

Luxury & Fashion 2020

Contributing editors
Meryl Bernstein and Sahira Khwaja
Hogan Lovells



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Luxury & Fashion 2020

Contributing editors**Meryl Bernstein and Sahira Khwaja****Hogan Lovells**

Lexology Getting The Deal Through is delighted to publish the first edition of *Luxury & Fashion*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Meryl Bernstein and Sahira Khwaja of Hogan Lovells, for their assistance with this volume.



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Hong Kong

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MARKET SPOTLIGHT

State of the market

1 | What is the current state of the luxury fashion market in your jurisdiction?

Hong Kong is a duty-free zone and, thus, luxury goods here are generally cheaper than most other places in Asia. Hong Kong has long been one of the top luxury destinations in the world, and the city is estimated to account for between 5 and 10 per cent of the annual global sales of luxury goods. The Hong Kong luxury goods market, including apparel, footwear, leather accessories, eyewear, watches and jewellery, and cosmetics, amounts to around US\$6 billion in 2019. The most popular brands with the highest revenues are those of the LVMH group, Swatch Group, Kering, Rolex, Chow Tai Fook and Chanel.

A large part of the sales is contributed by visitors from mainland China. However, since the anti-extradition protests began in June last year, visitor arrivals dropped sharply with the number of mainland tourists to Hong Kong falling 42.3 per cent, and consequently retail sales dropped, impacting the luxury end most heavily.

Compared to most other top luxury goods markets, the percentage of online sales is relatively low in Hong Kong at about 6 per cent in 2019. Traditional in-store shopping is likely to continue to dominate in Hong Kong as the high density of retail space means shopping in physical stores is very convenient.

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

2 | What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

The development, manufacture and supply chain for fashion goods are governed by general contract law in Hong Kong. The usual contractual arrangements for the development and manufacture of fashion goods are the development agreement and the manufacturing agreement, respectively. The usual contractual arrangements for the supply chain for fashion goods include the distribution agreement, sale of goods agreement, sales representative agreement and franchise agreement.

Distribution and agency agreements

3 | What legal framework governs distribution and agency agreements for fashion goods?

Distribution and agency agreements are governed by common law principles of equity and contract.

Distribution agreements are also governed by the competition law in Hong Kong and especially the Competition Ordinance (HKCO)

(Cap 619). Selective distribution agreements are often beneficial for competition but there is a higher risk of harming competition and breaching the HKCO. Agency agreements are not generally subject to competition rules.

Agency agreements are governed by the agency principles, which are general rules deriving principally from the law of contract. The common law also governs the rights and liabilities of principal and agent. Besides, the Factor Ordinance (Cap 48) governs the rights and obligations of mercantile agents.

4 | What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Distributors are usually appointed on an exclusive or non-exclusive basis. There is also selective distribution agreement where a supplier, in appointing a distributor as part of a selective distribution system, agrees to appoint additional distributors only if they meet certain criteria. This is designed to maintain the brand and image and is commonly utilised by luxury brands.

The usual contractual terms and provisions include territories, channels, reserved channels, product classifications, exclusivity, trademarks licensed, ownership of intellectual property, duration of the agreement, terms of the sale of products, payment terms, delivery terms, obligations of the distribution, termination, etc.

Import and export

5 | Do any special import and export rules and restrictions apply to fashion goods?

There are no specific importing and exporting rules and regulations for fashion goods in Hong Kong.

Usually, all cargo imported into or exported from Hong Kong via air, land and sea is subject to customs control. Hong Kong Customs and Excise Department (Hong Kong Customs) is responsible for monitoring the imports and exports of goods and has the power to inspect the documentation (eg, manifests) and examine the goods.

For imports of goods, the importers are required to complete customs clearance and declaration formalities with Hong Kong Customs. Charges are based on the value and nature of goods imported, except for articles exempted from declaration charge.

Certain goods, such as food, pharmaceuticals and vehicles, are subject to more strict control by the Trade and Industry Department (TID); for example, the 'prohibited articles' or 'reserved commodities' under the Import and Export Ordinance (Cap 60) and the Reserved Commodities (Control of Imports, Exports and Reserve Stocks) Regulations (Cap 296A). In which case, shipping companies, airlines and transportation companies must, within 14 days of import or export, deliver the relevant manifests and licences to the TID for manifest checking.

