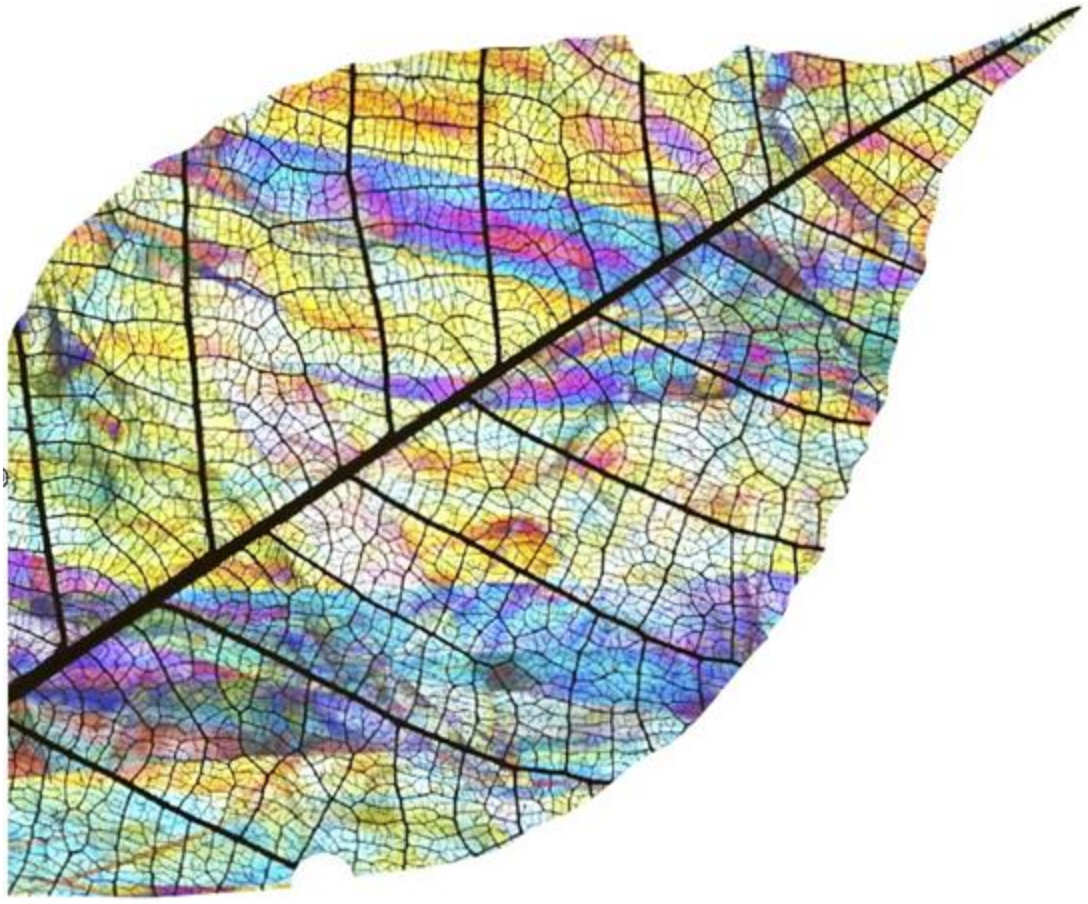
World Universities Comparative Law Project
Legal risk rating of Hong Kong

carried out by students at the Chinese University of Hong Kong

A production of the Allen & Overy Global Law Intelligence Unit



May 2014

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The World Universities Comparative Law Project is a set of legal risk ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal risk rating of Hong Kong was carried out by students at the Chinese University of Hong Kong.

The member of the Faculty of Law at the Chinese University of Hong Kong who assisted the students was Professor David C. Donald

The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were:

- Mr. Brett Graham, General Counsel – Asia Pacific, Morgan Stanley
- Mr. Laurence Li, Temple Chambers, Member, Financial Services Development Council
- Mr. Joseph Ngai, Director, McKinsey & Company, Member, Financial Services Development Council

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law

Foreword
by The Honorable Justice Kemal Bokhary

In the 4th decade of the 19th century, Hong Kong, then a collection of small fishing and farming communities, began a journey of transformation. We became in turn an entrepôt for the China Trade, a tourist destination, a hive of light manufacture and eventually the international financial centre which we became in the latter part of the British era and have remained post-handover. Throughout this process, the law has had a vital role to play. It is the business of our lawyers and students of the law to keep an ever-watchful eye on how well the law is carrying out this role - and to identify avenues of improvement. I therefore look most favourably upon the objectives of this project in general and, in particular, this survey of the position in Hong Kong.

It is plain to see that the authors of this survey have worked very hard. Their efforts have resulted in something very worthwhile. They have earned the satisfaction of having made a valuable contribution to the law. And they will undoubtedly have learned how to work as a team. It is a lesson which will serve them well in the stimulating and challenging years ahead.

Hong Kong
April 2014

Description of the legal risk rating method

Introduction

This paper assesses aspects of legal risk in Hong Kong with a view to rating the legal risk in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

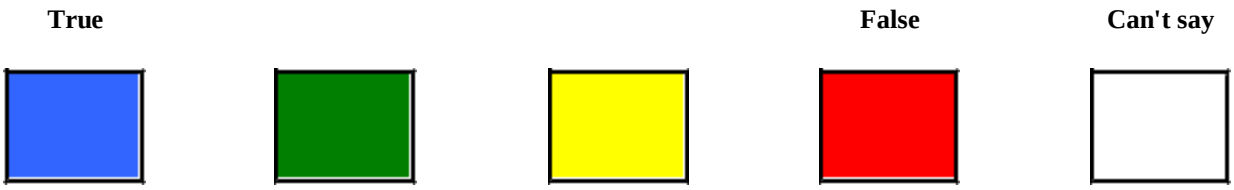
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at the Chinese University of Hong Kong. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of the Global Law Intelligence Unit, the members of Allen & Overy, the Chinese University of Hong Kong or the member of the Practitioner Expert Panel.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Hong Kong. This is by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. But if the law does intervene, this creates a risk because the law has to be complied with. If it is not complied with, there is generally some sanction in the form of liability, a penalty or the invalidity of a transaction.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is very different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators usually measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit to enhance growth. Their main risk is the insolvency of the debtor and therefore the key indicators are whether the law supports creditors or debtors when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A notable feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects the largest creditors who are typically banks (who in turn represent depositors, ie the citizen) and the law is creditor-protective. Their legal risk is reduced and hence the risks of depositors with banks is reduced.

If the jurisdictions prioritises these three super-priority claimants, then the legal system of that jurisdiction is likely to be pro-creditor. If these super-priority risk mitigants are subordinated, this may also tell us whether the legal system is generally pro-debtor in its bankruptcy law. For example, one might be able to conjecture whether or not there is a tough rescue law and whether wholesale creditors are or are not favoured in the bankruptcy ladder of priorities. The result is that it would be much quicker to check the key points.

Jurisdiction based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. They are therefore debtor-protective. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Hence insolvency set-off is creditor-protective. A prohibition is debtor-protective. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a major aspect of legal risk.

Q1 In Hong Kong, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True **False** **Can't say**

Comment:

S.35 of the Bankruptcy Ordinance (Cap.6) in Hong Kong expressly allows mutual credit set-off between the insolvent entity and the creditor, provided that the creditor had no knowledge of the

petition when he gained the credit. The Bankruptcy Ordinance is applied to companies by virtue of S.264 of the Company (Miscellaneous and Winding Up) Ordinance (Cap.32) and therefore is applicable to companies in Hong Kong. In *Japan Leasing (Hong Kong) Ltd v Shun Kai Finance Co. Ltd*, the Court followed a decision made by the House of Lord, that set-off is mandatory and only the net amount after set-off is recoverable. However, the Bankruptcy Ordinance is not applicable to certain entities, such as banks, as they are governed by special procedures in cases of insolvency. Creditors may not claim set-off against these entities.

Thus, although the law does not apply to certain exceptional bodies, the express law in Hong Kong provides sufficient protection to creditors in this area and the law of insolvency set-off in Hong Kong is still protective in favour of the creditor.

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some jurisdictions there are stamp duties.

On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a strict freeze under a judicial rescue statute.

The main tests are therefore (1) scope, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs. Security interests reduce the legal risk suffered by banks and hence strengthen the position of depositors with banks.

Q2 In Hong Kong, the law offers a security interest which is highly protective of the secured creditor.

