salaries tax irrespective of the number of days stayed in Hong Kong.

STAMP DUTY FOR PROPERTIES

Stamp duty is imposed on acquisition or lease of property. The amount payable for acquisition of property varies according to the amount or value of consideration. Effective 23 February 2013, the maximum rate for acquisition of a residential property where the purchaser is a Hong Kong permanent resident acting on his own behalf who does not own any other residential property in Hong Kong (the Exempted Case) is 4.25%. The maximum rate for other transactions which do not fall within the

Exempted Case is increased to 8.5%. On the other hand, the amount payable for lease varies according to the term of the lease, with the maximum at 1% of the yearly rent.

With a view to prevent speculative activities in the residential property market, any residential property acquired on or after 20 November 2010, either by an individual or a company (regardless of where it is incorporated), and resold within 24 months (if the property was acquired between 20 November 2010 and 26 October 2012) or 36 months (if the property was acquired on or after 27 October 2012), will be subject to a Special Stamp Duty. Depending on the length of period the subject property was held by the intended seller, the rates applicable to properties acquired between 20 November 2010 and 26 October 2012 are 15%, 10% or 5%, and the rates applicable to properties acquired on or after 27 October 2012 are 20%, 15% and 10%.

The Hong Kong government introduced a Buyer's Stamp Duty, effective 27 October 2012, chargeable on any residential property acquired by any person (including a company incorporated) except a Hong Kong permanent resident acting on his own behalf at a flat rate of 15% on top of the existing stamp duty and the special stamp duty, if applicable.

STAMP DUTY FOR SHARES

Stamp duty is also imposed on transfer of shares of companies incorporated in Hong Kong; the rate is currently 0.2% of the consideration. However, stamp duty is charged on the market value of a transaction if this is greater than the actual consideration. Consideration includes debts waived and assigned. Therefore, the audited accounts of the company may be checked for the net asset value.

9. DO COMPREHENSIVE INTELLECTUAL PROPERTY LAWS EXIST IN HONG KONG AND DO THEY PROVIDE THE SAME LEVELS OF PROTECTION FOR FOREIGN INVESTORS AS LOCAL COMPANIES? WILL LOCAL COURTS AND TRIBUNALS ENFORCE IP LAWS UNIFORMLY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

The Hong Kong government has always taken protection of intellectual property rights seriously.

The intellectual property laws are extremely comprehensive. Hong Kong joined the WTO in 1995 as a founding member. The intellectual property

laws comply with the WTO standards. In order to fulfill its obligations under various international agreements and maintain its status as a first-class international trade centre, Hong Kong has developed statutes to cover trademarks, trade description, copyright, registered designs and patents. Under the common law, actions against passing off and disclosure of confidential information are also available to intellectual property owners.

The Intellectual Property Department is responsible for advising the government on policies and legislation in relation to the protection of intellectual property and promoting the intellectual property protection through public education. It operates the registries for trademarks, patents and registered designs.

The law empowers the customs to investigate suspected infringing activities and enforce the criminal aspects of infringement of trademarks, copyrights and false trade description. Pursuant to the WTO-TRIPS Agreement, the customs assists the intellectual property right owner to combat infringing activities through cross-border enforcement measures.

Hong Kong laws do not distinguish between the rights available to local and foreign entities. Both the registries and the judiciary are highly regarded for their fair treatment to all parties regardless of their nationalities.

10. IF A COMMERCIAL DISPUTE ARISES, GIVEN THE CHOICE BETWEEN LOCAL COURTS OR AN INTERNATIONAL ARBITRATION VENUE, WHICH WOULD OFFER A MORE BENEFICIAL FORUM FOR FAIR DISPUTE RESOLUTION FOR FOREIGN INVESTORS?

Both local courts and arbitration are equally objective and reliable. The Hong Kong judiciary is independent from the executive and the legislature, and is generally regarded as so, even in politically sensitive cases. All judges are appointed by an independent statutory body and most are recruited from among eminent practicing lawyers. Judges have security of tenure until retirement. They enjoy a large measure of protection against civil liability in respect of acts performed while sitting in that capacity and their conduct cannot be questioned by the legislature. Although Hong Kong is now part of China, Hong Kong has its own Court of Final Appeal to hear all civil and criminal cases. This final court is usually made up of the Chief Justice, three permanent judges and either one nonpermanent Hong Kong judge or one judge from another common law jurisdiction. The panel of nonpermanent judges is comprised of world-renowned judges such as

former Lord Chief Justice of England and former Chief Justice of Australia. The court procedures are modeled on the English counterparts.

