

## Establishing integrity-based business principles with business partners

Irrespective of being based in Hong Kong, Macao or in mainland China, SME operators should clearly state all terms and conditions for investment and cooperation in a formal contract whenever entering into an agreement with business partners — including contractors and suppliers — to ensure that all agreements reached are legally binding.

## Entering into written contracts and listing conditions for cooperation

Businesspersons should clarify whether the advantages offered to an individual are lawful and whether they are directly relevant to their investment projects. If the party accepting an advantage is employed by a Hong Kong company, he/she must obtain his/her employer's prior approval before he/she can legitimately accept the advantage.

Offering bribes to a unit in mainland China also constitutes an offence. It should, however, be noted that the term 'unit' in Article 391 of the CLPRC refers only to State bodies, State-owned companies, State-owned enterprises, business units and public organisations. The term 'unit' does not include private companies or enterprises. Hence, when giving an advantage to a unit as a whole, you must clearly determine whether the receiving party is a private company or enterprise. In cases where it is not a private company or enterprise, you must pay special attention to avoid contravening the law in giving advantages. If the recipient is a representative of a non-State unit in mainland China, you should ensure that his/her acceptance of the advantage has been approved by the unit and that the advantage will accrue to the unit as a whole rather than to any individual. Otherwise, you may run the risk of committing the offence of 'offering bribes to non-State functionaries'.

In Macao, if an employee accepts unlawful advantages as the reward for violating his/her job obligations, he/she will commit the offence of 'accepting bribes in the private sector'.

Businesspersons should also pay special attention to the following issues when entering into contracts for investment projects:

1. **Define any offer of advantages in the contract**

An investor may sometimes need to legitimately enhance his/her competitive edge by proposing lawful advantages to a business partner, whether an enterprise or a unit. When he/she sets up a factory, for example, he/she may offer to provide shuttle buses for workers commuting between the workplace and their living quarters. He/she may also arrange overseas study tours or training courses for the staff of his/her mainland business partners. As these advantages are intrinsic to the project, the investor should guard against any suspicion of bribery by spelling them out clearly in the contract and limiting himself/herself to offering only these specified advantages.

2. **Define how payments and commissions are to be made**

Should representatives of trade partners ask investors to pay commissions in a specific way, for example, depositing money into offshore company accounts, investors should state the method of payment clearly in all contracts and invoices. Payments should normally be restricted to traceable payments such as crossed cheques and telegraphic remittances. Cash payments should never be made, whether in a direct way or via a third party.

3. **Report corruption and bribery**

For any irregularities encountered during contractual negotiations, such as a representative of the counterparty soliciting an advantage for himself/herself or on behalf of other people before striking a business deal, the investor should immediately report the case to the senior management of the company or relevant local anti-corruption agency.

## **Declaring your stance as an integrity-based business**

To put integrity management into practice, entrepreneurs are advised to formulate a code of conduct for the company and notify all suppliers, contractors and clients about the company's corruption prevention policy. Such a practice not only enhances policy transparency, but also helps boost the company reputation and reduces the risks of corruption and misunderstandings due to ambiguous policies on acceptance of advantages.

Please refer to Chapter 8 for details about formulating a code of conduct and advice on communicating with business partners.

# Resolving business disputes lawfully

When disputes arise in the course of business, SMEs should first seek assistance from their local government. If the issue lies outside the scope of any government departments and no criminal element is involved, such as in a civil case, a lawyer can be appointed to help resolve the situation and/or claim compensation through a civil lawsuit.

Businesspersons should never resort to exploiting connections with influential individuals, whether by a backdoor route or by the indiscriminate use of middlemen. The following means are useful in resolving business disputes in a lawful way:

## Mutual negotiation

In general, most business disputes can be resolved through mutual negotiation. This not only maintains harmony between the two sides, but also saves the trouble and costs of protracted arbitration and/or litigation. Moreover, this approach provides greater flexibility and is more conducive to any future cooperation and dealings.

## Arbitration

Arbitration is often employed to resolve commercial disputes, particularly those involving international commercial transactions. The advantage of arbitration is that it is professional and effective. On a voluntary and equal basis, the parties concerned agree in writing to refer their disputes to an arbitration organisation acceptable to both sides for adjudication and a binding verdict.