True **False** **Can't say**

Comment:
A company can create charges on its present and future debts. The company can create fixed and floating charges over its assets. In cases of default payment, a receiver is appointed under a deed of appointment after the issue of demand for repayment. Section 348 of the Companies (Miscellaneous and Winding Up) Ordinance (Cap. 32) requires a notice be sent to the Company Registry to specify the

registration within seven days. Section 56A of the Conveyancing and Property Ordinance (Cap.219) states that a floating charge will not affect the position of a mortgage created before its crystallisation. Therefore a mortgage will have priority over floating charge creditors unless there is notice of a negative pledge agreement or notice of a prior floating charge and notice of crystallisation to the mortgagee. The mortgagee may exercise his power under the terms of the mortgage, if any, to sell the property without the Court's intervention. This method is fast and can be carried out with low cost.

The mortgagor usually will be entitled to a right of redemption under the mortgage and can retain possession of the property by repaying the loan. If there is no such right in the mortgage, the equity of redemption is implied under S44 of the Conveyancing and Property Ordinance. In practice, the banks will usually impose a penalty, typically called an administrative fee, on the mortgagor in cases of default.

Therefore, the law is protective of the secured creditors while certain rights, eg the right of redemption, are retained by the mortgagor in law or in equity.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The availability of the trust mitigates the legal risk of, for example, those who place their securities in the custodianship of banks and the users of securities settlement systems. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit), but only the common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities.

Q3 Hong Kong has a universal trust for all assets.

True **False** **Can't say**

Comment:

The general rule is that any property can be subject to a trust if it is definite and distinguishable (*Hong Thai Citizens Travel Services Ltd v Hang Seng Bank Ltd* [1987] 3 HKC 565). Land can be subject to a trust as well as provided in the Conveyancing and Property Ordinance (Cap. 219) ("CPO"). An exception to the general rule is intangible property, such as shares. Since shares are fungible assets, they do not need to be distinguishable to be made the subject of a trust (*Re CA Pacific Finance Ltd & Another* [1999] 2 HKLRD 1 (CFI)).

There are generally no compulsory formalities as all types of assets can be held on trust by either written or oral declaration of trust, with the exception of land. With respect to land, it can only be made the subject matter of a trust if there is a land contract made in writing and signed by the party to be charged, or by its agent (section 5(1), CPO). For all types of assets, including land (Section 5(2) CPO), there are no formalities or restrictions with respect to resulting, constructive and implied trusts.

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are

liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Hong Kong the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True **False** **Can't say**

Comment

There is no rule stating that a director will be made liable for exacerbating the insolvency of a company. However, Section 275 of the Companies (Miscellaneous Provisions and Winding up) Ordinance (Cap. 32) prohibits directors from carrying on business for the purpose of defrauding the creditors and in such cases a director will be personally liable for the debts. This rule is restricted to situations of fraudulent trading only and it is not applicable to circumstances where the director is acting in good faith.

Directors nevertheless owe a duty of care and fiduciary duty to their company and should act with due diligence. For a listed company, if the director's acts involve defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members, the Securities and Futures Commission may apply to the Court under Section 214 of Securities and Futures Ordinance (Cap. 571) for an order that the company bring an action against the director and the director may be liable for his fault. Therefore, the director may be liable for his misconduct, which may involve exacerbating the insolvency of the company, after the company becomes insolvent.

There is no positive rule that requires the director to file for insolvency when the company is insolvent. However, for a listed company, Section 307B of SFO provides that a company has a continuous duty to disclose any inside information.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

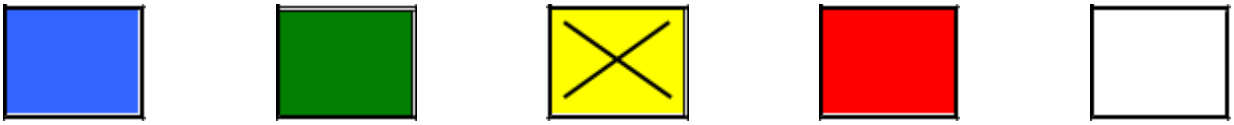
The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void, thereby exacerbating legal risk.

Q5 Hong Kong permits a company to grant financial assistance for the purchase of its own shares.

True **False** **Can't say**



Comment:
Section 275 of the Companies Ordinance (Cap.622) expressly prohibits a company from granting financial assistance to any person for the purpose of acquiring shares or reducing or discharging liability for acquisition. However, there are many exceptions to this rule. First, Section 275 does not apply for acquiring shares, reducing or discharging liability incurred for acquisition of the holding company's shares if the holding company is incorporated outside Hong Kong. Secondly, it depends on the principal purpose of the financial assistance. Section 275 does not apply if the principal purpose of the assistance is not for the purpose of acquiring shares, reducing, or discharging liability incurred for acquiring such shares, as long as the financial assistance is made in good faith. It also does not apply when the financial assistance is incidental to part of some larger purpose of the company.

Apart from the above exceptions, financial assistance to acquire a company's own shares is allowed in circumstances such as: lending in the ordinary course of business (Section 279, NCO), employee share schemes (Section 280, NCO) and loans to the employees (Section 281, NCO).

Listed companies are subject to more restrictions when giving financial assistance: the company must have net assets and the assistance is provided from the distributable profits.

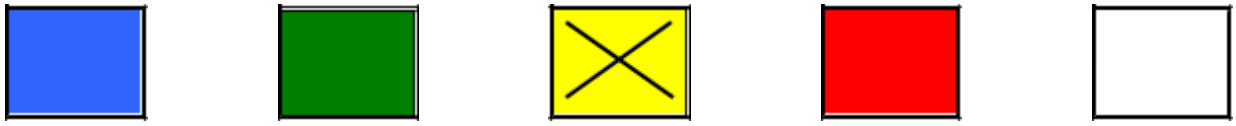
Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Hong Kong is open and has few restrictions.

True **False** **Can't say**



Comment:

The public takeover regime in Hong Kong is primarily regulated by The Codes on Takeovers and Mergers and Share Repurchases ("TC"). TC applies to public companies in Hong Kong, companies with a primary listing of their equity securities in Hong Kong and Real Estate Investment Trusts (REITs) with a primary listing of their units in Hong Kong (Introduction 4.1). The TC is regarded as an authoritative general guidance for the standard of conducting takeovers in Hong Kong and the Listing Rules expressly require compliance with it (Introduction 1.4). In this regard, the TC serves to regulate and codify the public takeover regime in Hong Kong. While it enhances the certainty, transparency and integrity of the regime, it requires the potential acquirer of companies to incur expenses and manpower to comply with the extensive provisions, and hence posing restrictions, on public takeover transactions in this sense.

In particular, a number of features favouring shareholders and hence pointing to a restrictive regime are found in the TC.

First, mandatory offers in cash, or accompanied by a cash alternative (Rule 26.3(a)), must be extended to shareholders of each class and bid for all classes of shares, where any person, acting in concert or not, acquires 30% or more of the (collective) voting rights of a company (Rule 26.1 (a), (b)) or where any person, acting in concert or not, holds between 30% to 50% (inclusive) of the voting rights and acquires additional voting rights of more than 2% (Rule 26.1 (c), (d)). The acquirer in the latter category is exempted from making a mandatory offer if he acquires voting rights within a band of 2% (Rule 26.1, Note 11). A waiver of the mandatory offer is possible where conditions are met (Rule 26.1, Note 6).

Second, the bidder must pay the same price to all shareholders. The principle of equal treatment and fairness is cardinal to the spirit and letter of the TC. All shareholders are to be treated even-handedly and all shareholders of the same class are to be treated similarly (General Principle 2.1). Hence, shareholders of the same class must not be discriminated against and should be paid *pro rata*. With regard to offers made for equity share capital by an offeree, companies with convertible securities outstanding, equality of treatment within a class of shareholders is also required (Rule 13.1). Any special deal involving committing or arranging to make a payment or settle the consideration for certain shareholders is prohibited (Note to Rule 20).

Third, safeguards are built in for shareholders to rely on the takeover offer and make informed decisions by requiring the offeror to prove his solvency and financial capabilities to implement the offer. For instance, the offer document must contain the long-term commercial justification for the proposed offer (Schedule 1, 3(iii)), confirmation by a (independent) financial adviser that resources are available to the offeror sufficient to satisfy full acceptance of the offer (Schedule 1, 11) and details of any bank overdrafts or loans or other similar contingent liabilities (Schedule 1, 24). Disclosure of other

information is required, including the identity of the offeror (Rule1.2) to facilitate the shareholders' decision-making process.

Fourth, compulsory acquisition of dissenting minorities (buy-out) is available to an offeror who has acquired at least 90% of the shareholdings to buy the remainder out for full acquisition under the new Companies Ordinance (Cap. 622) ("CO") which came into force in March 2014 (s.693 CO 2012). An offeror who has acquired less than the automatic threshold of 90% can also apply to the Court for an order to such effect where certain conditions are satisfied (ss.693 (3), (5), CO).