The arbitration system in Hong Kong is entirely open. The law recognizes both institutional and noninstitutional arbitration (ad hoc arbitration). There is no restriction whatsoever on the nationality or qualification of arbitrators in noninstitutional arbitration, and therefore parties are free to select any arbitrator from any part of the world by mutual consent. In case of disagreement, they may ask the Hong Kong International Arbitration Centre (an independent nongovernmental body) or any other appointing authorities (e.g., the ICC) to appoint one. Hong Kong is a signatory of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Other forms of ADR in specialized disputes (e.g., construction and admiralty) have been commonly used for decades, and are recently becoming more common in general commercial disputes.

In civil litigation, litigants should attempt mediation before setting down the case to trial, or they must give reasonable explanation to the judge.

If the parties intend to bring the Hong Kong award to any other part of the Greater China Region for enforcement, arbitration will be the preferred choice; otherwise both local courts and arbitration are reliable and efficient. Where the contract is silent, parties may choose arbitration if they both have the same arbitrator candidate in mind or if the dispute involves specialized technical issues. Otherwise, they may probably prefer litigation, particularly where the dispute falls within the traditional areas of the law (e.g., real estate transaction disputes, loan recovery, etc.).

II. WHAT RECOMMENDATIONS CAN YOU OFFER FOR HOW BEST TO NEGOTIATE AND CONDUCT BUSINESS IN HONG KONG?

As one of the major international financial centers, Hong Kong, like other business centers, has a world-class business infrastructure and very sophisticated legal regime. Therefore, foreign investors planning to enter the Hong Kong market should familiarize themselves with the legal requirements of different businesses.

As a starting point, before engaging lawyers to help, investors can seek some preliminary advice from government departments such as Invest Hong Kong and quasi-government institutions such as the Hong Kong Trade Development Council. Their major role is to assist foreign investors entering Hong Kong as well as Hong Kong businessmen going out.

These institutions can give investors some preliminary advice on the way to start their business in Hong Kong and some basic knowledge on Hong Kong's business environment, so that foreign investors will know how to go further to engage professionals in Hong Kong to help them implement their business plans.

12. WHAT PRACTICAL ADVICE CAN YOU SHARE WITH INVESTORS WHO DECIDE TO DO BUSINESS IN HONG KONG?

A lot of international investors find that the ideal way to enter into the China market is by first making use of Hong Kong's management experience and business infrastructure to manage and control the PRC operation. Therefore, they would plan to set up companies in Hong Kong which will be used as an investment vehicle to start or expand their business in China.

Using Hong Kong as a platform to do business in China can bring a lot of benefits to foreign investors. For instance, it will be more flexible to structure the shareholding of the Hong Kong company which holds the PRC company, as the transfer of shares in Hong Kong company does not need any governmental approval while transfer of equity interest in a foreign investment enterprise in China may need the approval of the local office of commission of commerce. Naturally it is easier for foreign investors to exit their investment in China by selling the parent company's shares in Hong Kong.

As the Chinese market is relatively restrictive in some areas of business, if an investor fails to engage experienced professionals to advise on business model and structure of the business in both Hong Kong and PRC markets, such investor may suffer the loss of time and money for restructuring the whole plan.

As an example, in order to set up a foreign investment enterprise in China, the applicant (an offshore company which can be incorporated in Hong Kong, BVI or other offshore regions) has to submit a notarial corporate certificate which contains corporate information of the applicant. A notarial corporate certificate (for use in China) cannot be issued for a company incorporated in British Virgin Islands. Therefore corporate information of the BVI company can be notarized (for use in China) only by way of a declaration to be made by its director. Such declaration of corporate information may not be accepted for setting up foreign investment enterprises in some localities in China. Yet, such notarial corporate certificate can easily be issued for a company incorporated in Hong Kong.

GALLANT Y.T. HO & CO.

Our firm was established in 1977 and is one of the largest local firms in Hong Kong with over 40 lawyers. We offer comprehensive legal services to individual and corporate clients alike, covering various aspects of commercial, corporate and property-related activities ranging from banking finance, joint venture to project finance, mergers and acquisitions to listing of red chip companies and “H” shares in Hong Kong.

Apart from banking, real estate and litigation work, which has always been the backbone of our services, we are particularly noted for our cross-border legal services between Hong Kong and China. Our China practice began as early as 1979 and work includes joint ventures, mergers and acquisitions, project financing, “B” and “H” share listing, trademark and patent registration, arbitration and dispute resolution.

In providing such cross-border services, all of our lawyers are conversant in both Chinese and English languages and this will ensure greater accuracy in documentation and efficiency in delivering our services in a cost-effective manner.

With China playing an ever increasing role in global economic development, Hong Kong has become a springboard for foreign enterprises to invest in China as well as Chinese enterprises using Hong Kong as a base for raising funds and international expansion. With over 30 years’ experience in cross-border work, we are in a privileged position to serve as a bridge in this two-way traffic.

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