Mergers & Acquisitions

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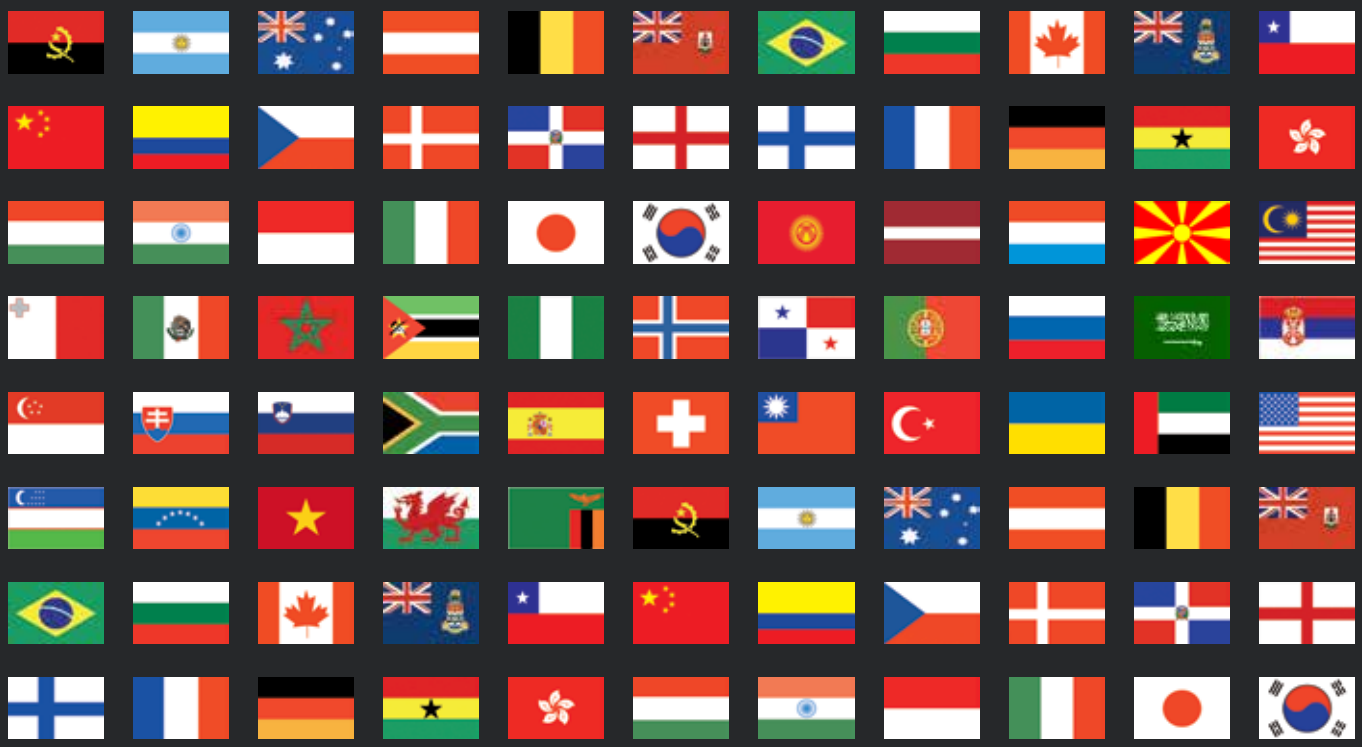
Contributing editor
Alan M Klein



2015

GETTING THE DEAL THROUGH

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Mergers & Acquisitions 2015

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Hong Kong

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1 Types of transaction

How may businesses combine?

Businesses may combine through one of the following:
- private acquisition of the target company's shares;
- private acquisition of the assets comprising the target company's business;
- general offer to shareholders to acquire the target company's shares; and
- scheme of arrangement of the target company under part 13 of the Companies Ordinance (scheme).

Purchasers may pay in cash, securities, other assets or a combination of the same.

We use the term 'Hong Kong companies' to mean corporations incorporated in Hong Kong and 'listed companies' to mean corporations whose securities are listed on the Stock Exchange of Hong Kong Limited (Stock Exchange). Listed companies may be incorporated in Hong Kong or certain other jurisdictions, for example in China, the Cayman Islands or Bermuda.

