

FINTECH

Hong Kong



Fintech

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Quick reference guide enabling side-by-side comparison of local insights into fintech innovation and government / regulatory support; regulatory bodies and regulated activities; cross-border regulation; regulation of sales and marketing and of changes of control; financial crime; peer-to-peer and marketplace lending; artificial intelligence, distributed ledger technology and crypto-assets; data protection and cybersecurity; outsourcing and cloud computing; intellectual property, competition, tax and corporate immigration considerations; and recent trends.

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FINTECH LANDSCAPE AND INITIATIVES

General innovation climate

What is the general state of fintech innovation in your jurisdiction?

Hong Kong is home to more than 600 fintech companies and start-ups, covering services in the areas of payment, AI, wealthtech, blockchain and insurtech. As is fitting for an international financial centre, more than one-third of fintech founders are from other countries. Nearly half of the established fintech companies have been in operation for more than three years, and the market has begun to mature. Consumer fintech adoption is high and consumers have a significant desire for financial products and services, although business-to-business services remain the biggest driver of fintech development in Hong Kong. The government supports the sector and has strengthened cooperation with regulators in other jurisdictions to encourage cross-border fintech development.

The Hong Kong Monetary Authority (HKMA) has granted eight 'virtual bank' licences to new entities to launch online only banking services. A number of licence-holders have launched services and are developing and testing new products.

Hong Kong's regulators continue to examine the fintech sector and to consult on regulatory changes and sector initiatives. The Securities and Futures Commission has been consulting on regulation for virtual assets (including cryptocurrencies) and the HKMA has been exploring how to encourage data sharing through a commercial data interchange and how central bank digital currencies might be used to address pain points in cross-border payments.

Law stated - 31 May 2021

Government and regulatory support

Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

Fintech is identified by the government as a priority investment area.

In 2019, the Hong Kong Monetary Authority (HKMA) granted eight virtual bank licences. These licences were granted as part of the government's Smart Banking Initiative and recipients included technology companies as well as more traditional banks.

The Securities and Futures Commission (SFC) operates a Fintech Contact Point and the HKMA established a Fintech Facilitation Office which, in each case, are intended to facilitate the fintech community's understanding of the current regulatory regime and for the regulators to work with market participants to support the sustainable development of the fintech industry. Linked with the Fintech Supervisory Sandbox established by the HKMA, in 2017 the SFC launched a Regulatory Sandbox that permits new and existing licensed entities to carry out regulated activities within a confined regulatory environment prior to launching on a wider scale.

The HKMA is one of the founding contributors of, and the SFC has joined as a coordination group member of, the Global Financial Innovation Network. The SFC has also signed cooperation agreements with a number of overseas regulators, including the UK's Financial Conduct Authority and the Australian Securities and Investments Commission. Pursuant to these agreements, the SFC will cooperate to share information on emerging fintech trends, developments and related regulatory issues, as well as on organisations that promote innovation in financial services.

In September 2017, the Insurance Authority launched a fast-track scheme to expedite applications by insurance companies using solely digital distribution channels as a means to promote the development of insurtech in Hong Kong.

The government also supports tech start-ups through the HK\$2 billion Innovation and Technology Venture Fund.

Law stated - 31 May 2021

FINANCIAL REGULATION

Regulatory bodies

Which bodies regulate the provision of fintech products and services?

The main regulatory bodies are the Hong Kong Monetary Authority (HKMA), Securities and Futures Commission (SFC) and the Insurance Authority.

Law stated - 31 May 2021

Regulated activities

Which activities trigger a licensing requirement in your jurisdiction?

Pursuant to the Securities and Futures Ordinance , the following activities are regulated and trigger a licence requirement:

- Type 1: dealing in securities;
- Type 2: dealing in futures contracts;
- Type 3: leveraged foreign exchange trading;
- Type 4: advising on securities;
- Type 5: advising on futures contracts;
- Type 6: advising on corporate finance;
- Type 7: providing automated trading services;
- Type 8: securities margin financing;
- Type 9: asset management; and
- Type 10: providing credit rating services.

For the purposes of the above categories, 'securities' are very widely defined and include stocks, shares, loan stock, bonds, debentures, all rights and interests in such securities, interests in collective investment schemes and structured products. However, shares and debentures of a private Hong Kong company do not constitute securities. Hong Kong private companies are companies incorporated in Hong Kong that restrict members' rights to transfer shares, limit the maximum number of shareholders to 50 and prohibit the making of an invitation to the public to subscribe for shares or debentures.

The licensing regime applies irrespective of whether the specified activities take place in Hong Kong or, if a person is actively marketing these activities to the public in Hong Kong, from outside Hong Kong.