Corporate social responsibility and sustainability

6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

There is no specific requirement in relation to corporate social responsibility and sustainability for fashion and luxury brands. The Companies Ordinance (Cap 622) requires public companies and the larger private companies (ie, companies that do not qualify for simplified reporting) and guarantee companies to prepare a more comprehensive directors' report that includes an analytical and forward-looking 'business review', while allowing private companies to opt out by special resolution. The business review will provide useful information for shareholders. In particular, the requirement to include information relating to environmental and employee matters that have a significant effect on the company is in line with international trends to promote corporate social responsibility.

Generally, the contracts are advised to contain corporate social responsibility representations and warranties where the seller represents and warrants to the buyer that it has implemented and conducts its business in accordance with corporate social responsibility values and policies. In addition, the seller represents and warrants that it complies with, and has required its subcontractors and suppliers to comply with, corporate social responsibility laws, rules and regulations.

Besides reporting their sustainability efforts if and as required by the law, luxury and fashion companies should work on creating corporate social responsibility awareness, integrating sustainability into business models and increasing transparency in respect of environmental, employee and other corporate social responsibility related matters.

7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

The occupational health and safety laws in Hong Kong are comprised of the Occupational Safety and Health Ordinance (OSHO) (Cap 509) and the Occupational Safety and Health Regulation (OSHR) (Cap 509A).

The OSHO requires the employers, including fashion companies, to contribute to safety and health in the workplaces by:

- providing and maintaining plant and work systems that do not endanger safety or health;
- making arrangements for ensuring safety and health in connection with the use, handling, storage or transport of plant or substances;
- providing all necessary information, instruction, training and supervision for ensuring safety and health;
- providing and maintaining safe access to and egress from the workplaces; and
- providing and maintaining a safe and healthy work environment.

The OSHR sets down some basic requirements for accident prevention, fire precaution, workplace environment control, hygiene at workplaces, first aid, as well as what employers and employees are expected to do in manual handling operations.

ONLINE RETAIL

Launch

8 | What legal framework governs the launch of an online fashion marketplace or store?

There is no specific e-commerce law in Hong Kong. Rather, online fashion marketplaces and stores are regulated by a network of laws in relation to the contract details, description of goods and services to be

provided, payment methods, delivery arrangement, goods safety, digital signature, consumer data privacy, etc, which comprises the following:

- the Sale of Goods Ordinance (SOGO) (Cap 26);
- the Supply of Services (Implied) Ordinance (Cap 457);
- the Consumer Goods Safety Ordinance (CGSO) (Cap 456);
- the Unconscionable Contracts Ordinance (UCO) (Cap 458);
- the Trade Descriptions Ordinance (TDO) (Cap 362);
- the Electronic Transaction Ordinance (Cap 553);
- the Payment Systems and Stored Value Facilities Ordinance (Cap 584); and
- the Personal Data (Privacy) Ordinance (PDPO) (Cap 486).

Sourcing and distribution

9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

The on-demand nature of e-commerce imposes a high requirement on the logistics and supply chain infrastructure. Instead of the traditional retail logistics, small shipments are delivered to customers of online stores located in all different places who require fast delivery and convenient return.

Besides, e-commerce contracts require contractual terms on online payment arrangements and protection of consumer data.

'Dropshipping' is a new form of e-commerce where the online store owners buy products from suppliers in advance. They advertise the suppliers' products on their websites, receive direct payments from end customers and redirect the orders to the suppliers who then ship the orders directly to the end customers. 'Dropshipping' is legal in Hong Kong as long as branded, copyrighted items or dangerous goods are not involved.

Terms and conditions

10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

It is important to include terms and conditions on an e-commerce website that are sufficient to provide the e-commerce provider as well as the customers with the necessary legal protection against any customer service issues or disputes that may arise in relation to the goods traded on the website. The terms and conditions form a contract between the e-commerce provider and the customers that binds both parties. The following are some important considerations that should be taken into account when drafting online terms and conditions.