Takeovers of 'public companies in Hong Kong' (which include listed companies and companies with significant numbers of shareholders in Hong Kong) are subject to the Code on Takeovers and Mergers (Takeovers Code) published by the Securities and Futures Commission (SFC). Such takeovers may be conducted by way of general offer or scheme. A scheme is a court-supervised process whereby the shareholders of a company agree to a reorganisation of the company's capital structure. To be successful, the Companies Ordinance requires that a scheme for a general offer or a takeover offer be approved by at least 75 per cent of the votes attached to the disinterested shares cast in person or by proxy at a meeting of the holders of the relevant class of shareholders and be sanctioned by the courts, and that no more than 10 per cent of the votes attached to all disinterested shares are voted against the scheme. For the purposes of the 10 per cent objection test under the Companies Ordinance, 'disinterested shares' means shares held by non-interested parties. 'Interested parties' include, in the case of a takeover offer, the offeror and its associates and nominees.

For this purpose, 'associates' include:
- various family members of an individual offeror or member;
- companies in which an offeror or member is 'substantially interested' (eg, by controlling more than 30 per cent of the voting power);
- companies within the same group of companies as the offeror or member (where the offeror or member is a body corporate); and
- a person (or its nominee) who is a party to an acquisition agreement with the offeror or member to acquire shares or interests in shares to which the offer relates.

The Takeovers Code requirements are similar but not identical. The courts have stated that the test for different classes is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from those legal rights. If meetings are incorrectly constituted the application for court sanction may be dismissed.

Assuming the scheme vote is passed, it will take effect once sanctioned by the court. If a scheme proposal is successful the offeror will typically obtain all outstanding shares of the company. If the scheme fails, the offeror will obtain no shares. Schemes are therefore typically used where the offeror seeks to take the target private but is not certain that it can obtain the necessary supermajority to squeeze out a recalcitrant minority (see answer to question 14).

A general offer to shareholders involves the purchaser offering to buy all outstanding shares of the target company from its existing shareholders. A mandatory offer under the Takeovers Code must not be subject to any condition other than that the offeror has acquired shares carrying over 50 per cent of the target's voting rights (a voluntary offer may be subject to additional conditions). Unlike a scheme, it is possible for a general offer to succeed partially so long as the 50 per cent threshold is met. In general, takeover offers are simpler and quicker to implement than schemes of arrangement.

Incremental stake-building may require the purchaser to make a mandatory offer to all shareholders of the target company. A mandatory offer will be required when the offeror, with any persons acting in concert with it, obtains or consolidates control over at least 30 per cent of the voting rights attached to the shares of the target company, among other events.

For 12 months after an offer or scheme is withdrawn or lapses, the offeror and its concert parties may neither acquire voting rights that would result in having to make a mandatory offer nor announce or be part of a concert party that announces a subsequent offer.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations in Hong Kong are:
- the Companies Ordinance;
- the Companies (Winding Up and Miscellaneous Provisions) Ordinance;
- the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Listing Rules) and related Guidance on Listing Matters;
- the Takeovers Code;
- the Transfer of Businesses (Protection of Creditors) Ordinance; and
- the Securities and Futures Ordinance (SFO).

A Competition Ordinance was passed in 2012 and is slowly coming into effect. In 2015 draft Guidelines on implementation were published.

Hong Kong is a bilingual jurisdiction. Most corporate documents and those published pursuant to the Takeovers Code, Listing Rules and Companies Ordinance are generally required to be prepared in both English and Chinese.

3 Governing law

What law typically governs the transaction agreements?

Overwhelmingly, agreements to acquire Hong Kong companies are governed by Hong Kong law.