The activities that are most relevant to fintech businesses are likely to be dealing in securities and advising on securities. Dealing in securities includes making or offering to make an agreement with a person, or inducing or attempting to induce another person to enter into an agreement to acquire, dispose, subscribe or underwrite securities. Advising on securities includes giving advice on whether, and the terms on which, securities should be acquired or disposed of and issuing analyses or reports for the purpose of facilitating decisions on whether to acquire or dispose of securities. It is also possible that some fintech platforms could constitute automated trading services, the operation of which requires a licence.

In addition to the above licensing requirements, if a business is undertaking banking activities, such as receiving money on a current, deposit, savings or similar account or paying or collecting cheques, such a business is required to be licensed as a bank by the HKMA.

Certain other activities, such as moneylending, money exchange services, money remittance services and money broking services, also require licences from the HKMA or the Commissioner of Customs and Excise.

The operation of stored value facilities (such as prepay cards or prepay mobile apps) or designated retail payment systems is subject to a new licensing regime under the Payment Systems and Stored Value Facilities Ordinance . Operators of these facilities now require a licence from the HKMA.

Law stated - 31 May 2021

Consumer lending

Is consumer lending regulated in your jurisdiction?

Under Hong Kong law, the offering and provision of consumer lending is not distinguished from primary lending.

Lending (consumer lending and primary lending) is a regulated activity in the jurisdiction and is governed by the Money Lenders Ordinance . The Money Lenders Ordinance requires that all loans made available in Hong Kong are by licensed moneylenders or authorised institutions (eg, licensed banks, restricted-licence banks and deposit-taking companies under the Banking Ordinance).

There are a number of exemptions that, if applicable, mean no formal licence is required. The loan and lending entity would need to satisfy one of the specified categories of exempted lenders and exempted loans in Schedule 1 of the Money Lenders Ordinance. Examples of exempted loans are:

- a loan made bona fide for the purchase of immovable property on the security of a mortgage of that property and a loan made bona fide to refinance such a mortgage;
- a loan made by a company, firm or individual whose ordinary business does not primarily or mainly involve the lending of money in the ordinary course of that business;
- an intra-group loan; and
- a loan made to a company that has a paid-up share capital of not less than HK\$1 million or an equivalent amount in any other approved currency.

Law stated - 31 May 2021

Secondary market loan trading

Are there restrictions on trading loans in the secondary market in your jurisdiction?

Secondary market loan trading is not a regulated activity in itself but it constitutes primary lending regardless of whether the loan has been fully drawn and, therefore, the loan and lender are subject to the restrictions of the Money Lenders Ordinance.

However, secondary market loan intermediation is not a regulated activity, provided that it does not involve any lending or deposit-taking and provided that loans are not in the form of securities.

Law stated - 31 May 2021

Collective investment schemes

Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

Broadly, a scheme is a collective investment scheme under Hong Kong law if it has the following four elements:

- it is an arrangement in respect of property;
- participants do not have day-to-day control over the management of the property even if they have the right to be consulted or to give directions about the management of the property;
- the property is managed as a whole by or on behalf of the person operating the arrangements or the contributions of the participants, or both, and the profits or income from which payments are made to them are pooled; and
- the purpose of the arrangement is for participants to participate in or receive profits, income or other returns from the acquisition or management of the property.

A collective investment scheme can cover any property and that property does not need to be located in Hong Kong for the scheme to be a collective investment scheme. 'Property' in this context is not limited to real property.

It is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to acquire an interest or participate in a collective investment scheme unless it has been authorised by the SFC or an exemption applies. Promoting a collective investment scheme may also constitute a regulated activity for which a licence is required. It is possible that certain fintech activity could constitute a collective investment scheme where the business concerned is managing assets on behalf of participants who have invested through a fintech platform (eg, investing in real estate or debt securities). Careful analysis of the specific circumstances and the way in which the platform permits investors to participate will be required to determine whether it constitutes a collective investment scheme.

Law stated - 31 May 2021

Alternative investment funds

Are managers of alternative investment funds regulated?

Management of securities or futures contracts or real estate investment schemes constitutes a regulated activity as it falls under Type 9: asset management of the Securities and Futures Ordinance. Accordingly, managers of alternative investment funds that invest in real estate or securities (which are widely defined) or futures contracts require a licence to do so.

The SFC confirmed in November 2018 that companies engaged in the distribution to the Hong Kong public of funds that invest in virtual assets are required to be licensed for Type 1 activity whether or not such virtual assets amount to 'securities'. In addition, the SFC will now apply additional conditions on licensed corporations that manage or distribute funds that invest, solely or partially, (more than 10 per cent of the gross asset value) in, or that have a stated investment objective to invest in, virtual assets. These conditions include a restriction that such funds can only be invested in, or offered to, professional investors.

Law stated - 31 May 2021

Peer-to-peer and marketplace lending

Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

There are no specific regulations applicable to peer-to-peer (P2P) or marketplace lending in Hong Kong. The SFC has issued a notice reminding potential P2P businesses that activity such as P2P lending might constitute a regulated activity, but much will depend on the precise structure of the platform. For example, it is likely that a platform offering debentures or loan stocks would constitute a regulated activity of dealing in securities.

