Global Private M&A Guide - Limited External Content - Hong Kong

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Due diligence investigations remain an essential tool for assessing and reducing the risks inherent in a merger and acquisition transaction in Hong Kong. In the absence of complete knowledge of the operations, the scope of assets and extent of liabilities of the target, due diligence investigations give the prospective buyer an opportunity to assess the target's legal and financial state of affairs. They also facilitate the consideration of structuring issues. Accordingly, thorough due diligence is vital in most merger and acquisition transactions in Hong Kong.

**Pricing and payment**

There are no requirements to carry out a valuation or follow a particular valuation model for determining the purchase price for companies or assets in Hong Kong. However, particularly where the transaction is made between related parties, it is advisable to ensure that the transaction is conducted on arm's length terms to manage any potential transfer pricing and other legal issues, such as those related to a transfer at an undervalue. In practice, commonly used valuation methods include using a debt-free, cash-free basis (representing the enterprise value of the business) and using a locked box structure in secondary buyouts and competitive auction processes (particularly where the sale process is run by a financial sponsor). The parties may also agree on an adjustment to the purchase price based on any shortfall or excess of the target's actual working capital against a target working capital.

Hong Kong applies no controls on the movement of foreign exchange. Similarly, there are no restrictions on investment or repatriation of capital or remittance of profits or dividends to or from a Hong Kong company and its shareholders.

**Signing/closing**

*Is a deposit required?*

The payment of deposits is not common practice in Hong Kong, except in the real estate sector. However, the buyer may be required to provide proof of funding. For financial sponsors, equity commitment letters are common.

*Is simultaneous signing/closing common?*

It is common for signing and closing to occur simultaneously in Hong Kong, and a seller may typically require simultaneous signing and closing. However, a split signing and closing is also not uncommon, particularly where it is necessary to obtain certain regulatory or other consents or approvals before closing, or for the buyer to complete further due diligence after signing the agreement.

## Approvals/registrations

**Foreign investment restrictions**

Hong Kong has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed.

The foreign investment review regime is targeted at foreign direct investments in the following sector: the broadcasting and telecommunication sector, and specifically in relation to the influence and control of the Domestic Free TV Licensee and Sound Broadcasting Licensee. For further information and definitions of Domestic Free TV Licensee and Sound Broadcasting Licensee, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Merger control in Hong Kong is limited to mergers involving an undertaking with a telecommunications carrier license. Parties can seek informal advice, or, subject to certain criteria, apply for a decision on whether a merger should be excluded from the regime. There are no specific deadlines for these processes, but the competition authority must start investigating completed mergers within 30 days of becoming aware of them. The law also includes two "safe harbor" thresholds for assessing potential competition concerns. For further information, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

For certain sectors, such as banking, insurance, financial services and broadcasting, consent is required from the relevant regulatory body for: (i) a change of ownership; (ii) the acquisition of even a minority interest; or (iii) the disposal or amalgamation of the regulated business. With only a few exceptions, these merger approvals apply equally to foreign and local investors.

In the broadcasting industry, approval is required under the Broadcasting Ordinance if foreign ownership of a domestic free television program service licensee is to exceed certain thresholds (5%, 10% and 15%).

Foreign ownership of a radio broadcasting company must not exceed 49% as regulated under the Telecommunications Ordinance. Certain telecommunications licenses may only be issued to Hong Kong companies (although there are no restrictions on foreign ownership of such companies).

## Employment

Where a transaction takes the form of an acquisition of shares in a company with employees, the process is simpler (than in respect of a transfer of assets), as the underlying employment contract (and employee benefits generally) between the target and its employees will usually be unaffected by the change in control. The contracts of key senior personnel should be checked, in particular, for any change of control provisions. Due diligence should be undertaken to ensure that potential liability for past acts and omissions is known.

The position is a little more complex in a transfer of the assets comprising a business, as the contracts of the business's employees are not automatically transferred to the buyer. Existing employment contracts must be terminated and new contracts should be entered into with the buyer. Technically, the employees will be made redundant by the transfer and it is important from the seller's perspective to take steps, to the extent possible, to minimize the existing employer's potential liability to make payments to employees in this situation.

To avoid liability to pay statutory severance to employees on the transfer of a business, the offer of new employment must be given by the buyer at least seven days before the date of the employees' transfer. In addition, the new terms of employment must either be identical to those under the employees' existing employment or constitute an offer of suitable employment on terms no less favorable to the employees than those under which they were previously employed. The new employer must agree to recognize the employees' previous period of service. It is common practice for the termination and offer of new employment to be combined in a joint letter sent by both seller and buyer or to be made in separate letters from the seller and buyer but given to employees at the same time. Typically, a clause requesting the employee's consent to a shorter contractual notice for the transfer will also be contained in the transfer letter. The notice period cannot, however, be shorter than seven days.