In a private acquisition, the main document will be a share or asset purchase agreement. Asset acquisitions may also require registrations or formalities for specific asset classes (eg, real estate). Generally, obligations may only be transferred with the consent of the obligee, although under the Transfer of Businesses (Protection of Creditors) Ordinance, a purchaser of a business will also assume liability for the debts and obligations of the business unless an appropriate notice is given. Acquisitions of public companies in Hong Kong require an offer document explaining the terms of

the offer and, if meetings are required, convening the requisite shareholder meetings, and a circular from the target's board stating its view as to the merits of the offer and recommendation as to whether or not to accept it. If an offer involves the purchaser offering securities to the public or a section of it, a prospectus may in certain circumstances also be required.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Private asset acquisitions do not need to be registered in Hong Kong but asset-specific registration may be required if the assets include assets of a specified asset class (eg, real estate).

Many of the public documents for takeovers of public companies in Hong Kong, including the offer document, any relevant prospectus and some regulatory announcements, are required to be cleared by the SFC or the Stock Exchange. Most prospectuses must be registered with the Companies Registry before publication.

Private share acquisitions need not be registered with any official authority. However, stamp duty is chargeable on transfers of Hong Kong shares (see answer to question 18). Hong Kong companies may not register the change of ownership of their shares without evidence that stamp duty has been paid or the transaction is exempt.

The SFC charges a fee for examining draft offer documents. The fee is assessed on a sliding scale based on the purchase consideration. The fee runs from HK$25,000 to HK$500,000 plus 0.01 per cent of the value over HK$2 billion.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are no specific publicity requirements for transactions by or involving unlisted companies that are not public companies in Hong Kong and the requirements depend on the structure.

Under the SFO, listed companies are required to disclose all 'inside information' as soon as reasonably practicable. 'Inside information' means information that is specific, is not generally known to that segment of the market that deals or is likely to deal in the listed company's securities, and which, if known, would be likely to have a material effect upon the price of the corporation's securities. There are safe harbours for issuers to omit or delay disclosure. These include where the disclosure is prohibited by law or a court order, where appropriate steps to maintain confidentiality are put in place and confidentiality is actually maintained, and where the information either concerns an incomplete proposal or negotiation or is a trade secret. The SFC may waive a disclosure obligation either unconditionally or subject to conditions (specified on a case-by-case basis). Failure to comply with the obligation to disclose such information may give rise to civil and criminal liability.

Under the Takeovers Code, a public announcement may need to be made in relation to any intended offer. This obligation applies regardless of which structure is used. Once a firm intention to make an offer for the target company has been formed, the offeror and, in some circumstances, the board of the target company would be obliged to disclose it. Market speculation or unusual price or trading movement may also give rise to an obligation on any or all of the offeror, controlling shareholder of the target or the target's board to announce any possible offer. The announcement must usually contain the offer terms, identities of the offeror and its ultimate controlling shareholder, details of existing shareholdings (including derivative shareholdings) by the offeror and its concert parties, conditions to the offer, details of any material arrangement relating to the shares and details of any agreements which relate to the circumstances in which the offeror may seek to invoke a precondition or condition to its offer and the consequences of doing so. The target company must set up an independent board committee to make recommendations to shareholders, having obtained competent independent advice, as to the acceptance or rejection of the offer. A scheme requires substantially the same disclosures.

Once an offer or possible offer has been announced and until it has been completed, all dealings by the target company, the offeror or any of their associates (which term is very broadly defined) in the target company's securities must be publicly disclosed no later than 10am on the next business day after the transaction date and must be disclosed in writing to all bidders and the target (or their respective financial advisers) and to the SFC.

If a prospectus is required in relation to any share issuance, it must comply with the contents requirements under the Companies Ordinance and (if the issuer is listed) the Listing Rules. It must include sufficient information to enable a reasonable person to form a valid and justifiable opinion of the relevant securities and the financial condition and profitability of the company at the time the prospectus is issued.

