

Lending to a Company in Hong Kong: Regulatory Issues

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Practice notes | [Law stated as of 01-Jun-2023](#) | Hong Kong - PRC

A Practice Note looking at regulatory issues for a proposed loan finance transaction where the borrower is a company incorporated in Hong Kong and the lender is incorporated in another jurisdiction. It considers economic and trade sanctions laws, anti-money laundering laws, anti-corruption and anti-bribery laws, and currency exchange controls in Hong Kong of interest to foreign lenders. It also highlights any licensing or other restrictions on foreign lenders making loans to, or taking security or guarantees from, a company incorporated in Hong Kong.

Lawyers advising a lender who proposes to make a loan to a borrower in another jurisdiction need to be aware of the various issues that may arise from the different jurisdictions involved in the transaction. Regulatory issues in a jurisdiction may cause problems in a transaction, and it is essential to identify these problems early on so that they can be dealt with, to ensure that the transaction runs smoothly.

This Note highlights the following regulatory issues that apply to foreign lenders:

- Laws and regulations in Hong Kong relating to economic and trade sanctions.
- Anti-money laundering laws and regulations in Hong Kong.
- Anti-corruption and anti-bribery laws and regulations in Hong Kong.
- Currency exchange controls in Hong Kong.
- Restrictions on a foreign lender making loans or taking security or guarantees in Hong Kong.
- Other requirements for doing business in Hong Kong that may apply to the making of loans by a foreign lender to a borrower in Hong Kong.

This Note does not consider or address consumer finance laws or regulations.

For information about matters which a lender may wish to consider in relation to tax, costs, security, and insolvency, in connection with a proposed loan transaction where the borrower is incorporated or located in Hong Kong and the lender is incorporated elsewhere, see [Practice Note, Lending to a Company in Hong Kong: Structuring the Transaction](#).

Economic and Trade Sanctions

Legal Framework: Economic and Trade Sanctions

The United Nations Sanctions Ordinance (Cap. 537) (UNSO) (and its subsidiary regulations) and the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (UNATMO) (UNSO and UNATMO together, the UN Ordinances) implement resolutions of the Security Council of the United Nations in Hong Kong pursuant to which trade and other specified activities

in Hong Kong with the sanctioned countries are subject to certain restrictions. As sanctions imposed by the UN fall within the ambit of foreign affairs, regulations relating to UN sanctions are made by the Chief Executive of Hong Kong on the instruction of the UN Security Council via the Ministry of Foreign Affairs of China.

The regulations relate to a specific, designated territory and vary in nature and scope depending on the identity of the sanctioned targets. For example, most regulations impose prohibitions against making funds or other financial assets or resources available to the relevant persons or entities. These prohibitions against providing financial assistance would apply to any person or entity acting in Hong Kong or a Hong Kong person acting outside the Hong Kong, so could apply to a Hong Kong borrower.

The list of the countries and individuals subject to UN sanctions and the scope of the applicable regulations is available on the website of the Trade and Industry Department under Trade and Investment Department: United Nations Sanctions.

Penalties for Breach of Economic and Trade Sanctions

Any person who breaches the relevant provisions of UNATMO commits an offence. The maximum term of imprisonment for an offence under UNATMO is 14 years, and an unlimited fine can be imposed.

Specific penalties in relation to specified sanctioned territories are set out in each of the subsidiary regulations to UNSO.

Economic and Trade Sanctions Provisions in a Loan Agreement

Sanctions provisions are not a feature of all investment grade loan agreements. Although the Asia Pacific Loan Market Association (APLMA) has produced a guidance note on sanctions, the form of documents prepared by it does not include any recommended sanctions provisions. Instead, a note is included in its form of documents reminding the lenders to consider the relevance of sanctions in relation to their transactions.

It has become increasingly common for lenders to seek documentary protections to deal with sanctions risk in view of the increasingly aggressive enforcement action taken by regulators in the EU and the US against financial institutions in respect of sanctions breaches. Where sanctions related representations and undertakings are included in loan agreements, their scope and detail may be deal-specific and need to be negotiated on a case-by-case basis. Different banks may have different levels of sensitivity and policies in this respect. Further, some borrowers may be conducting legitimate business in countries that are subject to sanctions. These are all factors that will need to be taken into account when drafting the sanctions related provisions in a loan agreement.

Sanctions related provisions may be unenforceable if they are found to be in breach of public policy or "The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region" passed by the National People's Congress Standing Committee of the People's Republic of China (known as the National Security Law) and brought into effect in the Hong Kong SAR on 30 June 2020.

Anti-Money Laundering Laws and Regulations

Legal Framework: Anti-Money Laundering

The principal anti-money laundering and counter terrorist financing ordinances in Hong Kong are the following:

- Organised and Serious Crimes Ordinance (Cap. 455) (OSCO).

- Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) (DTROP).
- UNATMO.
- Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526) (WMD(CPS)O).
- Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) (AMLO).

DTROP, OSCO and the AMLO provide the legal basis for countering money-laundering and criminal financing, while the UNATMO is to counter the financing of terrorism. The WMD(CPS)O prohibits the provision of services that may assist the production, acquisition or stockpiling of weapons of mass destruction in Hong Kong or elsewhere. In general, an offence under these ordinances can be committed by "a person", which includes both corporates and individuals. Under common law principles applicable in Hong Kong, courts in Hong Kong normally only have jurisdiction over criminal offences committed within the territorial jurisdiction of Hong Kong. As a result, unless expressly provided in legislation, offences under the laws of Hong Kong do not have extra-territorial effect.

The AMLO imposes requirements on specified financial institutions and designated non-financial businesses and professions in Hong Kong (including, for example, banks licensed in Hong Kong) relating to customer due diligence, ongoing monitoring and record-keeping requirements.

DTROP and OSCO

Section 25(1) of DTROP creates an offence where any person (which includes both individuals and corporates) "deals" with any property, "knowing" or "having reasonable grounds to believe" that it (in whole or in part) directly or indirectly represents the proceeds of drug trafficking.

The meanings of the key terms in section 25(1) are as follows:

- "Dealing" is widely defined to include receiving, acquiring, concealing or disguising, disposing of or converting, bringing into or removing from Hong Kong, or using the property to borrow money.
- "Knowing" means someone having knowledge of a fact or a certain state of affairs. Examples of proof for the "knowing" limb not only include evidence by the offender's admission that he had the required belief, but also evidence of the person's involvement in the offence.
- To ascertain whether a person had "reasonable grounds to believe", the court will apply a two-stage test. First, it requires proof that there were sufficient grounds to lead a "common sense, right thinking member of the community" to believe that the person being assisted was a drug trafficker or has benefited from such drug trafficking (or similar indictable offences). Second, it must be proven that those grounds were known to the defendant.

OSCO contains an almost identical provision (also section 25(1)) except that the provision refers to the dealing of proceeds of an indictable offence. For property to represent criminal proceeds, it must be derived or realised from (directly or indirectly) the proceeds of an indictable offence, that is, proceeds from summary-only offence are not caught under OSCO. As a general rule, the specific piece of legislation creating an offence will specify whether the offence is indictable. So, as an example, tax evasion, fraud, and robbery would be indictable offences and therefore could trigger the relevant offence under OSCO. The relevant offence for triggering DTROP is drug trafficking.

Note that the offence of money laundering has extra-territorial application under both OSCO and DTROP as the references to "indictable offence" and "drug trafficking" under each of OSCO and DTROP include references to conduct which would constitute an offence if it occurred in Hong Kong, irrespective of where it took place.

Both DTROP and OSCO provide a defence where the person proves that he intended to disclose such knowledge, suspicion or matter to an "authorised officer" or has a reasonable excuse for failing to make a disclosure in accordance with section 25A(2) of DTROP or OSCO (see [Suspicious transaction reporting](#)).

UNATMO

The UNATMO, among other things, criminalises the provision or collection of property and making any property or financial (or related) services available to terrorists or terrorist associates. It is irrelevant whether the property has not been used to commit a terrorist act; the offence is not predicated on a terrorist act having been committed. The UNATMO also permits terrorist property to be frozen and subsequently forfeited.

Under UNATMO, it is a defence for a person to prove that they intended to disclose such knowledge or suspicion to an authorised officer as soon as it was reasonable for them to do so, and they have a reasonable excuse for failing to do so earlier.

WMD(CPS)O

The WMD(CPS)O controls the provision of services that may assist the development, production, acquisition or stockpiling of weapons capable of causing mass destruction or that may assist the means of delivery of such weapons. Section 4 of WMD(CPS)O prohibits a person from providing any services where he believes or suspects, on reasonable grounds, that those services may be connected to proliferation financing. The provision of services is widely defined and includes the lending of money or other provision of financial assistance.

Suspicious transaction reporting

It is a statutory obligation under DTROP, OSCO, UNATMO, and the National Security Law, that a person must as soon as it is reasonable for them to do so, file a Suspicious Transaction Report (STR) with the Joint Financial Intelligence Unit where that person knows or suspects either of the following:

- That any property:
 - in whole or in part directly or indirectly represents any person's proceeds of;
 - was used in connection with; or
 - is intended to be used in connection with,

drug trafficking or an indictable offence.
- That any property is terrorist property.
- That any property is offence related property under the NSL.

The STR should be filed, together with the details of any matter on which the knowledge or suspicion is based.

The statutes provide protection to employees against the risk of prosecution where they have reported knowledge or suspicion of money laundering transactions to the person designated by their employer in accordance with the procedures established by their employer for the making of such disclosure.

