

Hong Kong

Mark Yeadon and Vishal Melwani, Eversheds

SECTION 1: CONTRACTS

- The contracts concerned are mainly loan contracts, guarantees, derivatives and other financial contracts.

JURISDICTION	CONTRACTS
1. Local presence of defendant	*
2. Local presence of director of corporate defendant	*
3. Local branch, even if claim unconnected to branch	*
4. Defendant does business locally, eg enters into contracts or has meetings	✓
5. Contract made locally	✓
6. Contract governed by local law	✓
7. Contract performable locally	✓
8. Local nationality or domicile of plaintiff	*
9. Local assets, however small	*

Expand on your jurisdiction's treatment of contract breaches. This includes, where applicable, explanation of courts' discretion and the types of contract that would apply.

About the author



Mark Yeadon
Eversheds

T: +852 2186 3225
E: markyeadon@eversheds.com

Mark Yeadon is a partner based in Hong Kong. He is the head of the Asia litigation and dispute management practice. Before joining the firm in 2010, he was a partner of Slaughter and May. He has practised in Hong Kong for the last 22 years, having spent his early career in London. He is admitted in both England and Wales and Hong Kong and he is a qualified mediator.

He specialises in the resolution of commercial disputes by arbitration, mediation and court proceedings as well as advising on the conduct of, and response to, regulatory and other types of inquiry and investigation. He has advised clients throughout Asia on a wide range of commercial and financial disputes, and in particular matters arising out of complex financial transactions including derivatives, commercial contract breaches, negligence, fraud, shareholder disputes and breaches of directors' and employees' duties.

Yeadon is currently advising the Hong Kong regulator of broadcasting and telecoms on the key issues affecting these industries, including the application of rules against anti competitive conduct.

He is listed as a leading individual for dispute resolution in various legal directories and has been described as "excellent and practical" and "thorough and diligent".

In this summary we consider (1) the wide discretion the court has to decide whether Hong Kong is the most appropriate forum (the *forum conveniens*) for hearing a claim for breach of contract and, (b) the circumstances in which a contractual claim can be served on a foreign defendant.

(1) Hong Kong as the *forum conveniens*

The Hong Kong court has a wide discretion as to whether Hong Kong is the most natural and appropriate jurisdiction (the *forum conveniens*) for a trial of a claim in contract.

The Hong Kong court will generally respect valid contractual agreements specifying the jurisdiction in which a dispute on the contract is to be resolved. For example, a contract between non-Hong Kong companies but which specifies Hong Kong jurisdiction will generally be heard by the Hong Kong court.

In the absence of a contractual agreement as to jurisdiction, the Hong Kong court must be satisfied that the contract has a substantial connection with Hong Kong. The court will likely take into account all of the factors listed in the table above in determining the jurisdiction with which the contract has a substantial connection; we have ticked the four factors which we consider are likely to be key.

(2) Service of contract proceedings on a foreign defendant

(a) Service in Hong Kong

If Hong Kong is the *forum conveniens* it may be possible to serve a foreign defendant in Hong Kong in certain circumstances where there is:

- the local presence of an individual defendant (Box 1);
 - the local presence of a director of a corporate defendant (Box 2); or,
 - a corporate defendant that is registered as an overseas company in Hong Kong (Box 3).
- * (Although note that these factors on their own would generally not be sufficient to satisfy a Hong Kong court that it is the *forum conveniens*.)

(b) Service outside of Hong Kong

If Hong Kong is the *forum conveniens*, the Hong Kong court may grant permission to a plaintiff to serve a foreign defendant out of the jurisdiction. In the context of a contractual claim, the most likely bases on which the Hong Kong court may, in its discretion, take jurisdiction over a foreign defendant would be where:

- the contract was made by a party trading or residing in Hong Kong (Box 4);
- the contract was made in Hong Kong (Box 5);
- the contract is governed by Hong Kong law (Box 6);
- the alleged breach of the contract took place in Hong Kong (Box 7);
- the contract specifies Hong Kong jurisdiction (other); and,
- the claim is for a debt which is secured over land or other property in Hong Kong (other).