Untrue statements in a prospectus may make the directors, promoters and any other persons authorising issuance of the prospectus liable to any subscribers of the securities in question who sustain loss by reason of any such untrue statements. Such individuals may also be liable to imprisonment and a fine if the statement in question was material and the individual cannot prove that he believed in its truth and had reasonable grounds for so believing. A statement is deemed to be untrue if it is misleading in the form and context in which it is included, or if it is a material omission. There are also civil and criminal liabilities under the SFO for contents of and omissions from documents.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The disclosure obligations in Hong Kong are highly complex. Under the SFO, all directors of listed companies must disclose among other things any interest in the listed company's shares. Direct or indirect interests of others in 5 per cent or more of any class of voting securities in a listed company ('long positions') must also be disclosed, as must certain short positions. Interests may be aggregated where a group of shareholders acts together ('concert parties'). The obligation also applies to an interest in the underlying shares of equity derivatives. Much of the complexity of the rules arises from determining the aggregation of shareholdings. Family holdings and companies in the same group are likely to have their holdings aggregated. 'Interests' are defined broadly and include not just ownership or other interests in securities but also derivatives, entering into contracts to acquire securities, control of the exercise of any right attaching to the securities or the right to acquire an interest in any securities. Events giving rise to the disclosure obligations are referred to as 'relevant events'.

Exemptions exist for small acquisitions or disposals (ie, ones that do not cross whole percentage points), taking up rights issues to maintain the same percentage shareholding and for wholly-owned subsidiaries of a company whose parent complies with the disclosure obligations. Certain trustees, pension and other provident fund schemes, collective investment schemes and trading by regulated financial institutions are also exempted in limited circumstances. These exemptions are narrowly applied, and many are not applicable to initial notifications or to a person who is a director of the relevant listed company.

Most disclosures must generally be made within three business days after the occurrence of the relevant event (or, if later, of the relevant person becoming aware of the relevant event). Failure to comply can result in criminal liability.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under the current regime, drawn from the Companies Ordinance and case law (including English common law), directors' duties include:

- to exercise reasonable skill and care in the performance of their functions as directors;
- to declare any interest in a contract or proposed contract with the company;
- to act in good faith in the interests of the company;
- to avoid any conflicts of interest or of duties owed by the director; and
- to exercise the powers of a director only for their proper purpose.

Directors' duties are owed to the company itself rather than to any individual shareholder, but a director may in some circumstances owe a specific duty of care to individual shareholders.

Shareholders not connected to a director can ratify a director's negligence, default, breach of duty or breach of trust.

Controlling shareholders owe no comparable duties. However, Hong Kong law provides various protections to ensure that the interests of minority shareholders are not abused.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Under the Listing Rules, if an acquisition by a listed company exceeds certain size thresholds with regard to various metrics (including turnover, assets, net profit and revenue attributable to the underlying assets, equity capital issued) the acquisition will require shareholder approval. Shareholder approval is usually required if any of those ratios is 25 per cent or more. Connected transactions (that is, transactions involving persons who are directors or substantial shareholders of the listed company or their related (in a broad sense) persons) may also require the approval of independent shareholders if they exceed specified materiality thresholds.

The articles of association of a Hong Kong company may specify that shareholder approvals are required for certain actions or grant pre-emptive rights to shareholders. In the context of private companies, this is particularly common in joint ventures where a minority shareholder has veto rights. In addition, under the Companies Ordinance, certain matters require shareholder approval, including amendments to the company's articles and a change of the company's name, which may be features of a business combination.

As mentioned in the answer to question 1, a takeovers scheme requires the approval of a 75 per cent majority by value of the shareholders of each class present and voting at the court meeting (with not more than 10 per cent of all disinterested shares being voted against). The Takeovers Code requirements on schemes are similar but not identical. Shareholders have no general appraisal right. However, an appraisal right is generally available on a squeeze-out (see answer to question 14). Takeovers of public companies in Hong Kong require the appointment of an independent adviser who must produce a fairness opinion for the benefit of the company's shareholders.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile takeovers are permitted in Hong Kong and are subject to the same regulatory considerations as those in which the offeror has the support of the target's board of directors. The primary practical differences include that an uncooperative board will be reluctant to provide non-public information to an unwelcome bidder and that schemes of arrangement are effectively impracticable in a hostile context as they involve steps such as convening shareholder meetings that require the board's co-operation. In practice hostile takeovers are invariably made by way of general offer to shareholders.