Information accuracy

As information changes from time to time, it is important to include a statement that the e-commerce provider will ensure and will make reasonable effort to ensure that information on the website is complete, accurate and current and to include a disclaimer that information (eg, prices, product descriptions, stock quantities) on the website may occasionally be inaccurate, incomplete or outdated, so as to avoid customer complaints on inaccuracy of information or any liability that arise therefrom.

Level of protection to e-commerce customers

The terms and conditions must offer a level of protection to e-commerce consumers and must not contain terms that are unfair, unreasonable or onerous to the e-commerce customers, as under the UCO, a consumer has the right to avoid or alter the contract if it is found to be unconscionable.

Intellectual property

Intellectual property rights are easily prone to infringement by unauthorised parties for online businesses. The e-commerce provider must state clearly its ownership over its intellectual property rights (eg, its logo, trademarks, brand name) and to limit the use of site content and features by the customers (eg, for 'personal and informational' purposes only) to ensure that its intellectual property rights are not misused in any way.

Disclaimer of liability

Product losses or damage that are beyond the e-commerce provider's control can occur (eg, the products may be broken or damaged or lost during delivery). The terms and conditions should specify the damages that the e-commerce provider is liable to the customers, and the events that the e-commerce provider will and will not be responsible for in case of any loss, liability, damage, personal injury or expense of any kind that may be suffered by the customer.

Tax

11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

No. According to the Departmental Interpretation and Practice Notes No. 39: Treatment of Electronic Commerce issued by the Inland Revenue Department in July 2001, e-commerce is treated on the same basis as conventional forms of business and no particular business form should have either an advantage or a disadvantage for tax purposes.

INTELLECTUAL PROPERTY

Design protection

12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Fashion designs may be protected by a wide range of IP rights under the Hong Kong law including trademarks, registered designs, copyrights (for original artistic work) and patents. They are governed by the Trade Marks Ordinance (TMO) (Cap 559), the Registered Designs Ordinance (RDO) (Cap 522), the Copyright Ordinance (CO) (Cap 528) and the Patent Ordinance (Cap 514), respectively.

Section 15 of the CO provides where a work is made on the commission of a person and there is an agreement between the author and the commissioner of the work that expressly provides for the entitlement to the copyright, copyright in the commissioned work belongs to the person who is entitled to the copyright under the agreement. However, the commissioner will have an exclusive licence to use the work for purposes reasonably contemplated at the time of commission.

13 | What difficulties arise in obtaining IP protection for fashion goods?

In Hong Kong, not all ideas, inventions or creations are protected. IP protection for the fashion industry, particularly clothing and fashion accessories, is of paramount importance. The fashion goods' appeal to consumer, albeit determined by a range of factors, is largely related to the appearance or distinct feature of the good itself. The appearance, known as 'design' under Hong Kong law, incorporates the element of shape, configuration, pattern or ornament applied to an article by any industrial process. With effect from 27 June 1997, Hong Kong has its own independent designs legislation (ie, the RDO). One difficulty arising from registration is that the Hong Kong designs registration system is separated from other design systems in the world, including that of China. That means if a fashion industry player has a particular design

registered in the design registry in China, it must separately register the design in Hong Kong to enjoy the relevant protection conferred by the RDO.

Another difficulty brought about by the evolution of internet, digitalisation and an increasingly global market for digital content is the prevalence of copying in the fashion industry or mimicking of styles with immaterial amendments in fashion goods. In practice, given the fast-changing nature in the fashion industry that implicates industrial behaviour, we rarely see fashion players registering their clothing designs and relying on the RDO to go after copyists. Instead, most of them on rely on trademark law for IP protections.

Brand protection

14 | How are luxury and fashion brands legally protected in your jurisdiction?

Word and device marks may be protected through filing a Hong Kong trademark application and registered trademarks are protected under the TMO. An unregistered trademark will not be protected under the TMO even if it has been registered in other jurisdictions, including mainland China. An unregistered trademark is only protected under common law against the action of passing off.

Owners of trademarks can protect their rights against bad-faith registration of domain names by claiming trademark infringement or passing off. Each registrant of country code top level domains of '.hk' (HK Domain Name) is bound by the Domain Name Dispute Resolution Policy, which imposes mandatory arbitration proceedings in the event of dispute. A dispute over a HK Domain Name can generally be resolved by arbitration in around two months from the lodging of the complaint. Arbitration in this instance provides a quick and cost-effective dispute resolution mechanism compared to court proceedings.