Additionally, it is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities, unless an exemption applies.

Law stated - 31 May 2021

Crowdfunding

Describe any specific regulation of crowdfunding in your jurisdiction.

There are no specific regulations concerning crowdfunding. However, certain crowdfunding activity is likely to constitute a regulated activity. For example, equity crowdfunding is likely to constitute dealing in securities and possibly advising on securities, both of which are regulated activities in Hong Kong. As such, the operator of these platforms would need to be licensed by the SFC.

Additionally, it is an offence in Hong Kong to issue any marketing material that contains an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities unless an exemption applies.

Law stated - 31 May 2021

Invoice trading

Describe any specific regulation of invoice trading in your jurisdiction.

To the extent that an invoice is purchased, without risk of being re-characterised as a loan for the purposes of the Money Lenders Ordinance, with true sale there is no specific regulation on the buying and selling of invoices. This is common in factoring and invoice discounting arrangements.

However, if invoices are opened to the public and crowdfunded then the operator of the trading platform needs to follow certain regulations. It is usually the case that if a platform investor is classed as a professional investor, then much of the regulation around crowdfunded invoicing might not apply, depending on the platform structure.

Law stated - 31 May 2021

Payment services

Are payment services regulated in your jurisdiction?

Payment services include a wide range of activities such as taking cash deposits, making cash withdrawals, executing payment transactions, issuing or acquiring of payment instruments, issuing and administering means of payment, making payments sent through the intermediary of a telecoms, IT system or network operator, or even providing stored value cards or devices.

Payment services are regulated activities in Hong Kong and are subject to the Banking Ordinance, the Anti-Money

Laundering and Counter-Terrorist Financing Ordinance and the Payment Systems and Stored Value Facilities Ordinance (as applicable).

Law stated - 31 May 2021

Open banking

Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

No. However, the HKMA published the Open Application Programming Interface (API) Framework for the Hong Kong Banking Sector in July 2018. This is intended to encourage financial institutions to make information available through open APIs within a staged time frame depending on the type of information but this is not a regulatory requirement.

In November 2020, the HKMA announced that it is exploring a new data strategy and considering building a new financial infrastructure called the Commercial Data Interchange (CDI). The CDI will enable a secure and efficient data flow between banks and sources of commercial data. The HMKA is conducting a proof-of-concept study in collaboration with banks.

Law stated - 31 May 2021

Robo-advice

Describe any specific regulation of robo-advisers or other companies that provide retail customers with automated access to investment products in your jurisdiction.

Robo-advisers will usually need to be licensed by the SFC as they provide investment advice and services for dealing in securities.

In addition, the SFC has issued Guidelines on Online Distribution and Advisory Platforms that took effect on 6 July 2019 (the Guidelines). The Guidelines set out requirements through the application of core principles concerning the proper design of the platform, clear disclosure of information, risk management, governance, capabilities and resources, review and monitoring of activities on the platform and record-keeping. Specific guidance is also given concerning robo-advisers in respect of client profiling, system design and development, supervision and testing of algorithms and technology and staff resource requirements.

Law stated - 31 May 2021

Insurance products

Do fintech companies that sell or market insurance products in your jurisdiction need to be regulated?

Yes, both insurance companies and insurance intermediaries (such as agents) need to be authorised or registered, or both, with the Insurance Authority in Hong Kong.

Law stated - 31 May 2021

Credit references

Are there any restrictions on providing credit references or credit information services in your jurisdiction?

The provision of credit ratings (opinions regarding the creditworthiness of entities other than an individual, securities and agreements to provide credit) is regulated, but the gathering, collating, dissemination or distribution of information concerning the indebtedness or credit history of any person is not regulated (except under data protection law).

Law stated - 31 May 2021

CROSS-BORDER REGULATION

Passporting

Can regulated activities be passported into your jurisdiction?

No.

Law stated - 31 May 2021

Requirement for a local presence

Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

It is unlikely that the SFC would grant a licence for regulated activities to an entity that did not have a local presence. Equally, the Hong Kong Monetary Authority is unlikely to provide a banking licence to an entity that does not have a presence in Hong Kong as it would be difficult to see how such an entity could comply with the obligations to which it would be subject as a bank.

Law stated - 31 May 2021

SALES AND MARKETING

Restrictions

What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

The issuance of any marketing materials that contain an offer to the Hong Kong public to enter into an agreement to acquire or dispose of securities must be authorised by the Securities and Futures Commission, unless an exemption applies.

Law stated - 31 May 2021

CHANGE OF CONTROL

Notification and consent

Describe any rules relating to notification or consent requirements if a regulated business changes control.