SECTION 2: TORTS/DELICTS

- Torts or delicts include such wrongs as mis-selling financial products or misrepresentation in an offering circular.
- The table disregards EU or EEA and common jurisdictional rules.

JURISDICTION	TORTS/CIVIL WRONGS
1. Local presence of defendant	*
2. Local presence of director of corporate defendant	*
3. Local branch, even if claim unconnected to branch	*
4. Defendant does business locally, eg enters into contracts or has meetings	✓
5. Tort committed locally	✓
6. Tort governed by local law	✓
7. Local nationality or domicile of plaintiff	*
8. Local assets, however small	*
9. Other	

Expand on your jurisdiction's treatment of torts or delicts. This includes, where applicable, explanation of courts' discretion, further explanation of the applicable torts, or other relevant factors.

The reach of the Hong Kong courts in multi-jurisdictional tort claims involves complex procedural and substantive laws. Below we summarise the discretion the court has to decide whether Hong Kong is the appropriate forum (the *forum conveniens*) for hearing a tort claim and the circumstances in which a tort claim can be commenced against a foreign defendant.

About the author



Vishal Melwani
Eversheds

T: +852 2186 3227
E: vishalmelwani@eversheds.com

Vishal Melwani is a partner in the litigation and dispute management practice of Eversheds having previously worked for six years at Slaughter and May. Before qualifying as a solicitor he qualified as a Chartered Accountant, having trained in the audit department of PwC and later worked in a leading Hong Kong practice specialising in insolvency and forensic accounting.

Melwani's accounting background has added value to clients in a number of commercial disputes on which he has acted as a solicitor. In addition to being a Canadian Chartered Accountant and a Hong Kong Certified Public Accountant, he is also an associate member of the Hong Kong Institute of Arbitrators, a distinguished professional mentor of the Chinese University of Hong Kong Faculty of Law, and is on the panel of accredited general mediators of the Hong Kong Mediation Accreditation Association Limited.

He has been recognised by various legal directories as "a future star litigator", with "strong black letter skills", "attentive to detail" and "of high integrity". He is consistently ranked as a leading individual for dispute resolution in Hong Kong.

(1) Hong Kong as the *forum conveniens*

(a) Torts committed in Hong Kong

Hong Kong will generally be the natural forum for torts that are committed in Hong Kong (Box 5). The governing law of the tort will generally coincide with the place where the tort is committed (Box 6).

(b) Torts committed outside of Hong Kong

The Hong Kong court will determine the forum with which the action has the most real and substantial connection. We have ticked the factors which we consider are likely to be key, but in exercising its discretion, the court will likely take into account:

- the place where the parties reside (Boxes 1, 2 and 7);
- the place where the parties carry out business and where loss was sustained (Boxes 3 and 4);
- whether the relevant act is actionable as a tort in Hong Kong (see below) (Box 6); and
- the availability of witnesses (Boxes 1 and 7).

As to governing law, the general rule in Hong Kong is that in order for a tort claim to be brought in respect of acts taking place wholly or partly outside of Hong Kong, it must be actionable both under the laws of Hong Kong, and the law under which the relevant acts took place (known as the 'double actionability' rule). Where this would cause injustice, in exceptional cases, the court may decide that the proceedings in Hong Kong may be governed by the law of the country which has the most significant relationship with the acts committed and the parties.

(2) Service of tort proceedings on a foreign defendant

(a) Service in Hong Kong

If Hong Kong is the *forum conveniens* it may be possible to serve a foreign defendant in Hong Kong in certain circumstances where there is:

- the local presence of an individual defendant (Box 1);
 - the local presence of director of a corporate defendant (Box 2); and,
 - a corporate defendant that is registered as an overseas company in Hong Kong (Box 3).
- * (Although note that these factors on their own would generally not be sufficient to satisfy a Hong Kong court that it is the *forum conveniens*.)