Licensing

15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Trade marks and registered designs are the most relevant IP rights to the fashion industry. The legal requirements on licensing of trademarks and registered designs are contained in the TMO and the RDO.

A licence of a trademark or a registered design needs to be in writing and signed by or on behalf of the grantor. It is not legally required but highly recommended to register any such licence with the Trade Marks Registry or the Designs Registry (as applicable), as an unregistered licence is not effective against anyone that subsequently acquires a conflicting interest in the trademark or design (as applicable) without knowledge of the unregistered previous licence. Additionally, an exclusive licensee is not entitled to damages or an account of profits for an infringement proceeding occurring after the grant and before the registration of the licence (unless the application for registration is made within six months of the date of the licence).

Enforcement

16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

Hong Kong has developed a comprehensive legal framework for the enforcement of copyright, trademarks and registered designs and a wide range of enforcement measures are available, which include civil action, criminal action and customs enforcement. The options that are commonly utilised are: (i) issuing cease and desist letters; (ii) bringing civil proceedings; (iii) applying for injunctions; and (iv) recording IP rights with Hong Kong Customs who are responsible for seizing

counterfeit goods and arresting suspects involved in the infringing activities under the TDO.

Hong Kong Customs is responsible for monitoring the imports and exports of goods and has the power to detain the suspected infringing goods. If the detained products are verified to be counterfeit by the registered IP right owners, Hong Kong Customs can seize the goods and prosecute the relevant importer or exporter. If IP right owners suspect that infringing goods will be imported to Hong Kong (and have reasonable grounds to believe so), they can apply to the Hong Kong court for a civil detention order. With such an order being granted, Hong Kong Customs will conduct the search and seizure operations accordingly.

DATA PRIVACY AND SECURITY

Legislation

17 | What data privacy and security laws are most relevant to fashion and luxury companies?

The PDPO is the principal legislation on data privacy in Hong Kong and is generally applicable to fashion and luxury companies. There are no separate regulations specific to fashion and luxury companies.

The Office of the Privacy Commissioner for Personal Data (the Privacy Commissioner) is an independent statutory body overseeing the enforcement of the PDPO in Hong Kong. The Privacy Commissioner has issued non-binding codes of practice, guidance notes and information leaflets to assist organisations and individuals to manage and safeguard personal data. Most relevant to the fashion and luxury industry are:

- Guidance for Data Users on the Collection and Use of Personal Data through the Internet;
- New Guidance on Direct Marketing;
- Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement; and
- Online Behavioural Tracking.

The PDPO is organised around six data protection principles, which lay down the legal requirements to be observed by data users in handling different aspects of a data processing cycle from collection, accuracy, retention, use, security, policy transparency to the access and correction of personal data.

Compliance challenges

18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

As a consumer-facing industry, luxury fashion retailers should pay particular attention to ensure compliance with direct marketing regulations under the PDPO. Investigation and prosecution relating to direct marketing practices have always been the focus of enforcement actions by the Privacy Commissioner. Retail companies should make sure they obtain the customer's consent before using his or her personal data (eg, contact details) for direct marketing purposes. The use of personal data in direct marketing without the customer's consent is a criminal offence punishable by a fine of HK\$500,000 and imprisonment. Additionally, the customer has the right to request the companies to stop using his or her personal data for direct marketing to which he or she had previously consented without incurring any charge.

Innovative technologies

19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Companies should carefully consider whether any data collected with such innovative technologies constitute personal data before jumping into a conclusion too easily. With the emergence of Big Data, more types of data previously not considered 'personal' can fall under the scope of 'personal data' if, combined with other data, it can be processed to directly or indirectly identify an individual.

Technologies such as facial recognition collect biometric data, which could be sensitive data. Under the PDPO, the collection of personal data must be 'necessary and not excessive'. Biometric data is typically collected for access controls for security purposes and such use is permitted with appropriate safeguards. Using biometric data, such as facial images, for retail purposes may not meet the requirement that personal data collected must be 'necessary and not excessive'.