Different consent requirements apply to the acquisition of different types of regulated businesses. In general, where a person is to become a holder of a specified percentage of a regulated entity or will control a specified percentage of voting rights of that entity, prior consent must be obtained from the relevant regulatory authority. For banks or entities that hold a licence for regulated activity, before a person acquires a holding of more than 10 per cent of the issued shares, or prior to them controlling, alone or with other associates, more than 10 per cent of the voting rights in the bank or regulated entity, consent must be sought from the Hong Kong Monetary Authority or Securities and Futures Commission respectively. Additional rules apply to persons becoming majority holders of banks and to the acquisition of indirect shareholdings in regulated entities. Failure to obtain consent is a criminal offence. In all cases, advice should be sought as to the applicable requirements and the process for obtaining consent.

Law stated - 31 May 2021

FINANCIAL CRIME

Anti-bribery and anti-money laundering procedures

Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

If the relevant entity is licensed for regulated activities, is licensed as a bank, operates a money service or provides trust or company incorporation services, it needs to comply with the Hong Kong legislation in relation to anti-money laundering and counter-terrorist financing, including establishing policies and procedures to identify clients and combat money laundering and terrorist financing. Whether these requirements apply to companies that receive digital currencies or launching ICOs will depend on whether they are carrying out a regulated activity and are required to be licensed to do so.

The Hong Kong government is consulting on changes to the anti-money laundering legislation in Hong Kong to require exchanges trading virtual assets (including cryptocurrencies) to apply for a licence from the SFC and to carry out customer due diligence in respect of anyone trading on the exchange.

The Hong Kong legislation in relation to the prevention of bribery would also apply, and licensed companies should have in place policies and procedures to prevent bribery.

Law stated - 31 May 2021

Guidance

Is there regulatory or industry anti-financial crime guidance for fintech companies?

There is no specific guidance for fintech companies, but there is guidance for licensed corporations and banks that would apply to fintech businesses that are licensed accordingly.

Law stated - 31 May 2021

PEER-TO-PEER AND MARKETPLACE LENDING

Execution and enforceability of loan agreements

What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

A loan agreement does not need to be executed as a deed and, accordingly, in respect of a Hong Kong company entering into a loan agreement, only the signature of the persons acting upon the company's authority (eg, the persons authorised in the board resolutions to sign) is required (under section 121 of the Companies Ordinance).

A security agreement would typically be required to be executed as a deed. As such, in respect of the execution by a Hong Kong company, the deed should be executed either with the common seal affixed in accordance with the requirements in the articles of association of the company or, in accordance with the Companies Ordinance, without the common seal affixed but signed by, in the case of a Hong Kong company with two or more directors, any two directors or any director and the company secretary or, in the case of a Hong Kong company with sole director, its sole director.

The key risk in respect of a peer-to-peer (P2P) marketplace lending platform is that in respect of pure P2P lending involving companies or individuals lending via the lending platform, each such lending company and individual may be regarded as carrying on a business as a moneylender and, thus, is subject to licensing and regulatory restrictions, including the restrictions on the form of loan agreement, early payment, interest rate, moneylending advertisements and duty to provide information and so on under the Money Lenders Ordinance.

Law stated - 31 May 2021

Assignment of loans

What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

According to the Hong Kong Law Amendment and Reform (Consolidation) Ordinance, the legal assignment of a loan by the assignor (ie, the lender) to the assignee (ie, the purchaser) will be perfected if:

- the assignor absolutely assigns the receivable to the assignee;
- the assignment is in writing and signed by the assignor in favour of the assignee; and
- a written notice of assignment is delivered to and received by the party liable to pay the loan (the underlying debtor, in other words, the borrower).

Regarding the written notice of assignment above, although there is no time limit within which this notice of assignment has to be given, the notice should be given as soon as possible to complete the perfection of the assignment.

If the assignment is not perfected, the assignment concerned may still constitute an equitable assignment (in contrast to a legal assignment), which is still recognised by the Hong Kong courts, although there are some practical disadvantages that may affect enforcement.

The lender (as assignor) need not obtain the consent of the borrower unless the loan agreement between the lender and the borrower contains a prohibition on the lender assigning certain or all of its rights under the loan agreement to a third party.

Notification to the borrower of the assignment is not mandatory for the assignment to be effective. However, there are a number of practical and legal difficulties that arise from an assignment without notice to the debtor (that is, an equitable assignment rather than a legal assignment).

Law stated - 31 May 2021

Securitisation risk retention requirements

Are securitisation transactions subject to risk retention requirements?

In June 2016, the Hong Kong Monetary Authority (HKMA) published the Credit Risk Transfer Activities Module (the CRTA Module) for inclusion in the HKMA Supervisory Policy Manual. The CRTA Module defines an 'originator' as:

- a person who directly or indirectly originates the underlying exposures in a securitisation transaction; or
- in relation to a securitisation transaction for which underlying exposures are acquired from third-party entities, a person who serves as a sponsor of the transaction by establishing, managing and advising on the transaction or by providing any credit enhancement or liquidity facility in respect of the transaction.