(b) Service outside of Hong Kong

If Hong Kong is the *forum conveniens*, the Hong Kong court may grant permission to serve a foreign defendant out of the jurisdiction. In the context of a tort claim, the most likely bases on which the Hong Kong court may permit service on a foreign defendant would be where the damage caused by the tort was (i) sustained (Box 4), or, (ii) resulted from acts (Boxes 5 and 6), in Hong Kong.

SECTION 3: INSOLVENCY – INDIVIDUALS OR CORPORATES

- This table disregards consumer transactions.
- It also does not include EU or EEA and common jurisdictional rules, eg the EC Insolvency Regulation of 2002.

JURISDICTION	INSOLVENCY OF INDIVIDUALS OR CORPORATES
1. Local presence of the debtor (who is an individual/natural person)	✓
2. Local presence of director of the debtor (who is not an individual/person)	Possible
3. Debtor has a local branch, even if creditor's claim is unconnected to branch	Possible
4. Debtor does business locally, eg contracts or meetings locally	Possible
5. Contract on which claim is based is made locally	Possible
6. Contract on which claim is based is governed by local law	Possible
7. Contract on which claim is based is performable locally	Possible
8. Local nationality or domicile of creditor	Possible
9. Debtor has local assets, however small	Possible
10. Other	

Expand on your jurisdiction's treatment of insolvent companies and individuals. This can include, where applicable, explanation of courts' discretion, or other relevant factors

General note

As a general note, whether or not the Hong Kong court will permit insolvency proceedings is highly fact-sensitive as to which the court has a wide discretion. It will not exercise that discretion if the proceedings would be futile in practical terms.

Bankruptcy of foreign individuals

Bankruptcy proceedings may be initiated in Hong Kong against a foreign individual by the presentation of a bankruptcy petition if the debtor:

- (1) is domiciled in Hong Kong;
- (2) is personally present in England and Wales on the day on which the petition is presented (Box 1); or
- (3) at any time in the three years preceding the presentation of the petition:
 - (a) has been ordinarily resident, or has had a place of residence, in Hong Kong; or,
 - (b) has carried on business in Hong Kong.

Insolvent winding-up of foreign companies

The liquidation process in Hong Kong in respect of insolvent companies was traditionally used to wind-up the affairs of a company before dissolution. However, a recent trend is for provisional liquidators to be appointed in Hong Kong to try to effect the restructuring of a company with a view to avoiding dissolution, rather than simply to preserve assets as a pre-cursor to winding-up.

The Hong Kong court may exercise its discretion to allow a foreign company to be put into liquidation or provisional liquidation in Hong Kong if the following requirements are met:

(1) There is a sufficient connection with Hong Kong.

This is a matter of the Hong Kong court's discretion and is highly fact-sensitive. Previous decisions in Hong Kong show that any of the factors listed in boxes 2 to 9 could be sufficient to satisfy this test depending on the particular factual circumstances. However, in recent decisions the Hong Kong court has made clear that the most appropriate forum for the winding-up of a company is generally its place of incorporation. The Hong Kong court will only exercise jurisdiction over a foreign company when there are compelling reasons demonstrating sufficient connection with Hong Kong.

(2) There is a reasonable possibility that the winding-up order would benefit those applying for it.

There is considerable overlap here with the sufficient connection test. The benefit to be derived from Hong Kong proceedings will be fact-sensitive.

(3) The Hong Kong court must be able to exercise jurisdiction over one or more persons interested in the distribution of the company's assets.

The Hong Kong court has the power to dispense with this requirement where the foreign company's connection with Hong Kong is sufficiently strong. The Hong Kong court is unlikely to initiate the liquidation of a solvent foreign company, unless there are exceptional circumstances.

Scheme of arrangement

Although not a type of insolvency proceeding, the Hong Kong court has the power to approve a scheme of arrangement of a foreign company where there is sufficient connection with Hong Kong to make such approval desirable.

The authors would like to thank Tim Browning, senior associate, who provided great assistance in putting together the chapter

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David Bernstein, corporate partner, K&L Gates