Fifth, a timetable for rolling forward the takeover scheme is devised in the TC for a clearer structure and a standardised approach so that shareholders can ascertain the timeframe in which decisions are to be made with certainty. The offer must initially be open for acceptance for at least 21 days following the date on which the offer document and the offeree board circular are posted, with corresponding adaptations where the documents are not concurrently posted (Rule 15.1) The latest time for acceptance is also fixed (Rule 15.1) with a possible extension to meet special circumstances (Rule 19.1). Where a condition offer becomes unconditional, it should remain open for acceptance for not less than 14 days thereafter (Rule 15.3). The final day rule should also be observed (Rule 15.5) Hence, safeguards are built in to ensure ample time for an informed decision to be made and to minimise undue pressure on shareholders. In addition, the TC provides for the timetable, form and manner for the announcement of results of offer. Such announcement must also be submitted to the Executive for comment (Rule 19.1). Hence, independent and third-party supervision for the takeover process from inception to end is incorporated in the TC.

Sixth, directors are prohibited from frustrating a bona fide offer by poison pills or deny shareholders an opportunity to decide on the merits of the offer, without the approval of the shareholders (Rule 4). Hence, although the offer is directly communicated to the board, the directors are obliged to leave the issue of acceptance to the shareholders. In addition, the directors are forbidden from issuing any shares or any convertible securities, options or warrants in respect of the company shares without the shareholders' approval (Rule 4(a), (b)). Effectively, no shareholder rights plan can be implemented legitimately in Hong Kong to dilute the bidder's interest and deter the acquisition.

Seventh, control of the content of circulars, particularly profit forecasts, is present in the TC. The issuance of research reports containing profit forecast statements is prohibited (Rule 8, Note 4). More specifically, release of any profit forecast, asset valuation or estimate of key figures may constitute an outright breach of the TC (Rule 8, Note 5). Hence, a mechanism is put in place to ensure that the decision-making process of the shareholders and/or the takeover offer as a whole is not prejudiced. In addition, the contents of offeree board circular are also standardised (Rule 8.4; Schedule II). Misleading statements during course of offer are not allowed (Rule 18.1). Directors of the offeree company are jointly and severally liable for any information irregularities (Rule 9.3). Information about companies involved in an offer must be made equally available to all shareholders as nearly as possible, simultaneously, and in the same manner (Rule 8.1). Hence, extensive safeguards are built to ensure fair, accurate, unprejudicial and equal presentation of information favouring shareholders.

However, a partial offer, which points away from finding a restrictive regime, is possible with the Executive's consent in the set circumstances (Rule 28.1).

On balance, the public takeover regime in Hong Kong possesses the chief features of a restrictive regime with extensive regulation and supervision by the Securities and Futures Commission as an independent third-party monitoring body. It is subjected to a considerable number of restrictions as found in the TC and is restrictive in the sense that the TC imposes requirements and standards on the potential acquirer and thus results in takeovers becoming more onerous transactions due to the various compliances and provisions.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

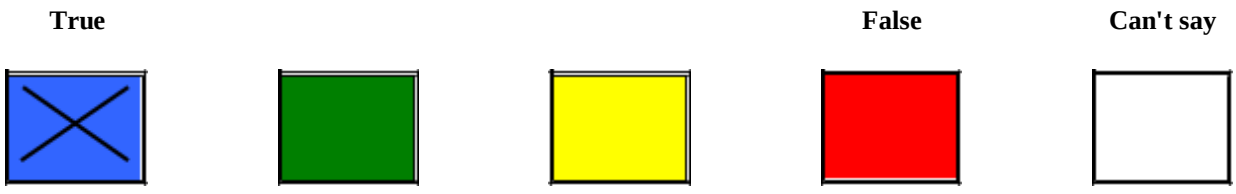
Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound. Legal risk is increased if parties are committed when they did not intend to be.

Q7 In Hong Kong, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.



Comment:

In order to determine whether a contract has been formed, the courts will look to the "correspondence as a whole" (*Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601). If a commercial agreement expressly states that it is not binding, parties will not be bound to it (*Rose and Frank Co v JR Crompton and Brothers Ltd* [1923] followed by *Hong Kong Aircrew Officers Association v Cathay Pacific Airways Limited* [1994] 2 HKLR 367).

If parties state that their discussions are 'subject to contract', this generally precludes the terms from becoming a contract even if the terms are sufficiently clear (*Attorney-General v Humphreys Estate*

(Queen's Gardens) Ltd [1987] HKLR 427). The introduction of 'subject to contract' will preclude the parties from raising part performance as no contract had been created (*World Food Fair Ltd v Hong Kong Island Development Ltd* [2007] 1 HKLRD 498).

However, Hong Kong has imported the English equitable remedies of promissory estoppel which may operate to bind the parties despite the terms of 'subject to contract'. Lord Templeman noted that "it is possible but unlikely … in circumstances" where negotiations, which are expressed to be "subject to contract" would be enough to satisfy the requirements of estoppel (*Attorney-General* [1987] HKLR 427, 435). In order to overcome the 'subject to contract' label, it has been argued that a "'double assurance' – an assurance that the claimant will have some right over the representor combined with an assurance that the right will endure even if formalities necessary to convey that right are not complied with" – is necessary (Dixon 'Confining and defining proprietary estoppel: the role of unconscionability (2010) 30 *Legal Studies* 408, pp 416-418 citing *Kinane v Mackie-Conteh* [2005] EWCA Civ 45). While the above is an English opinion, it is likely to be persuasive in Hong Kong, as the Hong Kong courts reference English opinions in many contractual cases.

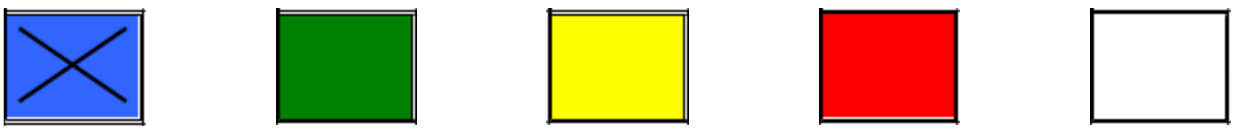
The one exception is where the parties use 'subject to contract' 'mindlessly and simply because it was the practice' but the parties had, in reality, reached the final agreement (*Hong Kong Housing Authority v Hung Pui* [1987] 3 HKC 495). Parties will unlikely be bound by any heads of terms where clear phrases are used.

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. We ignore consumer contracts - where there may be consumer protections.

Q8 In Hong Kong, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True **False** **Can't say**



Comment:

If a commercial contract makes it clear that the breach of a particular term entitles the parties to end the contract, even though the breach is minor, courts will uphold the terms in the interests of commercial certainty (*The Chikuma* [1981] 1 WLR 314 followed in Hong Kong by *World Ford Development Limited v Ip Ming-Wai and Another* [1994] 2 HKLR 1). The courts will do so even where the breach is relatively trivial. In *World Ford Development Limited v Ip Ming Wai* ([1994] 2 HKLR 1), one condition was that time was of the essence. A seemingly trivial delay of 24 minutes resulted in the termination of the contract, which the court upheld. Courts in Hong Kong will respect termination

clauses of the contracts and will uphold contracts which contain specific clauses which purport to terminate the contract upon breach even if the event is considered trivial.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area. An ineffective clause increases legal risk.

Q9 In Hong Kong, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True **False** **Can't say**

Comment:

Assuming that an exemption is clearly written, Hong Kong courts will apply it if there are no other legislative controls on the exemption clauses. Courts have stated that where the clause is clear and compelling as to leave no room for ambiguity or obscurity, there will be no justification for applying secondary rules of construction such as the principle of construction of 'contra proferentum' (*Bewise Motors Co Ltd v Hoi Kong Container Services Ltd* [1998] 2 HKLRD 645).

There are legislative controls on exemption clauses in contracts: the Control of Exemption Clauses Ordinance (Cap. 71) and the Unconscionable Contracts Ordinance (Cap. 458). The Unconscionable Contracts Ordinance applies to consumers of a sale of goods or supply of services, and not between sophisticated companies.

The *Control of Exemption Clauses Ordinance* (CECO) controls business liability (things done or omitted to be done by a person in the course of a business) and misrepresentations (section 2(2) and schedule 3 of the CECO). While the Ordinance mainly protects consumers, several aspects do apply to sophisticated commercial parties. For example, any clause which exempts parties from liability for death or personal injury resulting from negligence is void, as is any clause which exempts a breach of obligations to transfer title or possession of goods sold or supplied as required by section 14 of the Sale of Goods Ordinance (section 11(1) and 12(2) of the CECO).

The main exemption which applies to sophisticated commercial parties is the requirement that clauses which exclude or restrict liability for negligence must satisfy the requirement of reasonableness (section 7 of the CECO). The burden of proof lies on the person claiming that the clause is unreasonable to prove that it does so (section 3(6) of the CECO).