While there are no detailed risk retention requirements imposed on originators, the CRTA Module provides that an originating authorised institution should ensure that investors have readily available access to all materially relevant data concerning the transaction, including, where relevant and appropriate, the amount of risk retention by the authorised institution in the transaction and the manner in which the risk is retained.

The CRTA Module also provides that an authorised institution acting as an originator of a securitisation transaction should be prepared to explain to the HKMA the possible impacts on its financial position, capital adequacy, liquidity and asset quality, with regard to the risks incurred by it in the structure of the transaction including through retention of the first-loss tranche or provision of liquidity facilities.

The CRTA Module states that unless otherwise agreed with the HKMA, an authorised institution should refrain from investing in, or incurring an exposure to, a securitisation if the originator has not disclosed its compliance with any risk retention requirements applicable to it (in any jurisdiction).

Law stated - 31 May 2021

Securitisation confidentiality and data protection requirements

Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

The Personal Data (Privacy) Ordinance governs the collection, use and dissemination of the personal data of living individuals.

Data about or provided by obligors may also be protected by more general Hong Kong legal and regulatory principles that require the protection of confidential information. Largely, these apply irrespective of the legal structure of the obligor, but their precise application depends on the circumstances.

Law stated - 31 May 2021

ARTIFICIAL INTELLIGENCE, DISTRIBUTED LEDGER TECHNOLOGY AND CRYPTO-ASSETS

Artificial intelligence

Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

The provision of investment advice is a regulated activity irrespective of the method of delivery of the advice. There are no specific regulations governing the use of artificial intelligence and the provision of robo-advice. However, the Securities and Futures Commission (SFC) has issued guidelines on online distribution and advisory platforms, which took effect from July 2019. The guidelines identify six core principles that must be complied with by operators of online advice platforms and provide additional requirements for robo-advisers.

The HKMA has also issued guidance on the use of artificial intelligence, which sets out 12 high-level principles that should be complied with by banks in a manner proportionate to the nature of the artificial intelligence application and the level of risk, as well as guiding principles on consumer protection in using big data and artificial intelligence.

Law stated - 31 May 2021

Distributed ledger technology

Are there rules or regulations governing the use of distributed ledger technology or blockchains?

There are no specific regulations or guidelines regarding the use of distributed ledger technologies.

Law stated - 31 May 2021

Crypto-assets

Are there rules or regulations governing the use of crypto-assets, including digital currencies, digital wallets and e-money?

In respect of common 'digital currencies' or 'digital wallets', such as bitcoin, the Hong Kong government considers that these are virtual assets and do not qualify as digital currencies with regard to their nature and circulation in Hong Kong. In this regard, Hong Kong does not currently have any specific regulatory measures in respect of the use of virtual assets, but the existing laws provide for protection against unlawful activities in general (eg, anti-money laundering, fraud and terrorist financing).

Financial institutions dealing with virtual assets are required to comply with regulations from time to time by the relevant financial regulators, the Hong Kong Monetary Authority and the SFC. Additional requirements apply to companies engaged in distribution funds that invest in virtual assets.

Law stated - 31 May 2021

Digital currency exchanges

Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

Basic digital currencies, such as bitcoin, are considered virtual assets, and, therefore, operating an exchange to trade these currencies is not a regulated activity in Hong Kong. However, if a digital currency falls within the definition of a 'security' in Hong Kong then trading these securities is a regulated activity and requires a licence. In addition, investment products linked to digital currencies, such as bitcoin futures or funds linked to digital currencies, are

considered securities, and offering or trading these products requires a licence.

In November 2019, the SFC issued a position paper regarding the regulation of asset trading platform operators that provide trading, clearing and settlement services for virtual assets where at least one of the virtual assets is a security. The SFC has confirmed that it can currently only regulate platform operators that provide services in relation to virtual assets that constitute securities and that these platform operators may now apply for a licence. The SFC has adopted a set of regulatory standards for virtual asset trading platforms that are comparable to those applicable to licensed security brokers and automated trading venues.

In May 2021, the Hong Kong government released its consultation conclusions in relation to changes to the anti-money laundering and counter-terrorist financing legislation in Hong Kong. Following these conclusions it is expected that the government will introduce changes in the law to require all virtual asset exchanges (whether or not they are trading securities) to meet certain criteria and to obtain a licence from the SFC in order to operate. As a result, virtual asset exchanges will be subject to anti-money laundering requirements and other regulatory requirements designed to ensure the protection of market integrity and investor interests. Significantly, virtual asset exchanges will only be able to offer services to professional investors who meet certain criteria.