The paths available to the boards of public companies in Hong Kong to discourage would-be hostile bidders generally require shareholder approval. Under the Takeovers Code, once an offer has launched, issuing new securities, undertaking significant transactions or entering into contracts outside the ordinary course of business would generally not be permitted without express shareholder approval. The Takeovers Code also contains a number of principles that restrict a board's ability to stymie a hostile bid, including that:

- once the board knows of a bid, it may not take any action to frustrate the bid, or deny the shareholders of the target an opportunity to decide on the merits of an offer, without express shareholder approval (in general meeting);
- information must be disseminated equally to all shareholders; and
- directors of target companies must act only in their capacity as directors without regard to their personal or family shareholdings or personal interests.

Hostile takeovers remain a rarity in Hong Kong, principally because most listed companies are closely held, with small groups of shareholders (often families) controlling a significant voting majority.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The regime in Hong Kong permits certain types of deal protection but in general a company has little ability to protect deals from third-party bidders.

Break-up fees are allowed under the Takeovers Code if they meet the following criteria:

- the fee is no more than 1 per cent of the value of the offer;
- the target's board and independent financial adviser confirm that the fee is in the best interests of the target's shareholders; and
- the arrangement is fully disclosed in both the announcement of a firm intention to make an offer and the scheme or offer document.

Offerors may also obtain irrevocable undertakings from existing shareholders under which the shareholders agree to accept the offer or attempt to build a stake separately from the takeover process. For stake building, care should be taken to comply with the disclosure rules and to consider the potential impact on minority squeeze-outs (see answer to question 14) and on the offer price.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Generally, no, outside the telecommunications sector. General merger control legislation (the Competition Ordinance) has been passed but not all of it has yet come into force. The draft Regulations so far published under it are not sector- or industry-specific.

Many Hong Kong companies are holding companies whose operating businesses are located in China, which has a merger control regime and restrictions on foreign investment. In such cases, Chinese government approvals may be required.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

All general offers under the Takeovers Code must be conditional on the offeror obtaining at least 50 per cent of the voting rights attached to the shares of the target company. If the offer is mandatory (that is, was triggered by the offeror's and its concert parties' building or consolidating their stake in the target), the offer must otherwise be unconditional except if the SFC specifically consents.

Voluntary offers may be subject to additional conditions, often including regulatory approvals, the offeror's shareholder approval and stock exchange approvals as well as obtaining a higher percentage of the voting rights (for example, 90 per cent of shares under offer, the threshold for a minority squeeze-out under Hong Kong law). An offer should not normally be made subject to conditions that depend on the offeror's own judgement or the fulfilment of which is in the offeror's hands. Additionally, an offeror should only invoke the non-fulfilment of a condition as a reason not to close if the circumstances giving rise to the offeror's right to terminate the offer are of material significance to the offeror. Material adverse change conditions are permitted to the extent that they do not contain any subjective element, but may not be enforceable in light of these restrictions.

In acquisitions including a cash element (or other assets other than new securities to be issued by the offeror), the announcement of the offer must include confirmation by the offeror's financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer. The SFC will usually require evidence in support of this statement. There can be no condition relating to the availability of financing.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In acquisitions of unlisted companies, there is no restriction on a purchaser including a financing condition in the share or asset purchase agreement (although such a condition is likely to be unpalatable to most sellers in most circumstances). There is typically no obligation on a seller to assist in the buyer's financing.

Acquisitions of public companies in Hong Kong are subject to the Takeovers Code. While the Takeovers Code does not require cash offers to be guaranteed, the announcement of the offer must include a confirmation that the offeror has sufficient resources available to it to fulfil the offer, so that sufficient financing for the offer must be in place before the offer is announced. The offer or scheme document itself must include a description of how the offer is being financed and the source of finance unless the offer is a cash offer seeking to privatise the target in which there has been no waiver of the condition as to acceptances.

The Companies Ordinance permits companies (listed or unlisted) to provide financial assistance, subject to satisfaction of a solvency test and one of the following:

- if the assistance, and all other financial assistance previously given and not repaid, is in aggregate less than 5 per cent of the shareholders' funds, and is supported by a solvency statement and a resolution of the directors in favour of giving the assistance;
- if the financial assistance is approved by written resolution of all members of the company, supported by a solvency statement and a resolution of the directors in favour of giving the assistance; or
- if the financial assistance is approved by an ordinary resolution and supported by a solvency statement and the board resolves that giving the assistance is in the interests of the company.