Section 8 of the CECO, in respect of companies contracting with each other, controls exemption clauses where one party deals on the other's written standard terms of business. The *proferen* (party which proposes the terms) when in breach of contract cannot, unless the contract term meets the requirement of reasonableness:

(1) exclude or restrict any liability in respect of his own breach; or

(2) claim to be entitled to render (i) a contractual performance substantially different from that which was reasonably expected of him; or (ii) no performance at all.

The CECO also controls exemption clauses which purport to exempt parties from complying with the obligations in sections 15-17 of the Sale of Goods Ordinance (section 11 of the CECO). These obligations deal with the sale by description, implied undertakings as to quality or fitness, and sale by sample. These exemptions must pass the test of reasonableness.

The test of reasonableness in the CECO is whether the "term was a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made" (section 3 of CECO).

The CECO also prevents parties from circumventing CECO's controls on exemption clauses (section 5 of CECO).

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to an insistence on national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that legal risks are unexpectedly different.

Q10 The Hong Kong courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Hong Kong public policy and mandatory statutes.

True **False** **Can't say**

Comment:
It is well established that the Hong Kong courts will respect the parties' choice of governing law in a contract (Graeme Johnston, *The Conflict of Laws in Hong Kong*, 2nd edition, 5.005). The courts have upheld a number of narrow exceptions to the general rule.

The choice of governing law must be "bona fide and legal" (*Vita Food Products Inc v Unus Shipping Co Ltd (in liq)* [1939] AC 277 (PC)). The courts will ask whether the intention as to the governing law is "bona fide and legal, or whether there is on the ground of public policy a good reason for avoiding the choice" (*Credit Agricole Indosuez* [2002] HKCU 706, para. 31). This means that the Hong Kong courts will not allow parties to "pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law…" (*Shenzhen Development Bank Co Ltd v New Century Int'l (Holdings) Ltd & Another* [2002] HKEC 1087 quoting Cheshire & North, *Private International Law*, 11th Edn., p. 454). Therefore, a party trying to evade the laws of Mainland China by choosing Hong Kong as the governing law will not succeed (*Shenzhen Development Bank Co Ltd* [2002] HKEC 1087, para. 24).

The choice of governing law need not have a substantial connection with Hong Kong (*Credit Agricole Indosuez v. Shanghai Erfangji Co. Ltd. and Another* [2002] HKCU 706 following *Vita Food Products Inc.* [1939] AC 277). However, where there is a "lack of connection between the agreement and the law chosen", this may be evidence of bad faith.

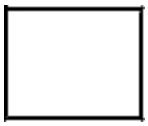
In striking out an application for summary judgment on the basis that the governing law is not bona fide or legal, the burden lies on the defence "to attack the bona fide of the Plaintiff in making such a choice" (*Shenzhen Development Bank Co Ltd* [2002] HKEC 1087, para. 24).

The choice of law must not violate Hong Kong's statutory laws, the common law, or domestic public policy (*Mackender v Feldia AG* [1967] 2 QB 590 (CA)).

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Hong Kong courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True			False	Can't say
				

Comment:
Where there is a foreign jurisdiction clause and the plaintiff has brought proceedings in Hong Kong in breach of the agreement to refer disputes to a foreign court, the defendant can apply for a stay of proceedings (*The Pioneer Container* [1994] 2 AC 324 at p.347E-G). The court has discretion as to whether or not a stay should be granted. However, the Hong Kong courts will not grant a stay unless a "strong cause for not doing so is shown" (*Lammas Global Corp v Barclays Bank (Suisse) SA* [2011] HKEC 522, para. 30). The courts will give "great weight to the jurisdiction clause" but will not allow strict enforcement where it would cause disorderly and inefficient resolution of the dispute or where one tribunal would be better suited towards making a judgment on the issues (*Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd* [2013] HKEC 1530 courts cited Dicey, Morris & Collins: Conflict of Laws, 15 ed, at §12-152).

Hong Kong follows the general English approach when deciding whether or not "strong cause" is shown. In particular, they have cited the following factors stated by Dicey & Morris on the *Conflict of Laws* as factors which they will take into account (*Tung Ho Wah v Star Cruises (HK) Ltd* [2006] 3 HKLRD 254 citing Dicey & Morris on the *Conflict of Laws* (13th.ed., 2000) Vol.1 at p.443): (1) in which country the evidence is available, and the effect of that on the relative convenience and expense of a trial in this jurisdiction or abroad; (2) whether the contract is governed by the law of the foreign country in question, and if so, whether it differs from English law in any material respect; (3) with which country either party is connected, and how closely; (4) whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages; and (5) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, or be unable to enforce the judgment in their favour, or be faced with a time-bar not applicable in this jurisdiction, or, for political, racial, religious or other reasons, be unlikely to get a fair trial.

If a party agrees to submit to the jurisdiction of the courts of a state, it is difficult to claim that it is inconvenient to conduct its litigation there (*Noble Power Investments Ltd v Nissei Stomach Tokyo Co Ltd* [2008] 5 HKLRD 631, para. 41). If the inconvenience ought to have been foreseeable at the time the contract was entered into, then only in exceptional circumstances in the interests of justice would the court give it weight (*Hyundai Engineering & Construction Co Ltd* [2013] HKEC para. 42-44).

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Hong Kong, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Hong Kong courts.

True **False** **Can't say**

Comment

Hong Kong is a pro-arbitration jurisdiction. The Hong Kong courts allow contracting parties to submit contractual disputes to a foreign arbitral tribunal, to the exclusion of Hong Kong courts. Generally, if the parties to the respective contract have agreed to arbitration, they cannot repudiate the arbitration agreement by going to court unless both parties agree. An arbitration clause is usually upheld and the Hong Kong court will stay proceedings under Section 20(5) of the Hong Kong Arbitration Ordinance, unless the arbitration clause is ineffective or both parties have submitted to the jurisdiction of the Hong Kong court.

Party autonomy is a key element of the arbitral process. It involves parties setting out their own regulations including the choices of seats, arbitration institution, arbitrators and procedure that will be embodied in the arbitration agreement. Section 20(2)(a) of the Hong Kong Arbitration Ordinance (Cap. 609), which adopts Article 8 of the UNCITRAL Model Law, states that the parties should be referred to arbitration according to the arbitration agreement. The agreement should be applied unless it violates accepted international norms or would contravene international public policy. If the institutions and rules of arbitration have been chosen in the arbitration agreement, they must be followed. Therefore, parties can submit their contractual disputes to a foreign tribunal to the exclusion of Hong Kong courts if that was decided in their arbitration agreement.

Hong Kong is a party to the 1958 New York Convention. The Convention applies to the recognition and enforcement of arbitral awards made in the territory of states other than the state in which the recognition and enforcement of such awards are being sought. Therefore, the arbitral award issued by the foreign arbitral tribunal on the contractual disputes can be freely enforced in any contracting states including Hong Kong. However, the enforcement of the arbitral award is subject to defences. These defences include that the arbitration agreement was not valid under its governing law, the enforcement would be contrary to public policy, and the composition of the tribunal was not in accordance with the parties' agreement or with the *lex loci arbitri* (i.e. law of the place where the hearing took place).

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound. The result can be enormous liabilities.

Q13 In Hong Kong, class actions where the class is bound if they do not opt out are generally not allowed.

True **False** **Can't say**

Comment:

Class actions are not a part of the current Hong Kong law. Nevertheless, the introduction of class action to Hong Kong is proposed and discussed. In May 2012, the Law Reform Commission of Hong Kong published the *Report on Class Actions* introducing a class action regime. The Report recommended close supervision by the Court where it certifies the commencement of a class action. It adopts an opt-out approach as a default position for class members. This means that persons holding claims concerning questions of law or fact raised in the class proceedings are bound as class members and are subject to judgments made in class proceedings. This prevents the abuse of systems where parties adopt class actions to receive unjustified awards at the expense of other class members, and encourages parties to keep costs proportionate to what is in dispute. Class action gives people access to justice and offers consumers a fairer share of settlement.

Class actions may be a priority for introduction in Hong Kong as the current law allowing joinder actions lacks a comprehensive regime. Where people claim under the same issue, they may run the case as joint plaintiffs (Rules of High Court Order 15, Rule 4(2); *Behrens Ng Mo Chee Cindy & 17 Others v Credit World Ltd* [2000] HKCU 318). The same applies for parties running a common cause of actions (Rules of High Court Order 15, Rule 4(3)). Where separate claims of similar facts or legal issues are made, claims can be addressed together by joinder of claims or a legal point that is common to both cases to be decided before the cases proceed further. Although joinder actions increase the efficiency of addressing claims, it is restrictive and inadequate. Joinder of claims under the same causes of action requires the same contract between the plaintiff class members and the defendant, the same issues of fact and law, and the same relief claimed by the plaintiff class members. This restriction may limit the number of actions brought under the joinder rules.