Law stated - 31 May 2021

Initial coin offerings

Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

The regulation of tokens offered in ICOs depends on the nature of the tokens offered. Utility tokens that only provide membership or access to a service or payment tokens that are only used as a means of payment for goods or services (such as bitcoin) are not regulated. However, tokens that comprise securities under Hong Kong regulations are regulated. For example, tokens that represent an asset such as a debt or a claim on the issuer's assets (such as a share in future earnings) or that amount to a collective investment scheme are securities.

Where the tokens involved in an ICO fall under the definition of securities, dealing in or advising on these tokens, or managing or marketing a fund investing in them, may constitute a regulated activity. Persons engaging in a regulated activity targeting the Hong Kong public are required to be licensed by or registered with the SFC, irrespective of where they are located. In addition, investment products linked to any tokens (whether securities or not), such as futures or derivatives, are considered to be securities and offering, trading or advising on these products is a regulated activity.

Law stated - 31 May 2021

DATA PROTECTION AND CYBERSECURITY

Data protection

What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

There are no specific regulations governing the processing and transfer of data relating to fintech products and services in Hong Kong, but fintech companies are required to comply with the Personal Data (Privacy) Ordinance (PDPO) when collecting or using the personal data of individuals. Personal data is information that relates to a living person and can be used to identify that person, where the data is in a form in which access or processing is practicable. Organisations that collect and use personal data must comply with, among other things, six data protection principles, which include the following.

- DPP1: personal data can only be collected for a purpose directly related to a function and activity of the data user

in a lawful and fair manner, and the amount of data to be collected must not be excessive. Data subjects have to be informed of the purpose of the collection of data and how it will be used.

- DPP2: data users must take all practicable steps to ensure personal data remains accurate and is deleted after the purpose of collecting this data is fulfilled.
- DPP3: unless the data subject has given prior consent, personal data can only be used for the purpose for which it was originally collected or a directly related purpose.
- DPP4: data users must take all practicable steps to ensure that personal data is protected against unauthorised or accidental accessing, processing, loss or erasure.
- DPP5: data users should stipulate, publish and implement policies in relation to personal data that can generally be achieved by having a data privacy policy in place.
- DPP6: individuals have rights of access to and correction of their personal data. Data users should comply with data access or data correction requests within the requisite time limit, unless reasons for rejection prescribed in the PDPO are applicable.

The Hong Kong Privacy Commissioner issued an information leaflet in March 2019 explaining the privacy implications and risks of fintech applications. The publication also recommends good practices in relation to data privacy for fintech operators.

The Hong Kong Privacy Commissioner has also published an information leaflet – ‘Matching Procedure: Some Common Questions’ – that emphasises the importance of obtaining consent from all individual data subjects or the Privacy Commissioner if the process of aggregation of personal data for commercial gain constitutes a matching procedure under the PDPO, to ensure that the risk of potential harm to the relevant data subjects is minimised. It also issued the ‘Guidance on the Proper Handling of Customers’ Personal Data for the Banking Industry’.

Law stated - 31 May 2021

Cybersecurity

What cybersecurity regulations or standards apply to fintech businesses?

There are no cybersecurity regulations or standards specifically addressing fintech businesses in Hong Kong. Cybersecurity is covered under various laws and regulations, such as the Personal Data Privacy Ordinance and the Crimes Ordinance.

The Hong Kong Monetary Authority’s (HKMA) Supervisory Policy Manual sets out the key regulatory standards that the HKMA expects authorised institutions to follow in relation to technology security and has issued a circular on Cybersecurity Risk Management, requiring industry players to establish appropriate governance frameworks. Several frameworks were launched by HKMA to strengthen cyber resilience in the banking sector, including the Enhanced Competency Framework on Cybersecurity and the Cybersecurity Assessment Framework.

The Securities and Futures Commission has issued the Guidelines for Reducing and Mitigating Hacking Risks Associated with Internet Trading, and the Circular to All Licensed Corporations on Cybersecurity, setting out areas that licensed corporations should pay close attention to when reviewing and mitigating their cybersecurity risks, as well as certain controls that these corporations should consider implementing where applicable.

Law stated - 31 May 2021

OUTSOURCING AND CLOUD COMPUTING



Outsourcing

Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

The Securities and Futures Commission (SFC) has endorsed the Principles on Outsourcing of Financial Services for Market Intermediaries published by the International Organisation of Securities Commission (the IOSCO Principles) but there are no specific regulations or guidance issued by the SFC on outsourcing. There are specific requirements that regulated entities must comply with, such as record-keeping requirements, which are relevant to decisions to outsource parts of the business.

The Hong Kong Monetary Authority (HKMA), which regulates authorised institutions, such as banks, includes in its supervisory policy manual a chapter on outsourcing. The HKMA expects authorised institutions to be aware of their legal obligations to meet the minimum authorisation criteria under the Banking Ordinance in relation to outsourcing plans. In particular, authorised institutions need to have adequate accounting systems and systems of control and to conduct their business with integrity, competence and in a manner not detrimental to the interests of depositors.