If on a transfer of assets or business, the employees are provided with due notice and all the mandatory details they should receive (as above), but the employees decide not to accept the offer from the buyer, and their employment is terminated by the seller, the legal exposure of the seller will, in normal circumstances, be limited to just a long-service payment (if applicable) plus accrued wages and untaken annual leave. If the employees are entitled to a contractual bonus, a pro-rata portion may also be payable.

## Tax

Transfers of shares in Hong Kong companies are subject to stamp duty. Stamp duty is currently calculated at a rate of 0.2% of the value of the shares or the purchase price paid, whichever is greater (plus a fixed duty of HKD 5). The seller and buyer are currently each liable to pay stamp duty at 0.1% (hence the aggregate of 0.2%). However, the parties may contractually agree that the overall stamp duty shall be shared between them on a different basis.

The transfer of assets in Hong Kong may be subject to Hong Kong profits tax depending on the nature of the assets being transferred and the source of the disposal gains.

Gains on the disposal of a capital asset are exempt from profits tax. A limited exception can apply where the gains are deemed to be Hong Kong sourced income by virtue of the refined foreign sourced income tax exemption (also known as the "refined FSIE regime"), discussed further below. However, to the extent that the capital asset is a depreciable asset, any income arising from the claw-back of depreciation or capital allowances may be assessable.

Hong Kong sourced income arising from the disposal of inventories or assets held for trade, in the course of a business carried on in Hong Kong is assessable. Whether a profit is Hong Kong-sourced will be determined on the basis of the location of the operations generating profit.

Effective from 1 January 2023, foreign sourced gains derived from the disposal of equity interests  that are accrued and received in Hong Kong (or deemed to be received in Hong Kong), by a member of a MNE Group (as defined under the Inland Revenue Ordinance (Cap. 112)) carrying on a trade, profession or business in Hong Kong, can be deemed to be Hong Kong-sourced income so as to be taxable in Hong Kong, unless the economic substance requirement is met or specific exemption or exclusion applies. The capital asset exemption does not apply where the gain is deemed to be Hong Kong-sourced income under the refined FSIE regime.

From 1 January 2024, the refined FSIE regime will expand to include foreign sourced gains derived from the disposal of any type of asset (whether capital or trading in nature). The extension covers foreign-sourced gains derived from the disposal of intellectual properties. Such foreign-sourced gains will be taxable unless the intellectual property is a patent (or equivalent assets) or copyright subsisting in software and the nexus requirement is met.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

As in other jurisdictions, the acquisition of a business in Hong Kong may be structured either as a sale of shares or as a sale of assets (or a combination of the two). The buyer may purchase the shares in the company operating the business from its shareholders or purchase the assets of the business directly from that company, with the former more common than the latter.

Auction processes are quite common in Hong Kong. They often involve a two-stage bid process, using non-binding bid letters at the indicative offer stage and binding bid letters at the final offer stage.

Broadly defined, a merger involves the absorption of one company (that ceases to exist) into another that retains its own identity and acquires the assets and liabilities of the former. Hong Kong provides a simple, court-free amalgamation procedure for effecting the merger of Hong Kong companies as long as the companies are sister companies or parents-subsidiaries and the statutory requirements can be satisfied. Complex amalgamations may be effected through a court-sanctioned scheme of the arrangement, though this is rarely used in practice. The court-free amalgamation procedure was introduced in March 2014 and the authorities have since provided guidance on the treatment of key elements, such as tax and employees. Where the legal position is unclear (e.g., whether employees transfer automatically), a more conservative approach is recommended. The economic results of a merger can also be achieved through any of the following:

Transfer of one company's business assets to another company, followed by liquidation or disposal of the transferor company.

Establishment of a new company that acquires the assets of two or more entities, which, following the transfer of assets, are liquidated or disposed of.

Transfer of one company's (company A) shares to another company (company B), followed by liquidation of Company A and distribution of its assets in their present form to company B.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

A Hong Kong target company or seller is typically a private company limited by shares incorporated in Hong Kong under the Companies Ordinance (Chapter 622 of the Laws of Hong Kong), which is the most commonly used entity form in Hong Kong. Such a company can be formed quickly and requires little formality.

## What are the different types of limited liability companies?

A company formed under Hong Kong law may be limited, by shares or by guarantee, or unlimited. If a company is limited by shares, the liability of its members (i.e., "shareholders") is limited to the amount, if any, unpaid on their shares. A company limited by guarantee means that the parties involved are not shareholders but guarantee members. Instead of investing capital, the members guarantee to contribute a predetermined sum to the company to cover its liabilities in the event of a winding up of the company.