The introduction of class actions in Hong Kong is not imminent as the Report requires detailed study before legislation can be put forward. It is currently proposed that the class action regime should first be made available for consumer cases, which will most likely be the majority of class actions. Consumer cases cover "tortious and contractual claims made by consumers in relation to goods, services and immovable property". The regime may extend to other cases in the future. With the benefits of class actions and the limitations of joinder actions, class action is practical for improving the efficiency of the legal system.

Other indicators

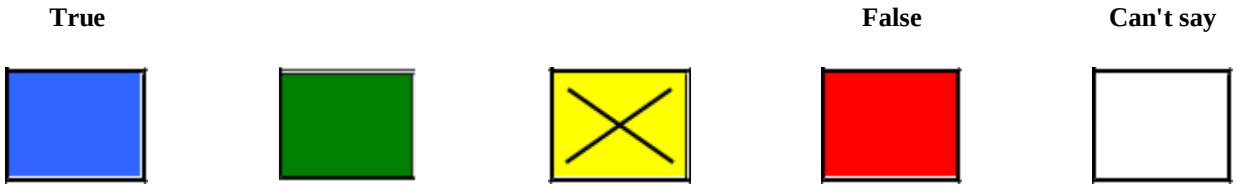
Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Hong Kong, nationals and local corporations are entitled to own land absolutely.



Comment:
In Hong Kong, land ownership operates by way of granting leasehold estates instead of fee simple estates (Article 7, Basic Law). The Government is the lessor and the "owners", nationals and local corporations, are the lessees. In the 1800s, Government lease terms for up to 999 years were granted. Since 1997, the general land grant policy endorsed by the Executive Council grants new leases of land for a term of 50 years. It should be noted that renewable and non-renewable leases are granted. Non-renewable leases, which are fixed term leases containing no right of renewal, may be extended for a term of 50 years upon expiry at the discretion of the Government. Despite the lease period generally being 50 years, the tenants of the Government leases can exercise rights that are essentially equivalent to absolute ownership. They can freely sell, mortgage or give away their property.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

The risk of losses is increased if title to land is unstable.

Q15 Most land in Hong Kong is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True **False** **Can't say**

Comment:
In Hong Kong, the Land Registry records the registration of deeds, conveyances, judgments and other instruments affecting real or immovable property under the Land Registration Ordinance (Cap. 128) ("LRO"). Its purpose is to allow the title to land to be easily traced and ascertained (Long Title, LRO). Registration does not affect the validity of an instrument, but it affects the priority of competing interests (Section 3, LRO). Generally, the earlier respective registration dates of the instruments would take priority (Section 3(1), LRO). An unregistered instrument in writing will be void against any subsequent bona fide purchaser or mortgagee for valuable consideration of the respective land (Section 3(2), LRO). Therefore, most major interests in land are registered for the practical reason of retaining priority.

It should be noted that equitable interests could arise in respect of land. Equitable ownership arising from remedial trusts may not be reflected in the land register. This is because only instruments in writing must be registered for priority preservation (Section 3, LRO) and the operation of remedial trusts concerning land does not need to be in writing (Section 5(2)), Conveyancing and Property Ordinance). Hence, this type of interest in land would not be registered in the Land Registry.

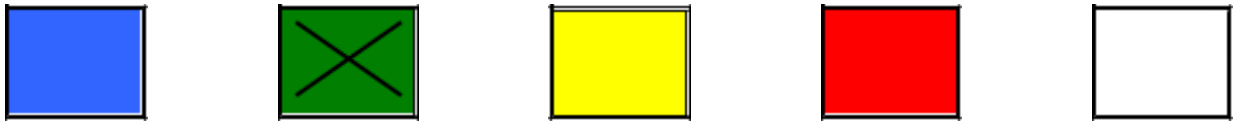
Presently, Hong Kong is operating a deeds registration system that is simply an index to registered instruments. Yet to come into force, the Land Titles Ordinance (Cap. 585) will convert the current regime to a title registration system, where the register itself gives the evidence of current ownership and interests in the property.

Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Hong Kong, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True **False** **Can't say**



Comment:
Where permission is required for the change of land use, the Town Planning Ordinance (Cap. 131) ("TPO") provides for the preparation and approval for the applications of proposed plans to the Town Planning Board. The proposed plans must endure a series of approvals, public scrutiny, further inspections and amendments. Public inspection of the draft plans is for a period of two months (Section 5, TPO) and there are respective periods of three weeks to comment on representations and to consider proposed amendments. After two months of publication, the Town Planning Board is required to submit publicised draft plans to the Chief Executive in Council for approval or refusal (Section 10, TPO) within nine months; or the Chief Executive may allow a further period of up to six months before submission. Therefore, the time needed to obtain permission for a change of land use may range from a few months to over a year.

As for costs, there are some fees involved in the application for land use changes. For instance, section 14(2) of the TPO stipulates that the Secretary for Development may, by regulation, prescribe fees for the amendment of plans on application (Section 12A(3)(c), TPO), application for permission in respect of plans (Section 16(2)(c), TPO), and amendments to permissions in respect of plans (Section 16A(3)(b), TPO).

Other indicators

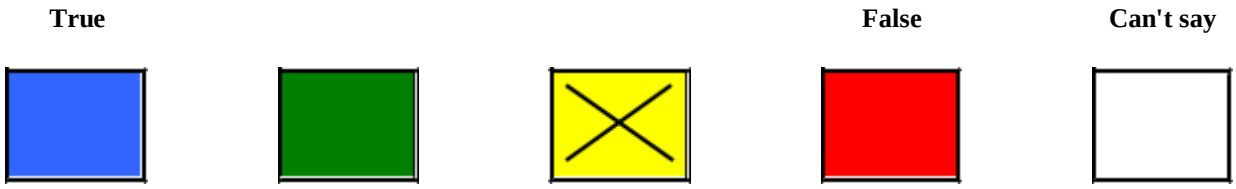
Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Violation may lead to large liabilities. The legal risks increase costs.

Q17 In Hong Kong, there are few controls on hiring and firing employees or on the terms of employment.



Comment:
The labour law in Hong Kong provides numerous protections to employees by imposing various controls on hiring and firing staff. When hiring an employee, the employer must take into account several considerations and there are controls on the employment contract. First, a minimum wage of $30 must be guaranteed to the employee (Section 8 and Schedule 3, the Minimum Wage Ordinance). Secondly, the employee is entitled to at least one rest day in a period of seven days (Section 17, the Employment Ordinance (Cap. 57) ("EO"), and statutory holidays (Section 39, EO)). If the employer fails to grant a statutory holiday, he must grant another holiday to the employee 60 days either

immediately before or after that statutory holiday. Furthermore, female employees are entitled to a ten-month maternity leave (Section 12, EO) and wages if she has been employed for not less than 40 weeks immediately before the commencement of maternity leave. Any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the EO shall be void (Section 70, EO).

In addition, employees are entitled to protection under the Race Discrimination Ordinance (Cap. 602), Sex Discrimination Ordinance (Cap. 480), Family Status Discrimination Ordinance (Cap. 527) and Disability Discrimination Ordinance (Cap. 487) which provide that their race, sex, family status and disability should not leave them at a disadvantage in their employment. The Code of Practice on Employment published by the government also provides guidelines for employers and guidance for employees. The concept of equal pay for equal work of value is implemented in Hong Kong by virtue of the Sex Discrimination Ordinance ("SDO"). The Equal Opportunities Commission was established under Section 63 of the SDO and it is responsible for eliminating pay discrimination on the grounds of gender. The Commission has published a 'Guide to Employers on Equal Pay between Men and Women' to provide practical guidance on how to achieve equal pay between men and women in the workplace. The Commission may start an investigation if they receive complaints and the employer may be required to remedy the employee if he is found liable (Section 76, SDO).

The decision to fire an employee should take into account section 32 of the EO which regulates dismissal. There are restrictions on the reasons for dismissal or variation of terms of the contract if the employer has been employed for over 24 months (Section 32K, EO). An employee may, in cases of the employer's breach, claim for remedy (Section 32M, EO) such as re-instatement or re-engagement (Section 32N, EO) and the Court may make an award of terminal payments to be payable by the employer to the employee (Section 32O, EO). However, an employer may choose to terminate the employment contract without giving notice to the employee nor paying wages in lieu of notice, if the employee is dismissed summarily on the grounds of willful disobedience, serious misconduct, fraud, dishonesty, or habitual negligence (Section 9, EO). Summary dismissal, however, requires a very high standard of justification and one single act of misconduct may not be sufficient (*Tsang Tak Chi v China Walll Ltd. [1999] 2 HKLRD H13*). Acts of dishonesty may justify the summary dismissal. In *Chan Kan Ip Philip v Kone Elevators International (China) Ltd. [2002] HKCU 383*, the Court held that making false claim of expenses was a 'material dishonesty and breach of trust' and the employer is entitled to dismiss the employee summarily.