Law stated - 31 May 2021

Cloud computing

Are there legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

The Hong Kong Privacy Commissioner, the HKMA and the SFC have published guidelines on outsourcing and data privacy in connection with cloud computing.

The Hong Kong Privacy Commissioner has published various guidelines, circulars and information leaflets providing guidance on measures and best recommended practices that are pertinent to cloud services. These include having contractual arrangements between providers and customers of cloud services, to address the Privacy Commissioner's key concerns relating to loss of control, and the use, retention or erasure and security, of personal data when it is stored in the cloud.

The HKMA's Supervisory Policy Manual sets out the key regulatory standards that the HKMA expects authorised institutions to follow, or else be prepared to justify non-compliance, for managing technology risks and cybersecurity, covering topics such as:

- IT governance and oversight, system development and change management;
- information processing;
- communication network management; and
- management of technology service providers.

The SFC has endorsed the IOSCO Principles in relation to 'licensed corporations' outsourcing their activities. The SFC also issued guidelines that require licensed corporations to establish policies and procedures to ensure the integrity, security, availability, reliability and thoroughness of all information relevant to the licensed corporation's business, which extends to situations where data is stored in the cloud. Other best recommended practices relevant to cloud computing include:

- reviewing policies and procedures to manage, identify and assess cybersecurity threats and IT security controls;

- considering the cybersecurity controls of third-party service providers; and
- ensuring continuity of critical activities and systems.

On 31 October 2019, the SFC issued a circular on the use of external electronic data storage by licensed corporations. The circular sets out various requirements in relation to licensed corporations' use of external data storage providers (EDSPs). These include requirements to obtain undertakings from EDSPs in favour of the SFC in certain circumstances and requirements regarding the management of risks and security with regard to the use of EDSPs. The SFC has also issued guidance in the form of FAQs as to how similar requirements are to apply to the use of electronic data storage provided by intragroup affiliates.

Law stated - 31 May 2021

INTELLECTUAL PROPERTY RIGHTS

IP protection for software

Which intellectual property rights are available to protect software, and how do you obtain those rights?

Computer programs (and preparatory design materials for computer programs) are protected by copyright as literary works under the Copyright Ordinance . Copyright arises automatically as soon as the computer program is recorded. Registration of copyright is not required and is not possible in Hong Kong.

If the software code has been kept confidential, it may also be protected as confidential information. No registration is required.

Programs for computers, and schemes, rules or methods of doing business 'as such', are expressly excluded from patentability under the Patents Ordinance .

Notwithstanding these exclusions, it is possible to obtain patents for computer programs and business methods if it can be shown that the underlying invention makes a 'technical contribution' over and above that provided by the program or business method itself, such as an improvement in the working of the computer. Accordingly, a well-drafted patent may be able to bring a computer-based software or business method invention within this requirement, but this may be difficult to do and will not always be possible. Registration formalities must be followed to obtain protection.

In particular, 'standard' patents are based on patents applied for and granted by one of three designated patent offices, namely, in China, the UK and the European Patent Office (where the UK is designated). They have a maximum period of protection of 20 years from the filing date of the designated application.

Law stated - 31 May 2021

IP developed by employees and contractors

Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

Copyright created by an employee in the course of his or her employment is automatically owned by the employer unless otherwise agreed.

An invention made by an employee belongs to the employer:

- if it was made in the course of the normal duties of the employee or in the course of duties falling outside his or her normal duties, but specifically assigned to him or her, and the circumstances in either case were such that an invention might reasonably be expected to result from the carrying out of his or her duties; or
- if the invention was made in the course of the duties of the employee and, at the time of making the invention, because of the nature of his or her duties and the particular responsibilities arising from the nature of his or her duties, he or she had a special obligation to further the interests of the employer's undertaking.

Copyright or inventions created by contractors or consultants in the course of their duties are owned by the contractor or consultant unless otherwise agreed in writing. However, the person who commissions a copyrighted work has an exclusive licence to exploit the commissioned work for all purposes that could reasonably have been contemplated by the author and the person who commissioned the work at the time the work was commissioned, and the power to restrain any exploitation of the commissioned work for any purpose against which he or she could reasonably take objection.

Law stated - 31 May 2021

Joint ownership

Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

If copyright is jointly owned (eg, copyright in respect of a computer program that has been co-written by two people) then all joint owners must consent to any act restricted by copyright (such as its use, licensing and assignment). As a result, the commercialisation of jointly owned copyright can be a challenge unless all owners consent to its use. It is advisable for the joint owners to enter into an agreement setting out how these rights should be exercised.

In respect of patents, each co-owner is entitled to an equal share in the patent and can do anything in respect of the invention for his or her own benefit without the consent or need to account to the other (in each case, subject to any other agreement reached between the co-owners).