A company limited by shares can be either public or private. Certain restrictions are imposed on a private company. Its articles of association must restrict the right of members to transfer their shares, limit the number of members to 50 (exclusive of any member who is a current or past employee) and prohibit invitations to the public to subscribe for any shares or debentures. However, a private company may be converted into a public company at any time by removing these restrictions from its articles of association.

Limited liability companies in Hong Kong no longer have authorized capital, which limits the capital of the company, and shares no longer have a par value. The capital of a company may be denominated in any currency.

## Is there a restriction on shareholder numbers?

Private companies shall not have more than 50 members (exclusive of employee members). There is no similar limit for public companies.

## What are the key features of a share sale and purchase?

A share acquisition is generally more straightforward to implement from both the seller's and the buyer's point of view. A share acquisition involves the transfer of ownership of only the shares in the target company and, as a matter of Hong Kong law, is a relatively straightforward process. An instrument of transfer and bought and sold notes executed by the buyer and seller are required for transfer of shares in a Hong Kong company. Legal title is considered transferred after the share transfer documents are stamped (stamp duty is payable at the rate of 0.2% of the consideration) and the register of members has been updated to reflect the name of the new shareholder. It also provides continuity for the business for the buyer and a clean break for the seller.

## What are the key features of an asset sale and purchase?

An asset sale involves the identification and transfer of title to specific assets or categories of assets, which is generally a more complicated process than a share acquisition. The target's assets may include land and premises, inventory and work-in-progress, book debts, intellectual property rights, goodwill, insurance, leases, hire purchase and other contracts, and plant and machinery. It may be necessary to transfer each asset or category of assets from the target to the buyer by way of separate conveyances, assignments and transfers and, in some instances, there may also be requirements for consent from third parties not directly involved in the transaction. New permits or authorizations may also be needed to carry on the business. Timing for obtaining consents or running by the necessary procedures may affect the timing of the transaction. The transfer of assets also raises additional concerns in relation to the employees of the business.

One of the main advantages of asset acquisitions is that the buyer may pick and choose specific assets or liabilities to be purchased or assumed, leaving behind those assets and liabilities that it does not require. The buyer of the assets will generally not inherit the target's liabilities, provided that the notice procedures under the Transfer of Businesses (Protection of Creditors) Ordinance (Ordinance) are followed. Otherwise, under the Ordinance, the buyer of a business, or part of a business, is deemed liable for all the debts and obligations arising out of the carrying on of the business by the seller.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

Parties often enter into a letter of intent or term sheet during the initial negotiation process to set out the key terms of the proposed acquisition. They will then conduct further due diligence and negotiations, and the letter of intent or term sheet can then be used to draw up the definitive agreement. Parties can decide whether the letter of intent or term sheet is intended to be binding or nonbinding, but whether it legally compels the parties to conclude the deal on those terms — or even at all — will depend on the circumstances. To avoid disputes, the terms of the letter of intent or term sheet should be clear as to whether it is legally binding or, as is more commonly the case, only some parts are legally binding (e.g., the governing law, confidentiality and exclusivity provisions).

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** Exclusivity provisions usually form part of a term sheet or letter of intent.

**Break fee:** Break fees are not common (but it is common to ask for deposits).

**Confidentiality:** Confidentiality provisions usually form part of a term sheet or letter of intent. Alternatively, a confidentiality agreement governing the exchange of confidential information relating to the transaction is typically entered into.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Confidentiality agreements and exclusivity agreements are common separately negotiated agreements. Exclusivity agreements must have adequate consideration or otherwise be entered into as a deed.

## Is there a duty or obligation to negotiate in good faith?

Generally, there is no duty or obligation on the parties to act in good faith in negotiating a contract - they are entitled to act in their own commercial interests in conducting the pre-contractual negotiations. However, this does not mean that there is no recourse for a party which has suffered a loss when an agreement fails to be signed and completed. For instance, when the parties have entered into an exclusivity agreement whereby one party undertakes not to negotiate with any third party, provided that such agreement is sufficiently certain as to the time and scope, it may be enforceable and binding on that party. Any breach may give rise to contractual remedies (e.g., the loss suffered as a result of the party's action to negotiate with a third party in breach of the agreement). A duty to act in good faith may also be implied if it is necessary to give business efficacy to the contract in an exclusivity agreement depending on the relationship of the parties and how the obligations are worded. In addition, even in the absence of any contractual relationship between the parties, a party may sue the other party for negligent or fraudulent misrepresentation depending on the circumstances of the case and the relationship of the parties (e.g., whether there is any relationship of trust and confidence).

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Very common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Debt-free, cash-free is very common. Working capital is fairly common. Locked box is becoming more common, especially in competitive situations. Net asset value (NAV) is rarely seen.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely, collars are not common.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is usually prepared by the target company.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely; not necessarily.

