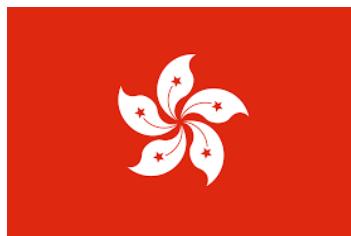




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# DOING BUSINESS IN HONG KONG



## COMPANY FORMATION IN HONG KONG

### MAIN FORMS OF COMPANY/BUSINESS IN HONG KONG

A subsidiary company, branch office and representative office are the three business structures available for foreign companies who wish to establish a presence in Hong Kong. The choice of the specific business structure will depend on the foreign company's business plans and goals. Most of the small to midsize companies opt for a subsidiary or a representative office, while large corporations opt for setting up a branch office.

#### **1. Private Company Limited by Shares**

A Private Company Limited by Shares is the most commonly-used company type for the set up of business in Hong Kong. It is a separate legal entity from its parent company, and the liabilities of the shareholders would only be limited to the unpaid portion of the shares that is agreed to be undertaken. This is a Hong Kong incorporated company for which it can take advantage of all the tax benefits and concessions available, including the Closer Economic Partnership Arrangement (CEPA), a free trade agreement with the mainland China.

#### **2. Branch Office of Parent Company**

An overseas parent company could establish a place of business as a branch office for conducting business in Hong Kong. The branch office must register itself as a "Registered Non-Hong Kong Company" within one month of establishment in Hong Kong with the local authority. Unlike a subsidiary limited company, a branch office is not a separate legal entity from the parent company and the parent company is accountable for all the debts and liabilities of the branch office.

#### **3. Representative Office**

A Representative Office could be established in Hong Kong for exploring market opportunities and undertaking coordinating activities on behalf of the overseas parent company. A representative office cannot engage in profit making activities (including trading activities, conclusion of any contracts, etc.) and is not treated as a legal entity.

## ESTABLISHING A HONG KONG COMPANY

### **General overview**

A company formed under Hong Kong law may be either limited by shares or by guarantee or unlimited. A company limited by shares can be either public or private. The usual form of a subsidiary company is a company limited by shares. This memorandum focuses only on a company limited by shares.

## Formation of a company

### Time required

In addition to making a formal application with the Companies Registry in Hong Kong to incorporate a company, a company may now also be incorporated on-line on a website designated by the Companies Registry.

If the application for incorporation is made formally with the Companies Registry, the certificate of incorporation is usually issued after 4 working days from the date the application is filed. If the application is made on-line (or otherwise referred as E-incorporation), the certificate of incorporation will be generated electronically and available as soon as the on-line application is successfully completed.

### Name

Where a company will be a wholly owned subsidiary of a foreign corporation, there is normally no objection to using the name of its parent with the addition of "(HK)" or "(Far East)" or the like before "Limited", which must be specified in a company's name.

### Registered office

The Companies Ordinance requires a company to have a registered office in Hong Kong to which all official communications and notices (including service of process) may be addressed. The intended address of a company's registered office must be completed in the incorporation form of the company

## SPECIFIC CONCERNS RELATED TO ESTABLISHING A COMPANY

Hong Kong operates under the principle of 'one country, two systems', which gives the city a high level of autonomy and different from other parts of the world. Such bi-cultural environment gives Hong Kong a unique position in the world for running a business.

Hong Kong's history as a British colony and its present unique principle of 'one country, two systems' with the mainland China enable Hong Kong to be a bi-cultural city nowadays. Such British influence within a Chinese culture is an enormous advantage for foreign enterprises setting up their business in Hong Kong and to access the market of the mainland China easily

## LEGAL ISSUES RELATED TO ESTABLISHING A COMPANY

### Director -

1. Company Limited by Shares - Both corporation and natural person could be director.
  - Minimum requirement: must consist of one natural director
2. Branch Office - Only require to report the details of directors of parent company
3. Representative Office - N/A

## Shareholder

1. Company Limited by Shares - Must appoint at least one individual resident in Hong Kong or
  - Another Hong Kong limited company.
2. Branch Office - Only require to report the details of directors of parent company
3. Representative Office - N/A

## Company Secretary

1. Company Limited by Shares - Must appoint at least one individual resident in Hong Kong or
  - Another Hong Kong limited company
2. Branch Office - Not required
3. Representative Office - N/A

## Registered Office

1. Company Limited by Shares - Must have an office address in Hong Kong as the registered office
2. Branch Office - Must have an office address in Hong Kong
3. Representative Office - N/A

## Authorised Representative

1. Company Limited by Shares - N/A
2. Branch Office - Must appoint at least one natural person resident in Hong Kong, or
  - Solicitor or
  - CPA authorised by the law
3. Representative Office - N/A

## Auditor

1. Company Limited by Shares - Must appoint an auditor
2. Branch Office - N/A
3. Representative Office - N/A

## Business Registration

1. Company Limited by Shares – Yes
2. Branch Office – Yes
3. Representative Office – Yes

## **PERMANENT ESTABLISHMENT IN HONG KONG:**

### **BRANCH OR SUBSIDIARY?**

#### **DEFINITION OF A PERMANENT ESTABLISHMENT**

The definition of a Permanent Establishment ("PE") in Hong Kong mirrors the same by the Organization for Economic Co-operation and Development ("OECD"). A PE is generally considered as a fixed place of business through which the business activities of the company are wholly or partly carried on, it could be a branch, a representative office, or other place of business. Therefore, in determining whether the activities of a company constitute a PE, three criteria are to be considered, namely space, time and function. Space refers to a fixed place of business, which may include a house, a site, equipment or facilities, a warehouse, a place for extraction of natural resources, etc., whether owned or rented by the company. Secondly, the term "Permanent Establishment" implies a degree of permanence while disallowing the effect of any temporary suspension of business activities. Moreover, if the fixed place of business only carries out preparatory or auxiliary activities such as solely for the purpose of storage or purchase of goods or collection of information and etc., it would not constitute a PE, considering that the preparatory or auxiliary activities do not by themselves generate profits.