The assistance may only be given not less than 28 days after the resolution is passed and within 12 months after the solvency statement is made. Shareholders holding at least 5 per cent of the total voting rights or members representing at least 5 per cent of the total members of the company may, within the 28-day period, apply to the court to restrain the giving of the assistance.

A company may aid an offeror in obtaining financing, so long as doing so does not contravene the financial assistance rules and could not result in a bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits. If it is incorporated outside Hong Kong, the rules of its home jurisdiction prevail.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority shareholders in a Hong Kong company may be squeezed out if the offeror goes on to acquire, by virtue of acceptances, at least 90 per cent in number of the shares to which the offer relates. To exercise this right, the offeror must give notice to each minority shareholder in a prescribed form before the earlier of the end of the period of three months beginning on the day after the end of the offer period of the takeover; and six months beginning on the date of the takeover offer. Within two months after giving the notice, the offeror must pay the consideration to the target company and send the target company a copy of the notice together with a signed instrument of transfer. Once the 90 per cent threshold has been achieved, offerees are granted a corresponding right to require the offeror to acquire their shares.

If the target is a public company in Hong Kong, the Takeovers Code will also apply. The Takeovers Code provides that in addition to the 90 per cent threshold above, or, in the case of a non-Hong Kong company, to any threshold set out in the company law of such company's home jurisdiction, the purchaser must also have obtained during the period of four months after posting the initial offer document at least 90 per cent of the disinterested shares (in this context, shares held by shareholders other than the purchaser and its concert parties).

A scheme will bind all shareholders immediately upon becoming effective (which entails court sanction), meaning that a purchaser can acquire a 100 per cent shareholding in the target company as soon as the scheme has taken effect, without needing to go through a separate squeeze-out procedure.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific rules or regulations governing cross-border transactions in Hong Kong and no statutory restrictions on the shareholding in a Hong Kong company that may be held by a foreign entity. The structuring of cross-border transactions is typically driven by tax considerations and by any regulatory considerations that may apply in the foreign jurisdiction (in particular, if the target company directly or indirectly carries on business in China).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are no specific waiting or notification periods except for the minority squeeze-out provisions described above (see answer to question 14) and particular requirements under sector-specific legislation.

In the case of an offer governed by the Takeovers Code, the offer document must be posted within 21 days (for a cash offer) or 35 days (for a securities offer) after the offer has been announced. The final day for an offer to close is 60 days after the announcement unless the SFC agrees otherwise. If there is a competing bid, the timetable will be adjusted and the SFC must be consulted with. The timetable for a scheme is generally longer than for a general offer due, among other things, to the need to accommodate the court's timetable.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes. Regulatory approvals are required for changes of control in the sectors of financial intermediation, banking, insurance and broadcasting. In addition, under the Telecommunications Ordinance, telecommunications licence-holders are prohibited from engaging in conduct having the purpose or effect of preventing or substantially restricting competition in the operation of public telecommunication services. This is supplemented by the Competition Ordinance which, when fully in effect (expected to be later in 2015) will introduce a merger control regime for transactions that have or are likely to have the effect of substantially lessening competition in Hong Kong. Initially, the merger control regime will apply only to mergers involving telecommunications carrier licensees.

18 Tax issues

What are the basic tax issues involved in business combinations?

Hong Kong levies a transfer tax (stamp duty) on written agreements for the sale of Hong Kong shares (principally, shares in either a Hong Kong company or on the Hong Kong register of a Hong Kong listed company). Stamp duty is also charged on other transactions in which a beneficial interest in Hong Kong stock is transferred.

Stamp duty is currently levied at a rate of 0.2 per cent in total on the higher of the amount of the consideration or of the value of the shares. Each of the buyer and seller of the shares is liable for half of this amount.

Certain asset transfers may also attract stamp duty. Stamp duty on the sale or transfer of land (immoveable property) is levied on a sliding scale starting at HK$100 where the consideration is HK$2 million or less and rising to 4.25 per cent where the consideration is greater than HK$21,739,130. A stamp duty exemption is available for intra-group transfers of shares or immoveable property. The exemption applies to corporations in respect of which one is at least 90 per cent owned by the other, or at least 90 per cent of the share capital of each is under the common ownership of a third corporation. The exemption is only available where all such entities are corporations rather than natural persons. Relief is also available in the context of share borrowing and lending, transactions with certain government entities and certain transactions by the managers of unit trusts as well as for charitable donations and gifts in consideration of marriage.