## Is an earn-out common?

Frequency/market practice: Earn-outs are fairly common where the parties need a mechanism to bridge the valuation gap. They are more common in private equity transactions when sellers continue to manage the target company after closing. They are less common where the seller is completely exiting. Earn-outs are commonly capped.

## Is a deposit common?

Frequency/market practice: Rarely (People's Republic of China-based buyers are generally more willing to pay a deposit, particularly where there is a financing condition).

## Is an escrow common?

Frequency/market practice: Fairly common; escrows are used by private equity investors and strategic buyers for supporting warranty and indemnity claims, and for certain People's Republic of China tax obligations.

## Is a break fee common?

Frequency/market practice: Rarely. A break fee is more common in competitive bids, if regulatory approval is required or if a party is willing to pay.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Uncommon; this is typically only available where there is a long period before execution and completion, or a foreign seller.

## Is the MAE general or specific?

Frequency/market practice: Both are seen. It is more likely to be specific. It may be general if both parties are from the US.

## Is the MAE quantified?

Frequency/market practice: Rarely; it is more likely to be quantified than general.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Very common; but not for sellers that are private equity funds or other financial investors.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Waterfall provisions are rarely used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Very common (in conjunction with noncompete); but not from sellers that are private equity funds or other financial investors.

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Very common (in conjunction with noncompete); but not from sellers that are private equity funds or other financial investors.

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: It is very common, to impose restrictions on the seller in relation to the conduct of the target's business between signing and closing and, subject to applicable competition law, to give veto rights to the buyer on matters that may have a material effect on the target's business (subject to carve-outs).

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Very common, with reasonable limitations; we generally get this for private deals (subject to common competition law compliance issues such as the sharing of confidential information prior to closing).

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: This is subject to negotiation, on a case by case basis, and it depends on whether there is warranty insurance ("**W&I Insurance**").

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Materiality qualifiers are commonly seen but often not quantified (other than for specific warranties, taking into account the de minimis threshold).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: It is often limited to the actual knowledge and due enquiry of a specified list of senior management and people involved in the deal.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Rarely in an auction seller's draft; sellers may be willing to consider if there is W&I Insurance. Common for general sale and purchase.

## Is disclosure of the data room common?

Frequency/market practice: Very common.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common, depending on the parties' bargaining power; repetition at completion is sometimes limited to fundamental warranties if the seller has a strong bargaining power.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Less common than repeating warranties at completion.

## Is a bring-down certificate at closing common?

Frequency/market practice: Rarely. Bring-down certificates are not common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is common but often carve out for fundamental representations (e.g., title and capacity), which must be absolutely true. If it is a condition to closing, then it may be tied to MAE.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely. Double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: The buyer will ask for 100% but it is possible to negotiate down for non-fundamental (business) warranties. It ranges from 10%-30% for business warranties. It may be higher, depending on the bargaining power of the parties and if there is W&I Insurance. Common to have 100% for fundamental warranties.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Both are seen, subject to negotiation.

## What are the common exceptions to the cap?

Frequency/market practice: Fundamental warranties (e.g., title, capitalization, authority) are often not subject to the cap. Tax and specific areas of concern are often also excepted, sometimes with specific higher caps. Separate caps can be negotiated.

## Is a deductible or basket common?

Frequency/market practice: Tipping basket is more common, but both are seen.

## Is a de minimis common?

Frequency/market practice: Very common.

## How long does seller liability survive?

Frequency/market practice: A general survival of 18-24 months for business warranties is common, subject to negotiation. Longer periods may be required for fundamental warranties (including tax): 3-7 years or the statutory limitation (generally six years for Hong Kong).

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud. Tax is commonly longer than business warranties.

## Is warranty insurance common?

Frequency/market practice: Increasingly common, particularly when financial sponsors exits. It is generally becoming more common and can be adapted to cover specific identified risks e.g., tax.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common for insurance proceeds actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common for third-party recoveries actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Not usually express; required by law.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: This is subject to negotiation.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes

## What is the common governing law?

Frequency/market practice: Hong Kong law is the most common governing law, but the law of other common law jurisdictions, e.g., English law, are sometimes used as well.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration is more common. Hong Kong International Arbitration Centre is predominantly chosen but will typically carve out court or administrative action (e.g., injunction).

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: It is common to share the stamp duty payable in Hong Kong, which has been reduced from 0.26% to 0.2% (with effect from 17 November 2023) of the greater of the purchase price and value (usually determined as NAV).

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is more common to have a tax indemnity included in the purchase agreement. Warranty insurance coverage is increasingly being used in private equity deals for tax related liabilities.

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