Law stated - 31 May 2021

Trade secrets

How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

Confidential information can be protected against misuse, provided the information in question has the necessary quality of confidence, is subject to an express or implied duty of confidence, and that no registration is necessary (or possible).

Confidential information can be kept confidential during civil proceedings with the permission of the court.

Law stated - 31 May 2021

Branding

What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

Brands can be protected as registered trademarks in Hong Kong. A brand can also be protected under the common law tort of passing-off if it has acquired sufficient goodwill. Certain branding, such as logos and stylised marks, can also be protected by design rights and may also be protected by copyright as artistic works.

The HK Registry trademark database can be searched to identify potentially problematic trademarks that have been registered or applied for. It is highly advisable for fintech businesses to conduct trademark searches to check whether earlier registrations exist that are identical or similar to their proposed brand names. It may also be advisable to conduct searches of the internet for any unregistered trademark rights that may prevent use of the proposed mark.

Law stated - 31 May 2021

Remedies for infringement of IP

What remedies are available to individuals or companies whose intellectual property rights have been infringed?

Remedies include:

- preliminary and final injunctions;
- damages or an account of profits;
- delivery up or destruction of infringing products;
- disclosure orders; and
- costs.

Law stated - 31 May 2021

COMPETITION

Sector-specific issues

Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

There is a competition regime under the Competition Ordinance in Hong Kong that applies to all entities carrying out business in Hong Kong. There are no particular aspects of this regime that would affect fintech businesses disproportionately to other businesses.

Law stated - 31 May 2021

TAX

Incentives

Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no specific tax incentives applicable to fintech companies.

Law stated - 31 May 2021

Increased tax burden

Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

No.

Law stated - 31 May 2021

IMMIGRATION

Sector-specific schemes

What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

The Hong Kong government launched three schemes to recruit skilled staff in areas including the technology and financial sectors.

The Talent List of Hong Kong was promulgated to attract people around the world who specialise in the 11 professions most needed for Hong Kong's economic development, including 'Experienced professionals in Fintech', 'Experienced data scientists and experienced cyber security specialists' and 'Innovation and technology experts'. These candidates are potentially eligible for immigration via the Quality Migrant Admission Scheme, which does not require them to have secured an offer of local employment for settlement in Hong Kong.

The Innovation and Technology Commission introduced the Technology Talent Admission Scheme, a three-year scheme that provides a fast-track arrangement for admission of overseas and mainland research and development talent. Eligible technology companies and institutes, including those engaged in the areas of fintech, artificial intelligence and cybersecurity, may be granted quotas to sponsor eligible persons to apply for employment visas or entry permits.

Law stated - 31 May 2021

UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends to note?

There is a particular focus on opening up banking and payment infrastructure and services in Hong Kong and the roll-out of services by the holders of the newly granted virtual bank licences.

The HKMA is seeking to improve the flow of financial information through the establishment of the Commercial Data Interchange. It is also exploring the use of central bank digital currencies to ease cross-border trade settlement.

The government is likely to introduce legislation to regulate cryptocurrency exchanges and to require them to hold a licence to operate and to restrict their services to professional investors.

Law stated - 31 May 2021

Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

While there have not been any Hong Kong government support measures specifically targeted at the fintech sector, there are a number of market-wide and industry programmes under which fintech business may obtain support. These include low interest loans for small and medium-sized enterprises (SMEs) and an SME financing guarantee scheme, pre-approved loan principal payment holidays, employee wage support, subsidies for Securities and Futures Commission-licensed individuals and waivers of business registration and annual return fees.

Law stated - 31 May 2021

Jurisdictions

	Australia	Piper Alderman
	Belgium	Simmons & Simmons
	Brazil	Machado Meyer Advogados
	Canada	Stikeman Elliott LLP
	China	Simmons & Simmons
	Denmark	Plesner Advokatpartnerselskab
	Egypt	Soliman, Hashish & Partners
	France	Kramer Levin Naftalis & Frankel LLP
	Germany	Simmons & Simmons
	Gibraltar	Ince
	Hong Kong	Simmons & Simmons
	India	Kochhar & Co
	Indonesia	SSEK Legal Consultants
	Ireland	Matheson
	Japan	Anderson Mōri & Tomotsune
	Kenya	Bowmans
	Liechtenstein	NÄGELE Attorneys at Law
	Malta	Ganado Advocates
	Mexico	Nader Hayaux & Goebel
	Netherlands	Simmons & Simmons
	New Zealand	Anderson Lloyd
	Pakistan	Asma Hamid Associates
	Singapore	Simmons & Simmons
	South Africa	Bowmans
	Spain	Simmons & Simmons

	Switzerland	Niederer Kraft Frey
	Taiwan	Lee and Li Attorneys at Law
	Turkey	SRP Legal
	United Arab Emirates	Simmons & Simmons
	United Kingdom	Simmons & Simmons
	USA	Seward & Kissel LLP
	Vietnam	YKVN