Often, the retailers would engage third parties to supply such innovative technologies. This type of arrangement would typically create a data-user-data-processor relationship between the retailer and the third party. Under the PDPO, a data processor is not directly liable, and the data user may be held liable as the principal for any wrongful act of its authorised data processor. Therefore, it is advisable that a retailer includes in its contract with such third-party providers data protection clauses to ensure compliance and provide itself with recourse against the data processor in the event of breaches. Helpful guidance was given in the 'Outsourcing the Processing of Personal Data to Data Processors' information leaflet issued by the Privacy Commissioner, which lists non-exhaustively the types of contractual obligations that should be included.

Content personalisation and targeted advertising

20 | What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

ADTech tracking the online behaviour of customers is increasingly being adopted in marketing strategies. Behavioural information collected may constitute personal data even if it does not contain unique identifiers, as long as such information taken in its totality can be used to directly or indirectly identify an individual. With the advancement of technology – in particular, Big Data – it is anticipated that more information previously not regarded as personal will now be in scope and if companies do not follow up with adequate policies or protection, they could inadvertently be in breach of the law. Companies should consult to the Online Behavioural Tracking information leaflet mentioned above before deploying such technology.

ADVERTISING AND MARKETING

Law and regulation

21 | What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

With freedom of expression being a constitutional right and core value in Hong Kong, there is generally no law or regulation restraining or restricting advertising and marketing in Hong Kong. Having said that, advertising and marketing communications may be governed by the TDO, which is a key legislation prohibiting false trade descriptions,

false, misleading or incomplete information, false marks and misstatements in respect of goods or services provided in the course of trade. While there are pieces of legislation, regulations or codes of practice in relation to advertising standards specific to certain sectors (eg, medicine, tobacco products, gambling, and radio and television programme services) there are no such pieces of legislation, regulations or codes specific to the luxury and fashion sector.

Online marketing and social media

22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

There is currently no specific law or regulation governing online conduct of marketing or business activities in Hong Kong. However, such activities may be regulated by the TDO. The TDO specifies various unfair trade practices that traders may deploy against consumers, commission of which will constitute an offence under the TDO. Examples of unfair trade practices that may be relevant to online marketing are misleading omissions of material information that cause or are likely to cause the average consumer to make a transactional decision that a consumer would not have made otherwise, bait advertising, bait and switch, wrongly accepting payment and using aggressive sales techniques.

Hong Kong Customs is the principal government agency responsible for enforcing the TDO. If the online trader has committed an offence under the TDO, the following enforcement actions may be taken by the Hong Kong Customs and Excise Department:

- issuing warning or advisory letters to the online trader concerned;
- with the consent of the Secretary for Justice of Hong Kong, seeking and accepting an undertaking from the online trader pursuant to which he, she or it undertakes not to continue, repeat or engage in conduct or commercial practice of the kind or of a substantially similar kind of concern;
- applying to the court for an injunction to order the online trader not to continue, repeat or engage in the contravening conduct; or
- instituting criminal proceedings against the online trader (usually where the contravention is serious).

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

23 | What product safety rules and standards apply to luxury and fashion goods?

Hong Kong does not have any rules or standards for product safety specific to luxury and fashion goods. However, because luxury and fashion goods are often consumer goods (those ordinarily supplied for private use or consumption), their safety requirements will be regulated under the CGSO. Manufacturers, importers and suppliers of consumer goods are required under the CGSO to ensure that the goods they supply for local consumption are reasonably safe with regard to the following circumstances:

- the manner in which, and the purpose for which, the goods are presented, promoted or marketed;
- the use of any mark, instructions or warnings on the goods given for the keeping, use or consumption of the goods;
- compliance with reasonable safety standards published by a standards institute; and
- the existence of any reasonable means to make the goods safer.

Product liability

24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

In Hong Kong, there is no specific statutory regime governing product liability for luxury and fashion goods. However, certain laws applicable to general consumer goods may apply.

If the luxury and fashion good is defective or does not meet the general safety requirement under the CGSO or comply with the applicable approved standard for those goods, then the person may be liable on conviction to a fine or imprisonment under the CGSO.