### *The People's Republic of China*

There are two main foreign economic arbitration organisations in mainland China — both are non-government arbitration bodies:

1. The China International Economic and Trade Arbitration Commission; and
2. The China Maritime Arbitration Commission

The legally binding effect of arbitration agreements has been confirmed by international treaties. Most treaties and protocols signed between mainland China and foreign countries — on commercial and maritime matters, trade agreements and delivery terms — contain provisions for arbitration. Arbitration agreements are now widely accepted and recognised by most countries and regions around the world.

Courts may, however, refuse to process cases that involve arbitration agreements. Article 257 of the *Civil Procedure Law of the People's Republic of China* clearly stipulates that no person who is party to a dispute concerning foreign economic relations, trade, transportation and/or maritime matters shall put his/her case to the People's Court if the dispute involves a contract that contains an arbitration clause or if the parties concerned have already entered into a written agreement to the effect that the dispute be referred to a PRC foreign economic arbitration organisation or any other arbitration organisation. Nevertheless, Article 5 of the *Arbitration Law of the People's Republic of China* stipulates that, if the arbitration agreement is invalid, then either party can initiate litigation in the People's Court.

### *Hong Kong*

In Hong Kong, disputes can also be resolved through arbitration. According to the *Arbitration Ordinance*, which came into effect on 1 June 2011, the *Model Law on International Commercial Arbitration*, enforced by the United Nations Commission on International Trade Law (UNCITAL), applies to all arbitrations made in Hong Kong. This reconciliation of differences between local and international arbitration systems has made things significantly easier for business operators.

In accordance with *the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)* and the signing of the Mutual Enforcement of Arbitral Awards with mainland China, arbitral awards made in Hong Kong are automatically enforceable in over 140 jurisdictions. The *Mutual Enforcement of Arbitral Awards* endorsed by the Central Government of the PRC and Hong Kong in 1999 contains stipulations similar to those in the *New York Convention*.

### *Macao*

In Macao, the World Trade Centre (WTC) Macao Arbitration Centre is responsible for handling foreign commercial arbitration matters and is governed by the internal regulations of the WTC Macao Arbitration Centre.

The validity of arbitral awards is governed by certain regulatory documents promulgated in Macao, including the *New York Convention* stipulated in March 2007. If business organisations choose to conduct arbitration in Macao, the arbitral awards will be automatically enforced in all countries and regions that are signatories to the *New York Convention*. In addition, with Macao's signing of the *Mutual Enforcement of Arbitral Awards* with mainland China in October 2007, application to the court for endorsement and enforcement of an award can be made either in mainland China or Macao.

## Litigation

Aggrieved parties may file suit in a court which presides over the appropriate jurisdiction to resolve their disputes through judicial process.

### *The People's Republic of China*

According to PRC law, the Intermediate People's Courts are the courts of first instance in handling cases involving overseas parties. Hence, legal proceedings in business disputes should be initiated at such courts.

If the case involves economic crimes, it should be reported to the appropriate authorities. If the case is a general criminal case, it should be reported to the local Public Security Bureau.

### *Hong Kong*

Business operators in Hong Kong may file a lawsuit either to the High Court or District Court for monetary claims — depending on the amount of claims. The High Court has unlimited jurisdiction in civil matters while the District Court has civil jurisdiction to hear monetary claims over HKD50,000, but not more than HKD1 million.

Courts in Hong Kong have the responsibility to resolve disputes of parties who have the right to pursue or defend a legal action by themselves, or have the right to seek legal representation from lawyers or barristers to state the case, point of law and statement of facts for the court's judgment.

### *Macao*

There is no designated court in Macao to deal with cases involving foreign interests. The courts of the Macao SAR are structured in three levels: the Court of First Instance, the Court of Second Instance and the Court of Final Appeal. The Primary Court with the support of the Court of First Instance is the preliminary hearing court with general jurisdictions. This means cases not yet classified under the law for court hearing are tried by the Primary Court. For civil cases involving commercial contract disputes, parties concerned should take legal proceedings to the Primary Court.

The Court of Second Instance is vested with exclusive jurisdiction on the assessment and endorsement of judgments made by courts or arbitration institutions which are outside of Macao. In respect of verdicts reached in courts or arbitration institutions which are outside of Macao, businesspersons can make a direct application to the Court of Second Instance for endorsement in Macao.