It is a defence for a person to continue dealing with property known or suspected to represent proceeds of crime or terrorist property under the respective Ordinances if disclosure is made before the dealing and the dealing is made with the consent of an authorised officer. Consent may be refused by an authorised officer and a "Letter of No Consent" will be issued.

Penalties for Breach of Anti-Money Laundering Laws and Regulations

The maximum penalty applicable to persons convicted upon indictment under OSCO or DTROP is a fine of HKD5 million and imprisonment for 14 years. The maximum penalty for breaching the UNATMO is imprisonment for 14 years and a fine.

Under the DTROP, the OSCO and the UNATMO, failure to report knowledge or suspicion is an offence and carries a maximum penalty of imprisonment for three months and a fine of HKD50,000.

Anti-Money Laundering Provisions in a Loan Agreement

Anti-money laundering provisions are not a feature of all investment grade loan agreements. The form of documents prepared by APLMA does not include any recommended anti-money laundering provisions. Instead, a note is included in its form of documents reminding the lenders to consider including provisions to reflect laws and regulations on anti-money laundering that may affect them. It has become increasingly common for lenders to include representations and undertakings in this respect. As different banks may have different policies in this respect, the scope of anti-money laundering provisions may be deal-specific and will need to be considered on a case-by-case basis.

Anti-Corruption and Anti-Bribery Laws and Regulations

Legal Framework: Anti-Corruption and Anti-Bribery

The Prevention of Bribery Ordinance (POBO) (Cap. 201) is the primary anti-corruption and anti-bribery legislation in Hong Kong. It regulates both the private and public sector.

Bribery

The offence of bribery can be committed by both private individuals and public servants. In relation to individuals, under section 4 of POBO, bribery is committed when any person, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers an advantage to a public servant as an inducement to or reward for that public servant doing any of the following:

- Performing or abstaining from performing an act in the capacity of a public servant.
- Expediting, delaying, hindering or preventing the performance of an act in the capacity of a public servant.
- Assisting, favouring, hindering or delaying any person in the transaction of any business with a public body.

Public servants commit the offence when they solicit or accept any advantage in the abovementioned circumstances, whether in Hong Kong or elsewhere. Civil servants who solicit or accept any advantage without the Chief Executive of Hong Kong's permission are guilty of an offence.

Public sector contracts and tenders

In relation to tendering for, and contracts with, a public body in Hong Kong (which could include financing arrangements), the following acts are prohibited under POBO:

- Offering an advantage to a public servant or the Chief Executive of Hong Kong for assistance in influencing the promotion, execution or procuring of any contract with a public body or the payment of monies provided in such

contracts. The solicitation or acceptance of an advantage by a public servant or the Chief Executive of Hong Kong is equally an offence (*section 5, POBO*).

- Offering, soliciting or accepting an advantage for the withdrawal of a tender or bid at an auction for a public body (*section 6, POBO*).
- Offering an advantage to a prescribed officer or public person employed by a public body while having dealings with the government or such public body (*section 8, POBO*).

"Entertainment" is specifically excluded from POBO's definition of an "advantage" but is narrowly defined to refer to the provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time as, such provisions. Note that civil servants are subject to guidelines in relation to gifts and entertainment.

Private commercial bribery

Private sector bribery offences under POBO (*section 9, POBO*) relate to corrupt transactions with agents and include carrying out the following acts without lawful authority or reasonable excuse:

- Offering an advantage to an agent without the permission of their principal, in connection with the agent's performance or abstaining from performance of any act in relation to their principal's affairs or business.
- As an agent, soliciting or accepting an advantage without the permission of their principal, in connection with his or her performance or abstaining from performance of any act in relation to their principal's affairs or business.

Penalties for Breach of Anti-Corruption and Anti-Bribery Laws and Regulations

The maximum penalties for any offence under POBO are as follows:

- For possession of unexplained property (for example, maintaining a standard of living above that which is commensurate with present or past official emoluments, or being in control of pecuniary resources or property disproportionate to present or past official emoluments), a fine of HKD1 million and imprisonment for ten years.
- For bribery for giving assistance in relation to contracts or for bribery for procuring withdrawal of tenders, a fine of HKD500,000 and imprisonment for ten years.
- For any other offence, including the broader offence of bribery, a fine of HKD500,000 and imprisonment for seven years.

Anti-Corruption and Anti-Bribery Provisions in a Loan Agreement

Anti-corruption and anti-bribery provisions are not a feature of all investment grade loan agreements. The form of documents prepared by APLMA does not include any recommended anti-corruption and anti-bribery provisions. Instead, a note is included in its form of documents reminding the lenders to consider including provisions to reflect laws and regulations on anti-bribery and anti-corruption that may affect them. It has become increasingly common for lenders to include representations and undertakings in this respect. As different banks may have different policies in this respect, the scope of anti-corruption and anti-bribery provisions may be deal-specific and will need to be considered on a case-by-case basis.