When firing an employee, the employer should also consider the severance costs. An employee, who has been employed under a continuous contract for a period of not less than 24 months, is entitled to severance payment if he is dismissed by the employer by reason of redundancy or is laid off (Section 31B, EO). The amount of a severance payment to which an employee is entitled in any case shall be calculated by allowing, for every reckonable year of service: (a) two-thirds of the last-month wages for monthly rated employee; or (b) any 18 days' wages chosen by the employee out of his last 30 normal working days for daily or piece rated employment (Section 31G, EO). The severance payment can be reduced if gratuities and benefits have been paid to the employee under the employment contract or mandatory provident fund scheme (Section 31I, EO). Employers are generally required to pay a large amount of severance costs to employees under the labour law in Hong Kong.

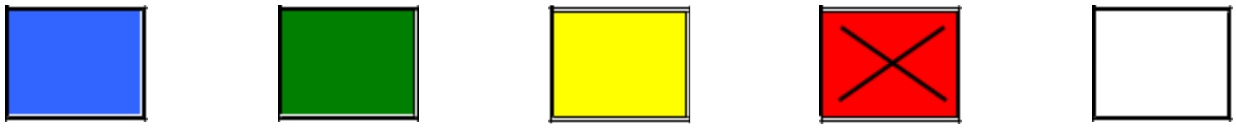
The employer may be guilty of an offence if he contravenes any provision of the Employment Ordinance (Section 63, EO). Sanctions depend on the sections breached. In general, the employer or employee is liable on conviction to a fine. For example, the employer is liable to a fine at level 6, which amounts to $100,000, if he breaches section 31 of EO (Section 63A, EO). The employer may be liable to imprisonment for breaches of certain provisions such as section 32 (Section 63B, EO).

Other than the above restrictions on employers and employees, there is no relevant law stipulating the maximum working hours in Hong Kong at the moment though there has been call for such legislation. To conclude, the labour law in Hong Kong imposes controls on hiring and firing of the employees. There are also restrictions on the terms of employment contract.

Environmental restrictions

Q18 In Hong Kong the rules governing the environment and liability for clean-up are very light and relaxed.

True **False** **Can't say**



Comment:

There exists a wealth of environmental legislations in Hong Kong, regulated by the Environmental Protection Department ("EPD") and supplemented by delegated legislation and various policy initiatives. Within the comprehensive spectrum, the primary legislations include Air Pollution Control Ordinance (Cap. 311) ("APCO"), Waste Disposal Ordinance (Cap. 354), Water Pollution Control Ordinance (Cap. 358), Environmental Impact Assessment Ordinance (Cap. 499) ("EIAO") and Product Eco-responsibility Ordinance (Cap. 603). The constitution of Hong Kong also attaches importance to the protection of the environment (Article 119, Basic Law). However, the jurisprudence of environmental liability borne by companies is limited. Given the elaborate environment-governing legislation, companies in Hong Kong have to incur expenses in two aspects: (1) compliance, and (2) sanctions (including liability for clean-up).

In the first aspect, companies bear an onerous burden of complying with the statutory requirements. As Hong Kong adopts a single/separate permit system, as opposed to an integrated system, companies need to apply for individual permits, licenses or permissions for different kinds of emissions before commencing projects that fall within the realm of the legislation. Since the permits and licenses are not permanent, the need for renewal also increases the costs for the project.

In addition, designated projects (Schedules 2 and 3, EIAO) must follow the statutory environmental impact assessment ("EIA") process (Section 6, EIAO) and require environmental permits for their construction and operation (Section 5, EIAO), incurring expenses for hiring expertise and the necessary manpower for preparation of the report and the technical memorandum. Such EIA is also subject to challenge by judicial review as the report is exhibited for public inspection, leading to potential delay of operation and substantial increase of costs and hence diminishing profitability. Cessation order may be issued in case of a breach and the company can be required to remedy environmental damages caused by the project (Section 24, EIAO) or be apportioned costs required to carry out the remediation works (Section 25, EIAO).

In some cases, companies are imposed with cost increases by paying fees charged by the government. For instance, the construction waste charging scheme introduced in 2005 stipulates that construction

waste producers must open a billing account with the EPD and pay a construction waste disposal charge before using government waste disposal facilities.

In the second aspect, companies face potential cost inflation by sanctions for non-compliance with statutory requirements. Companies can also suffer from reputational loss by the EPD's practice of monthly conviction listing and its naming and shaming of businesses publicly.

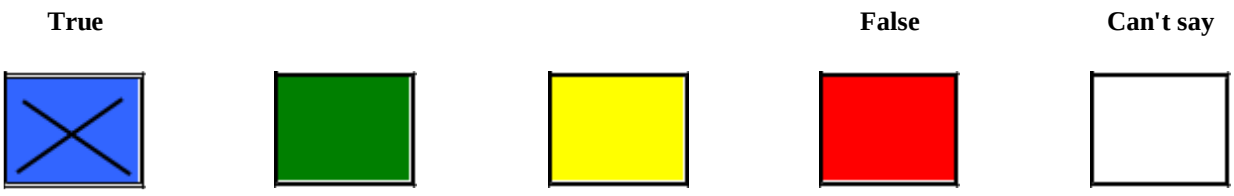
Moreover, the rules governing liability for clean-up in Hong Kong are burdensome and stringent. Hence such area involves the outflow of company resources and the increase of operational costs and business risks. As opposed to the "polluter pays" principle, the general rule in Hong Kong in this respect attributes the financial burden of remediation to the potential developers of the contaminated land. The current site developer generally does not owe a duty to future developers under common law. Hence, interested developers are responsible for clean-up operations and undertake the burden to carry out environmental due diligence to reduce potential liability or reduce such liability under contract law. Furthermore, liability for environmental damage is inherited by the buyer in an asset sale with the seller having no obligation to disclose any environmental information as the common law maxim of *caveat emptor* applies in Hong Kong. Besides practicing due diligence, companies might also need to carry out site inspections and hire environmental consultants lest they incur the transfer of liability for cleaning up. In addition, companies could be liable to restore the environmental damage or undertake such costs (e.g. Water Pollution Control Ordinance).

Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In Hong Kong, foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.



Comment:

This statement entails two aspects. The first part of the statement involves whether foreigners may freely own and control local companies while the second part asks whether foreigners may do the same in protected industries.

The FDI regime in Hong Kong is generally lightly regulated with minimum restrictions, adopting a free and open market policy to encourage the growth of foreign investments. The framework of FDI is built within the Constitution, as well as within various governmental policy initiatives and programmes.

First, pro-FDI constitutional safeguards have been built to maintain the appeal to international investors. For instance, the ownership of enterprises and the investments from outside Hong Kong shall be protected by law (Article 105, Basic Law ("BL")) and the government is obligated to provide an appropriate economic and legal environment to maintain Hong Kong's status as an international financial centre (Article 109, BL) and to encourage investments and the development of new industries (Article 118, BL). Thus, the BL provides a facilitative climate and sets a positive tone for FDI to take place in Hong Kong. Furthermore, the principle of fair treatment adopted by the government does not discriminate between foreign and domestic investors and does not subject foreign investments to special regulatory regimes or requirements. For instance, the profit tax rate is the same for Hong Kong and foreign companies (Inland Revenue Ordinance (Cap. 112)).

Second, the registration requirements of the Companies Ordinance (Cap. 622) ("CO") are pro-FDI to a certain extent. It does not require any officers or shareholders of a Hong Kong incorporated company to be a resident or be ordinarily resided in Hong Kong. The company secretary, however, must either be an ordinary resident in Hong Kong (if a natural person) or have a registered office or a place of business in Hong Kong (if a body corporate) (s.474(4), CO). Hence, a foreign investor can control a Hong Kong company. Furthermore, redenomination is possible and thus a limited company may by resolution convert its share capital to another currency (s.172, CO) to enhance business convenience. The simplicity of the incorporation procedures also promotes FDI.

Under such legal framework and policy direction, controls on new investments are almost non-existent. FDI in Hong Kong generally meets no challenges in establishing business in any industries and could occupy 100% ownership in the market. Foreigners may freely own and control local companies.

However, in relation to the second half of the statement, controls of the degree of foreign investment are inbuilt with protected industries, namely banks, broadcasting and defence.