An overseas company would not be deemed to have a PE in Hong Kong if it only carries on business through an independent agent who is merely acting in the ordinary course of its business, unless the agent regularly acts on behalf of that company and has authority to negotiate or conclude contracts in its name.

#### **DEFINITION AND MAIN DIFFERENCES BETWEEN A BRANCH AND A SUBSIDIARY**

The main difference between a subsidiary and a branch is that a subsidiary is an independent legal entity separate from its owners, as such the parent company would not be liable for the debts of its subsidiary and its legal liability towards the subsidiary would be limited to the amount of any unpaid registered share capital; whilst a branch is not a separate legal entity and the company is accountable for all the debts and liabilities of the branch. On the other hand, a branch can rely on

the credit from the company and it would adopt the company's name and carry out the same business activities.

## **REGISTRATION FORMALITIES**

Under the one-stop company and business registration service, any person who applies for incorporation of a local limited company, such as a subsidiary company, or register of a non-Hong Kong company will be deemed to have made a simultaneous application for business registration. Upon approval of an application for company incorporation, the Companies Registry will issue the Certificate of Incorporation and the Business Registration Certificate in one go. The business registration certificate should be renewed annually by settling the payment on the renew demand note issued by the Business Registration Office.

The valid business registration certificate must be displayed in a conspicuous place at the address where the business is carried on. Apart from business registration, a Hong Kong company is also required to deliver an annual return to the Companies Registry within 42 days after the anniversary of the date of the company's incorporation every year.

The annual return contains the particulars of the company such as its shareholders, directors, secretary, the registered office address, etc. The annual return should be submitted even if the information contained in the last return has not changed. A company should also ensure that the information recorded at the Companies Registry is up-to-date by notifying them any changes relating to the company particulars as mentioned above within the prescribed time period.

## **TAX AND ACCOUNTING OBLIGATIONS**

In terms of tax and accounting obligations, there is little difference between operating a branch and a subsidiary in Hong Kong. Every person carrying on business in Hong Kong is required to keep sufficient records and books of account of its income and expenditure to enable the assessable profits to be readily ascertained and shall maintain such records for at least 7 years after the completion of the transactions.

Failure to do so is an offence which may render the person liable to be fined. A company is required to prepare audited financial statements each year, but it is not mandatory for a branch or a dormant company to do so. The primary taxes levied in Hong Kong are profits tax, salaries tax and property tax. There is no capital gains tax or valued-added tax in Hong Kong. Profits tax is levied only on "revenue profits" and not income of a capital nature; its tax rate is 16.5% for corporations and 15% for individuals and unincorporated business, including branches. Loss incurred in the production of assessable profits may be carried forward indefinitely and could be offset against the assessable profits in the subsequent years. Unless specifically exempted, a person carrying on business in Hong Kong is required to file an annual Profits Tax Return to the Inland

Revenue Department for final tax and provisional tax purposes together with the audited financial statements and a profits tax computation in support.

### **STANDARD LEGAL OBLIGATIONS AND FORMALITIES FOR A BRANCH**

Like a subsidiary company, a branch office must also be registered with the Companies Registry. However, the one-stop company and business registration service is not applicable to the registration of a branch office; therefore, the application for branch registration shall be lodged directly with the Business Registration Office of the Inland Revenue Department in advance. Similarly, a branch office must also comply with the compliance requirements like renewal of the branch registration, filing annual returns, notify changes of company particulars, filing profits tax returns and etc.

Comparing with a subsidiary company, a branch office's ongoing maintenance cost is lower. For instance, a separate audit of a branch office is not mandatory in Hong Kong. Upon cessation of the Hong Kong branch, the capital can be easily remitted back to the parent company. On the other hand, the documents and information of the parent company are required for the registration of a Hong Kong branch. A Hong Kong branch office must appoint at least one Hong Kong resident agent (either an individual or an authorised corporation) to accept legal notice served to the branch.

### **CAN SOMEBODY DO BUSINESS FOR ME AND NOT BE AN EMPLOYEE?**

In Hong Kong, there are different methods in which a company can engage an individual other than in the capacity as an employee. The most common is as an independent contractor. Independent contractors are used frequently in the construction industry, among others. Whether someone is an independent contractor can sometimes be a difficult question. Some factors which indicate that someone is an independent contractor and not an employee include the fact that they have control over their work schedule (that is, they are not subject to the employer's day-to-day control), they can use their own equipment, and they have the power to hire their own people to complete the job at hand. Another common method is the use of agency workers. In general, the agency will provide an individual to work for you. In this type of arrangement, it is generally the agency and not you which is considered the worker's employer



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