The SOGO also provides that there is an implied condition that the goods for sale: (i) must be of merchantable (satisfactory) quality; (ii) must be reasonably fit for their purposes, including any particular purpose made known by the buyer to the seller; (iii) must correspond with the description; and (iv) if a bulk purchase of the goods is made and a sample is shown before delivering the whole lot must correspond with the sample. Failure of the seller to meet the above implied conditions constitutes a breach of contract by which consumers are entitled to reject the goods and demand a full refund.

A product liability claim may also be found under common law or existing laws of contract and tort.

There has not been any notable product liability litigation or enforcement action in relation to luxury and fashion goods in recent years.

M&A AND COMPETITION ISSUES

M&A and joint ventures

25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

The luxury and fashion industry is an ever-growing sector and has a relatively resilient market. To build up or maintain competitiveness in the increasingly consolidated market, strengthening the products and building or expanding the brand, and equipping the business with the resources necessary to reach an ever-expanding consumer base should be the major business objectives of luxury and fashion companies.

M&A in the luxury and fashion industry often involves complex acquisition strategies to achieve the company's business objectives and requirements. Transactions therefore need to be well structured and carefully executed. Examples of acquisition strategies include: (i) horizontal acquisition, a typical type of M&A in the luxury and fashion industry, where a luxury and fashion company acquires a similar company to quickly and effectively strengthen its brand and increase its market shares; (ii) acquisition of distribution channels or suppliers to maintain brand integrity; and (iii) entering into licence and distribution agreements, joint ventures or local partnerships, usually pursued by young brands to establish or strengthen their presence on a global scale.

Due diligence forms an important part of any M&A transaction, and when acquiring a luxury and fashion company, identifying and verifying the intellectual property rights (eg, copyright, trademarks and registered designs) of the target company is of particular significance as they are valuable assets of the company that its brand name and reputation are built on, and it is important to make sure that they are valid or duly registered and are not subject to any encumbrance.

It is also vital to identify the legal and beneficial titles to the shares and real estate of the company as they are two distinct interests. A person registered as holding the legal title to the property may merely be a nominee with another party having the right to receive the economic benefits of the property. In transferring title to assets or

properties subject to Hong Kong law, companies should observe the applicable laws or regulations on notifications to be given, consents from third parties to be obtained and registrations to be made.

Where a joint venture is to be established, from a legal perspective, the joint venture vehicle should best be organised in a jurisdiction in which there is an established legal regime on company law where specific performance is available as a remedy. This is particularly important for enforcing provisions in a joint venture agreement on brand protection and equity transfers.

The following are issues that a brand owner should take into consideration in setting up or managing a joint venture:

- the brand owner should consider contributing only a licence over the brand to the joint venture vehicle, and should have very tight control over brand positioning and quality; and
- when exiting the market, the brand owner should consider the right to terminate any licence or taking reassignment of any brands whose ownership has been contributed to the joint venture vehicle. The brand owner should also consider controlling the distribution channel and pricing of any remaining inventory and imposing non-compete restrictions on the other joint venture party for a period of time after termination of the joint venture.

Competition

26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

The key legislation in Hong Kong on competition law is the HKCO and its subsidiary legislations. The HKCO prohibits three major areas of anti-competitive conduct:

- the First Conduct Rule prohibits agreements or concerted practices between undertakings and decisions of an association of undertakings that have the object or effect of preventing, restricting or distorting competition in Hong Kong;
- the Second Conduct Rule prohibits an undertaking that has a substantial degree of market power in a market from abusing its power through engaging in conduct that has the object or effect of preventing, restricting or distorting competition in Hong Kong; and
- the Merger Rule prohibits a merger involving a carrier licensee under the Telecommunication Ordinance (Cap 106) that creates the effect of substantially reducing competition in Hong Kong.

Competition issues under both the first and second conduct rules are likely to arise on sale or distribution of luxury and fashion goods in Hong Kong, in particular:

- vertical price restrictions, such as resale price maintenance or recommended/maximum price;
- exclusive distribution and exclusive customer allocation;
- anticompetitive tying and bundling;
- exclusive dealing;
- predatory pricing; and
- limiting or controlling production, markets, technical development.

There is currently no guidance under the HKCO or its subsidiary legislations on online sales restrictions in Hong Kong.