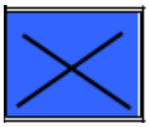
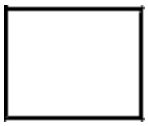
Particularly with the banking sector, branches of foreign banks may operate in Hong Kong as authorised institutions under the Banking Ordinance (Cap. 155). Foreign banks may be subject to market entry criteria such as minimum asset size, maintenance of adequate liquidity and capital adequate ratios and submission of periodic statistical returns to the Hong Kong Monetary Authority to ensure the integrity of public deposit-taking institutions. Hence, certain regulatory regimes are in place for FDI in the banking industry.

In addition, there is greater prohibition of FDI in sound and domestic television broadcasting as foreign ownership in such sectors may not exceed 49% of the total market share. In relation to defence, since the Central People's Government shall be responsible for the defence of Hong Kong (Article 14, BL) and since Hong Kong has no autonomy in this respect, foreign investors are not free to own and control defence-related businesses which are state-owned activities.

To conclude, the constitutional and statutory provisions, along with government initiatives, provide a pro-FDI framework in Hong Kong and create a liberal regime with minimal restrictions. Foreign investors may own and control local companies in accordance with the provisions of the CO outside protected industries.

Exchange controls

Q20 In Hong Kong, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True			False	Can't say
				

Comment:

Foreign exchange controls do not exist in Hong Kong and the Hong Kong dollar shall be freely convertible. The Hong Kong Government also has the obligation to safeguard the free flow of capital within, into and out of Hong Kong (Article 112, Basic Law ("BL")). Free trade and movement of capital are also guaranteed (Article 115, BL). Given such overarching constitutional provisions, the flow of foreign funds in Hong Kong is extremely fluid and meets with no statutory regulations.

In addition, banks in Hong Kong commonly provide foreign currency savings account services in major currencies and allow transactions in foreign currency. Hence, the depositing of foreign money and repatriation of profits in foreign currency to foreign shareholders is possible. Although banks are required to adopt a balanced and common sense approach when dealing with customers connected with certain jurisdictions in light of Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) risks (para. 4.1.6, AML Guideline), banks generally cannot impose indiscriminate and blanket nationality restrictions on customers when they intend to open a bank account. Hence, except on AML/CFT grounds, companies may freely open foreign bank deposit accounts in foreign currency for foreign transactions. Furthermore, deposits, whether denominated in Hong Kong dollar or any other currency, are qualified for identical protection under the Deposit Protection Scheme ("DPS") (s.34, DPS Ordinance (Cap. 581)). Hence, foreign deposit accounts enjoy fair treatment in this respect.

Further, business may freely borrow in foreign currency for funding. External loans (the sum of all foreign currency loans and Hong Kong dollar loans for use outside Hong Kong) are feasible in Hong Kong with no restrictions other than commercial considerations and are an important component of the banking system in Hong Kong.

Lastly, the only form of exchange regulation is found in the statutory establishment of the Exchange Fund managed by the Hong Kong Monetary Authority (Article 113, BL; Exchange Fund Ordinance Cap.66). However, the objective of the Fund is not for prohibitive and restrictive exchange control but rather for facilitative purposes to maintain the stability and integrity of Hong Kong's monetary and financial systems by providing liquidity and preserving capital with its two-portfolio segregation investment strategy.

To conclude, the exchange controls regime in Hong Kong is extremely liberal and is characterised by the absence of any form of foreign exchange restrictions. Funds from profit or capital accounts may be freely repatriated and remitted overseas.

Alien ownership of land

Q21 In Hong Kong, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True **False** **Can't say**

Comment:
There are generally no restrictions in ownership or leasing of land by foreign-controlled or non-Hong Kong companies, similar to the situation for residents or domestic companies. Companies incorporated under the Companies Ordinance (Cap. 32) ("CO") have the power to acquire, hold and dispose of land (Section 17, CO)). Non-Hong Kong companies, which are incorporated outside Hong Kong and have established places of business in Hong Kong, must have their Hong Kong branch registered with the Companies Registry (Section 333, CO (Cap. 32)).

It should be noted that the Buyer's Stamp Duty ("BSD") was introduced in 2012. It is applicable to all purchasers, persons and companies, except for Hong Kong Permanent Residents. Therefore, foreign corporate buyers will need to pay BSD. BSD is to be charged at a flat rate of 15% on all residential properties in addition to other relevant stamp duties.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Unpredictability and arbitrariness in the application of the law can increase legal risks.

Q22 In Hong Kong, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True **False** **Can't say**

Comment:
In Hong Kong, courts usually treat big businesses fairly. Businesses are treated on par with individuals in litigation involving areas such as contract, company and taxation law. In *DBS Bank (HK) Ltd v San-Hot HK Industrial Co Ltd* [2013] HKEC 352, the court ruled in favour of DBS despite the defendant being an "unsophisticated investor" individual who argued that she should not be bound by contractual terms. Similarly, in *Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA* (HCCL7/2010), the court required private bank clients suffering losses from investing in financial products to bear the accepted risk consequences. It enforced the terms of the account agreements and risk disclaimers signed by investors. This ruling indicates that would-be investors should carefully read documents before signing, as ignorance is not accepted as an excuse. Simultaneously, financial institutions should ensure

that the opening account documentation provided to clients contains explanation, risk disclosure statements and exclusion of liability to protect them against claims. Evidently, Hong Kong courts view that big businesses and individuals bear different, yet equally important responsibilities to ensure fair transactions.

Also, Hong Kong courts do not favour local interests over foreigners and treat them equally. In *Democratic Republic of Congo & others v FG Hemisphere Associates LLC* FACV 5, 6 & 7 of 2010, the Hong Kong Court of Final Appeal, as the highest court in Hong Kong, favoured the foreign government at the expense of the local corporation according to the laws of the land. They made rulings according to the Basic Law (the Hong Kong constitution) regardless of whether the parties are local interests or foreigners. Evidently, the higher courts did not rule in favour of local interests over foreigners.

Hong Kong courts deal with legal issues arising in the disputes that come before them and do not decide on any aspect other than the legal issues which arise. Whether the concerned parties are individuals or corporate entities, and whether they are foreign or local, the courts will treat them equally.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Hong Kong are not considered materially greater than in developed countries.

True **False** **Can't say**

Comment:

The 2009 Hong Kong Civil Justice Reform increased the cost-effectiveness of the practice and procedure of civil proceedings, and ensured that cases are dealt with as expeditiously as is reasonably practicable. Regarding delay, the Reform introduced active case management where courts control the progress of cases to trial, including setting "milestone" dates (dates which the courts fix for case management conferences, pre-trial reviews, or trials). Courts do not tolerate adjournment of "milestone" dates or other delays (*Ho Mei Wah v Boon Chi Sun* [2010] HKEC 1841). Furthermore, the Court is robust in reducing delay and encouraging out-of-court settlements. In *Winpo Development Limited v Wong Kar Fu [2011] HKCU 257*, the plaintiff appealed an order dismissing its claim for want of prosecution. It failed to take steps in the action for vacant possession of land for two years from 2006 to 2008. Such delay was held as inordinate and inexcusable as active case management should follow and parties should know that no further delay was tolerated.

Case management is present in other developed countries. The Assisted Dispute Resolution program was introduced into the Federal Court in Australia in 1990 after a number of cases failed to reach resolutions having several directional hearings. In the United States, the electronic court system requires case filings to be accomplished electronically to increase the efficiency of case management.

Regarding costs, Hong Kong protects against risk of irrecoverable legal costs by introducing security for costs by the application of a defendant (Order 23 Rules of High Court). Where a defendant has a reasonable apprehension that its legal costs will not be paid for by the plaintiff if the defendant is successful, the defendant can apply for a court order that the plaintiff provides security for costs (*Haifa International Finance Co Ltd v Concord Strategic Investments Ltd* [2014] HKEC 399). Similarly, Rule 25.12 of the Civil Procedure Rules in England and Order 28 of the Federal Court Rules in Australia grant the power of the court to order security for costs. In *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FSR 189, the Federal Court of Australia held that security for costs should be brought promptly and that courts should consider whether anyone standing behind the applicant is likely to benefit from the litigation and is willing to provide necessary security.

The Hong Kong courts also facilitated settlements by the sanctioned offer and sanctioned payment regime (Order 22 of the Rules of High Court). It avoids unproductive and expensive prolongation of litigation by introducing flexibility for parties to make settlement offers relating to the monetary or non-monetary claims in proceedings. It encourages parties to give settlement serious consideration. This is because it provides offerors with a high level of protection on costs and puts offerees under pressure of severe costs consequences if they fail to better a rejected sanction offer or payment. The Courts make adverse costs orders against parties falling foul of the sanctioned offer and payment regime. In *Wealthy Century Investment Ltd v DBS Bank (HK) Ltd* [2010] HKCU 1915, by operation of the original sanctioned offer, the bank was ordered to pay interest on the judgment sum and costs with interest. The sanctioned offer and sanctioned payment regime also exists in developed countries. In England, sanctioned offers made under Part 36 of the Civil Procedure Rules are intended to be made before proceedings commence.