Currency Exchange Controls

Currently, there are no currency exchange controls or other governmental restrictions in Hong Kong which restrict payments to a foreign lender, whatever currency those payments are made in.

Restrictions on Making Loans or Taking Security or Guarantees

Restrictions on Making Loans

In Hong Kong, a person generally cannot engage in the business of making loans without a money lender's licence. This licence is granted according to the terms of the Money Lenders Ordinance (Cap. 163) and the Money Lenders Regulations (Cap. 163A).

Certain exceptions to this rule are set out in Part 1 and Part 2 of Schedule 1 to the Money Lenders Ordinance. Under these exceptions, certain persons and types of loans are exempted from the requirement of a money lender's licence.

Exempted persons include the following:

- Authorised institutions under the Banking Ordinance (Cap. 155).
- Insurers under the Insurance Ordinance (Cap. 41).

Exempted loans include the following:

- Inter-company loans.
- Loans made to a company secured by a mortgage, charge, lien, or other encumbrance registered under the Companies Ordinance (Cap. 622).
- Loans made to a company with a paid up share capital of not less than HKD1 million.

The Hong Kong Companies Registry (HKCR), which has taken up the role of the Registrar of Money Lenders, in April 2021 issued the Guideline on Fit and Proper Criteria for Licensing of Money Lenders and the Guideline on Submission of Business Plan by Applicant of a Money Lenders Licence.

The HKCR also revised the Guidelines on Licensing Conditions of Money Lenders Licence in March 2021. These revisions introduced an additional licensing condition (licensing condition 15, requiring each money lender to undertake an assessment of a potential borrower's ability to make repayments under the loan agreement in an affordable manner), and amended several other licensing conditions on money lenders.

All these guidelines are designed to refine the assessment and selection of applicants for money lenders licences and their related persons, and to better regulate money-lending practices in Hong Kong. The guidelines should be read in conjunction with the Money Lenders Ordinance.

The Money Lenders Ordinance may have extra-territorial effect, in that the express choice of a foreign law as the governing law of the loan agreement will not necessarily prevent the Money Lenders Ordinance from applying. When determining whether the Money Lenders Ordinance applies, the Hong Kong courts usually consider the following:

- At the time of entering into the loan agreement, whether the lender was carrying on business as a money lender in Hong Kong, or advertising or holding itself out as such.
- Whether the proper law of the loan agreement, objectively assessed, should be the law of Hong Kong.

If the court regards the foreign lender as a money lender within the meaning of the Money Lenders Ordinance, the foreign lender cannot legally lend money without a licence, and any loan made in breach of this licensing requirement would be unrecoverable without leave of the court.

Lending without a licence may be punished by a fine of up to HKD100,000 and imprisonment for up to two years.

For more information, see [Country Q&A, Lending and Taking Security in Hong Kong: Overview: Question 13](#).

Restrictions on Taking Security or a Guarantee

Assuming the requirement for a money lender licence is not triggered (see [Restrictions on Making Loans](#)), it is not necessary under the laws of Hong Kong for a foreign lender to be licensed or registered in Hong Kong before it can take a guarantee or a security interest from a Hong Kong incorporated company or a security interest over assets located in Hong Kong.

Restrictions on Enforcing Rights Under a Loan Agreement

Assuming the requirement for a money lender licence is not triggered (see [Restrictions on Making Loans](#)), it is not necessary under the laws of Hong Kong for a foreign lender to be licensed or registered in Hong Kong to enable that lender to enforce its rights under a loan agreement or security agreement.

Restrictions on Enforcing Security

The powers of a lender on enforcement are usually set out expressly in the security agreement. The principal enforcement powers in a security agreement governed by the law of Hong Kong generally include the power to appoint a receiver and the power to sell the secured assets.

A lender can generally enforce a security interest in accordance with the terms of the security agreement. The exception is the foreclosure power which may also be included in a security agreement as an enforcement power. In the Hong Kong context, foreclosure is rarely used as a remedy for enforcement. Under foreclosure, the lender essentially becomes the absolute owner of the secured assets. This remedy would require court proceedings in Hong Kong that would be uncertain in outcome, expensive and time consuming (for example, the court would require an account to be taken of the amount of the secured indebtedness and would give the borrower a period of at least six months to repay it before any foreclosure order absolute was made).

Furthermore, the effect of foreclosure is the extinguishing of the secured obligations completely and, therefore, foreclosure is of little practical use in circumstances where the value of the secured assets may be less than the outstanding amounts owed to the lender.

Doing Business Requirements

In general, other than the money lender's licence (see [Restrictions on Making Loans](#)), there are no particular restrictions imposed on foreign lenders, nor particular costs which foreign lenders are more likely to incur than domestic lenders.

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