EMPLOYMENT AND LABOUR

Managing employment relationships

27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

The Employment Ordinance (EO, Cap 57) is the main piece of legislation governing the employment relationship in Hong Kong. To qualify for substantial protection under the EO, it is necessary to prove that the employee is in a 'continuous contract of employment'. The criteria for a continuous contract of employment can be found in section 3 and Schedule 1 of the EO, which requires that the worker must have worked for the same employer during each of the previous four weeks for at least 18 hours in each of those four weeks. As a result, most part time, temporary and casual workers are excluded from the main protections and entitlements in the EO. However, casual workers and part-time workers who have worked a sufficient number of hours and have satisfied the continuous contract requirement are entitled to all or some of the protections.

Minimum Wage Ordinance (Cap 608) applies to all employees except for certain specified categories that include persons to whom the EO does not apply, students undertaking internships necessitated by their curricula, and work experience students under the age of 26.

The two common categories of workers are employees and independent contractors and their usual contractual arrangements are contract of employment (either written, verbal or implied by law) and contract for services (eg, independent contractor agreement, professional services agreement, consultancy agreement, etc).

Trade unions

28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

In Hong Kong, the level of employee participation in trade unions is relatively low, compared to many other key jurisdictions. But the Basic Law and the legislation governing trade unions, that is, the Trade Unions Ordinance (Cap 332), have offered employees fundamental freedom and protections in various aspects. Further, employees gain extra protection in a strike situation in terms of termination payments.

There is no statutory recognition of collective bargaining agreements in Hong Kong and employees will be able to rely on the terms only if the provisions have incorporated into the employees' contract of employment.

For trade disputes in the private sector in Hong Kong, the Labour Relations Ordinance (Cap 55) sets out the avenues for resolving such disputes through conciliation, mediation, arbitration and hearing by a board of inquiry.

Immigration

29 | Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Fashion companies have the statutory duty to ensure all the employees are lawfully employable and it is an offence to employ a person who is not a holder of an identity card or other valid travel document (with no condition of stay prohibiting him or her from taking employment in Hong Kong imposed on him or her) under sections 17G and 17I of the Immigration Ordinance (Cap 115). An employer who employs an employee who does not possess the necessary work authorisation is

potentially guilty of an offence and is liable to a fine of up to HK\$350,000 and to imprisonment for three years. This requirement applies whether the employee is undertaking work on behalf of a Hong Kong entity or an overseas entity registered in Hong Kong.

The Immigration Department allows certain categories of work activities termed 'business-related activities' to be conducted by a person who does not possess an employment visa and enters Hong Kong holding a visitor's visa, which include the following:

- concluding contracts or submitting tenders;
- examining or supervising the installation or packaging of goods or equipment;
- participating in exhibitions or trade fairs (except selling goods or supplying services direct to the general public, or constructing exhibition booths);
- settling compensation or other civil proceedings;
- participating in product orientation; and
- attending short-term seminars or other business meetings.

UPDATE AND TRENDS

Trends and developments

- 30 | What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal and or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

The future prospects of Hong Kong's luxury retail market depends heavily on how the protests evolve. The number of mainland China visitors has fallen sharply since the protests began and Hong Kong's retail market has taken a big hit. Several leading brands, such as Prada, have permanently shut down some stores to limit their exposure, while many other brands have adopted a wait-and-see approach, adjusting down inventories, temporarily shutting down stores and giving unpaid leave to employees. Though it is yet to be determined if the ongoing protests will have a permanent impact on Hong Kong's status as a top luxury shopping destination, it is safe to say the situation will remain unfavourable in the short term.

Several brands have altered their strategy towards mainland China customers, placing more focus on Japan and South Korea, which are increasingly popular shopping destinations for mainland China customers. In case the conflict does have a permanent impact on luxury sales in Hong Kong, brands will have to shift their focus more towards local resident customers, who are more price-sensitive compared to their mainland China counterparts. Refocusing on local residents may also promote e-commerce in luxury retail sales, which has seen sluggish growth in Hong Kong as compared to many other regions. This is because of the fact that a large number of shoppers are travellers, and that the presence of multiple stores within a small area means there is hardly any need for e-commerce. However, if brands plan to reduce their exposure in Hong Kong, they may look at shutting down physical stores and promoting e-commerce sales.

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