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	Can't Say
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True **False** **Can't say**

Commentary and suggestions for change

The legal regime in Hong Kong is generally liberal and facilitative of business and investments in various areas of law. In favour of foreign direct investments, exchange controls in Hong Kong are non-existent and there is extensive legislation and constitutional safeguards to maintain a free, open and liberal market with minimum restrictions and governmental intervention. Much of Hong Kong's contractual principles are still similar to its English common law counterpart. Courts strongly uphold the terms of the contracts which sophisticated parties enter into. In addition, the public takeover regime, while imposes requirements for acquirers of companies, provides a detailed framework in which takeovers can be conducted fairly for shareholders, which in turn facilitates takeover transactions as standardized procedures are laid out. With respect to real estate, there is very little limitation in practice concerning the ownership and dealing of land in Hong Kong by nationals and foreign corporations.

However, some areas of the law can be improved in Hong Kong. Regarding changes in litigation, the class action should be introduced in Hong Kong as it gives consumers a fairer share of settlement. This can resolve some of the inadequacies of the existing joinder actions approach. In regard to employment law, there may be a need for legislation to limit maximum working hours and ensure a fair pay.

Research Team Profiles

The survey was carried out by the following students:

Adrian Low is a third year student of the LL.B. at The Chinese University of Hong Kong. His areas of interest are corporate law, corporate governance, and criminal law. He was the President of the Undergraduate Law Society in The Chinese University of Hong Kong from 2012-2013 and has involved in a wide variety of extracurricular activities. He has studied international law courses at the University of Sydney. He hopes to pursue the PCLL and practice law in Hong Kong. He can be reached at adrianlow.cuhk@gmail.com.

Adrian Fong is a third year student of the LL.B. at The Chinese University of Hong Kong. His areas of interest are corporate law, corporate governance, and regulatory policy. He is involved in a number of extracurricular activities. He has published a number of articles in international peer-review journals on a number of topics. He is currently pursuing a practice in law in Hong Kong after his PCLL degree. He can be reached at adrian.fong@cuhk.edu.hk.

Karlie Leung is a third year student of the LL.B. at The Chinese University of Hong Kong. Her areas of interest are commercial litigation and dispute resolution, corporate law and public administrative law. She also has keen interest in pro bono work in areas of refugee law and animal law, and has clinical legal experience with the Hong Kong Refugee Advice Centre. She has overseas learning experience, including studying international law (including international humanitarian law and WTO trade law) at the University of Sydney. She was also attached to Yale University for a community service programme and represented Hong Kong on a delegate trip to Singapore. She has interned in a number of firms and chambers. She hopes to pursue the PCLL and practice law in Hong Kong. She can be reached at karlie1023@gmail.com.

Leah Chun Hui is a fourth year student of the LL.B. at The Chinese University of Hong Kong. Her areas of interest include equity and trusts, commercial law, criminal law and private international law. In addition to law courses taken at her current university, she has studied international law at the University of Sydney and Chinese law at Tsinghua University. Prior to reading law in Hong Kong, she studied one year of social sciences at The University of Toronto – St. George. After completion of the LL.B., she will pursue the PCLL and she plans to practice law in Hong Kong. She can be reached at leah.c.hui@gmail.com.

Stephanie Poon is a third year student of the LL.B. at The Chinese University of Hong Kong. Her areas of interest are company law, corporate law and international commercial arbitration. She has represented the university in the 2011 World Universities Peace Invitation Debate in Kuala Lumpur and the 2012 Willem C. Vis International Commercial Arbitration Moot in Vienna and has won several awards. She has internship experiences at international law firms in both Hong Kong and Shanghai. She hopes to pursue the PCLL and practice law in Hong Kong. She can be reached at stephanie.poon@cuhk.edu.hk.

Faculty Supervisor

The survey was supervised by the following faculty member:

Professor David C. Donald is a Professor in the Law Faculty of The Chinese University of Hong Kong. David previously taught at the Institute for Law and Finance of the University of Frankfurt, Germany and worked as a commercial lawyer in the US and Europe. His publications include *A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in its Transition from Britain to China* (Cambridge University Press, 2014) and *The Hong Kong Stock and Futures Exchanges – Law and Microstructure* (Thomson, Sweet & Maxwell 2012). He is participating with scholars from other universities on a Hong Kong Research Grants Council funded project, "Enhancing the Future of Hong Kong as a Leading International Financial Centre," which has in part supported the completion of this Report. David is currently a member of Hong Kong's Standing Committee for Company Law Reform and its Financial Policy Research Committee.

Practitioner Expert Panel

The survey was reviewed by the following expert practitioners:

Brett Graham is the General Counsel for Morgan Stanley for the Asia Pacific Region. He is also the Chairman of Morgan Stanley's Franchise Risk Committee for Asia Pacific, which deals with suitability, conflicts of interest and franchise issues for the firm. He was previously the Deputy Head of Legal for Asia Pacific and also headed legal coverage for the region in Investment Banking, Private Wealth Management, and Institutional Equity Division. Prior to joining Morgan Stanley in June 1997, he was an associate at Clifford Chance in Hong Kong, Hashidate Law Office in Tokyo, and trained at Morris Fletcher and Cross, Brisbane (now Minter Ellison). He is admitted as a solicitor in Queensland, and in NSW and in the Federal jurisdictions of Australia, England and Wales, and Hong Kong.

Laurence Li is a barrister at Temple Chambers in Hong Kong and a Member of the Qatar Financial Centre Regulatory Tribunal in Qatar. His practice focuses on finance and encompasses banking, commercial, company, and securities law. He has advised financial institutions, investors, the Government, listed companies, their directors, regulators, as well as shareholders in a full range of compliance and contentious matters. He regularly deals with all the main enforcement agencies and appears before the civil as well as criminal courts, the Securities and Futures Appeals Tribunal, the Takeovers Panel, and the Listing Committee of the Stock Exchange. Before being called to the Hong Kong Bar, from 1999 to 2005, he worked at the Securities and Futures Commission (SFC). He served as the Commission Secretary and later a Director of Corporate Finance. Prior to joining the SFC, Mr. Li practiced US corporate tax law at the New York head office of Paul, Weiss, Rifkind, Wharton & Garrison.

Joseph Ngai is a Director and Managing Partner of McKinsey & Company's Hong Kong practice and he serves as a member of the Financial Services Development Council. For the past decade, he has focused on serving leading financial institutions across Asia, as well as advising leading private equity investors on their Asia investments. He led the first McKinsey Asset Management Survey across Asia involving over 80 participants across seven countries in 2008 and subsequently in 2009. Also, he is the co-author of two books on insurance, namely *Life Insurance in Asia: Sustaining Growth in the Next Decade, and Life Insurance in Asia: Winning in the Next Decade*. Most recently, he published an extensive study with Ping An Trust of China's trust industry, which was widely quoted in top-tier media, including The Financial Times and Chinese media. Furthermore, Mr. Ngai is a regular speaker at leading industry forums, and is a frequent commentator on business issues in top-tier media, including The Financial Times, The Wall Street Journal Asia, The Economist, South China Morning Post, and Hong Kong Economic Journal.

Allen & Overy Global Law Intelligence Unit

The Allen & Overy Global Law Intelligence Unit is part of the international firm of Allen & Overy and produces papers, surveys and other works on cross-border and international law within the field of its practice. Allen & Overy is one of the largest legal practices in the world with approximately 5,000 people, including some 512 partners, working in 40 offices worldwide. For further information, please contact Philip Wood, philip.wood@allenovery.com or Melissa Hunt, melissa.hunt@allenovery.com.

Philip R Wood QC (Hon) BA (Cape Town), MA (Oxon) LLD (Lund, Hon)

Head, Allen & Overy Global Law Intelligence Unit
Special Global Counsel at Allen & Overy LLP
Visiting Professor in International Financial Law, University of Oxford
Yorke Distinguished Visiting Fellow, University of Cambridge
Visiting Professor, Queen Mary College, University of London

Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

Allen & Overy LLP
One Bishops Square
London E1 6AD

T: 00 44 (0)20 3088 0000
D. 00 44 (0)20 3088 2552
M. 00 44 (0)7785 500831

philip.wood@allenovery.com
intelligence.unit@allenovery.com

D. 00 44 (0)20 3088 2750
melissa.hunt@allenovery.com

Allen & Overy LLP

One Bishops Square, London E1 6AD United Kingdom | Tel +44 (0)20 3088 0000 | Fax +44 (0)20 3088 0088 | www.allenovery.com