Update and trends

The mergers and acquisitions market in Hong Kong is likely to grow in the coming year as non-Hong Kong investors (particularly investors from mainland China) seek to acquire businesses and companies in Hong Kong.

The Securities and Futures Commission published in January, 2015 a Consultation Paper on an Effective Resolution Regime for Financial Institutions in Hong Kong, making proposals for resolution of difficulties if systemically important financial institutions fail. This results from the 2008 credit financial crises and its ongoing repercussions and may lead to alterations in mergers and acquisitions regime relating to financial institutions.

No capital gains tax is payable on asset transfers. Asset transfers other than immoveable property are generally not liable for tax unless the disposal is in the nature of the trade of the seller (in which case corporate profits tax may be charged). Hong Kong also does not charge withholding tax on the payment of dividends to overseas shareholders.

Many Hong Kong companies are owned by offshore holding companies offshore, notably in the Cayman Islands and British Virgin Islands. Many also have operating subsidiaries in China. In cross-border transactions involving Hong Kong companies, it is therefore important to consider the tax laws of these jurisdictions on tax structuring.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The primary law relating to labour and employee benefits in the context of a business combination is the Employment Ordinance. The Employment Ordinance is part of a broader set of legislation including among others the Minimum Wage Ordinance, Mandatory Provident Fund Schemes Ordinance and Employees Compensation Ordinance.

There is no automatic transfer of employees when a business is transferred. By default, if the ownership of a business changes, the employment contracts with the seller will terminate. Employees whose contracts are terminated in this way are entitled to claim for dismissal and may be entitled to severance payments unless the buyer makes a valid offer to re-employ them and the employee unreasonably refuses this offer. The characteristics of a valid offer are that it takes effect on or before the termination date, that the terms of employment are no less favourable to the employee than those in force immediately prior to the termination and that it is made to the employee not less than seven days prior to termination by the seller. The requirement that employees are offered terms no less favourable than those previously enjoyed means in practice that buyers often maintain transferred employees on their previous terms. There are no equivalent protections for employees acquired as a result of a transfer of shares of their employer company.

The Employment Ordinance provides that an employee who has been in continuous service with the same employer for at least 24 months is in most cases entitled to severance payment on being laid off, dismissal for redundancy or on the expiration of a fixed-term contract. Employees who have worked not less than five years for the same employer under a continuous contract may additionally be entitled to a long-service payment depending on the circumstances of their dismissal.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

This is a complex area, a full discussion of which lies outside the scope of this chapter. In general, when buying a company in receivership or liquidation, the first consideration is conducting due diligence to ensure that the receiver or liquidator has been validly appointed and has obtained good title to the target.

Hong Kong has no concept of the 'debtor-in-possession'. Financial acquisitions of insolvent companies therefore typically involve the purchaser acquiring the assets of the target directly from the receiver or liquidator. A receiver or liquidator will not give extensive warranties and representations as to the condition of the business.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Anti-corruption laws in Hong Kong are enforced by the Independent Commission against Corruption (ICAC), within the statutory framework of the Prevention of Bribery Ordinance (POBO) and the Independent Commission Against Corruption Ordinance (ICAC Ordinance). The POBO criminalises bribery in a number of commercial contexts, including giving assistance in regard to contracts. Typically, share or asset purchase agreements will include a representation given by the seller that no third party has been paid any commission or finder's fee in connection with the bid.

In addition to Hong Kong's own laws, local and cross-border transactions involving Hong Kong companies typically involve the purchaser requesting a representation from the seller that the target company and any subsidiaries are in compliance with the anti-corruption, anti-bribery and sanctions laws of the jurisdictions in which the target and its subsidiaries do business as well as the key international regimes such as the United States Foreign Corrupt Practices Act and the UK Bribery Act 2010, as well as US, UK and European sanctions regimes.

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