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Mondaq Comparative Guide Hong Kong Private M&A



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[Mondaq](#) published Slotine's contribution for Hong Kong to their international comparative guide on Private M&A. The Q&A covers all aspects from the regulatory framework and funding structures to governance, employment and tax considerations. Read on for the full guide.

1. Deal structure

1.1 How are private M&A transactions typically structured in your jurisdiction?

Hong Kong is a common law jurisdiction with very stable tax legislation.

M&A transactions are broadly structured as asset or share purchases, with similar characteristics as in other jurisdictions.

1.2 What are the key differences and potential advantages and disadvantages of the various structures?

Structure	Pros	Cons
Asset purchase		
Buyer	<ul style="list-style-type: none"> • Can cherry-pick assets. • The sale of assets may not require the approval of the shareholders of the buyer, or only qualified consent (as opposed to unanimity). 	<ul style="list-style-type: none"> • Consider whether employees dedicated to the assets sold will be offered employment with the buyer.
Seller	<ul style="list-style-type: none"> • There are no financial assistance constraints. 	<ul style="list-style-type: none"> • The seller may be left with assets or liabilities that the buyer was not prepared to acquire. • The shareholders of the seller do not receive the sale proceeds.
Share purchase		
Buyer	<ul style="list-style-type: none"> • The buyer takes the target 'as is' (subject to conditions precedent negotiated with the seller). • The buyer acquires a going concern that continues its operations after the acquisition as before (subject to compliance with change of control provisions). 	<ul style="list-style-type: none"> • The transaction costs and delays are usually higher, as the legal and tax documentation is more sophisticated. • For the acquisition of 100% of the target, the consent and participation of all shareholders is required. • Financial assistance constraints apply and may interfere with the buyer's plans for funding the transaction. • Operations may be at risk during the transition period for the updating of bank authorisations.
Seller	<ul style="list-style-type: none"> • The seller(s) is(are) the shareholder(s) of the target; they achieve a clean break from the target and receive the purchase price directly. 	<ul style="list-style-type: none"> • There is no control on conditions for the release of the portion of the purchase price retained by the buyer.

1.3 What factors commonly influence the choice of transaction structure?

The choice of transaction structure is a commercial one.

1.4 What specific considerations should be borne in mind where the sale is structured as an auction process?

The auction process gives the advantage to the seller, which can control:

- what bidders must deliver and by when; and
- which aspects of the transaction it regards as non-negotiable.

The auction process is suitable for high-quality targets with a high degree of compliance.

2. Initial steps

2.1 What agreements are typically entered into during the initial preparatory stage of a private M&A transaction?

Financial and legal vendor's due diligence are highly recommended to prepare the target and the vendor by identifying and managing potential hurdles, leaving no room for surprises once discussions with potential buyers have started.

2.2 Which advisers and stakeholders are typically involved in the initial preparatory stage of a private M&A transaction?

Typically, the board of directors is a key stakeholder that decides:

- who will be involved from the finance or operation departments; and
- what information to share with shareholders that do not participate in board meetings.

Since shareholders owe no fiduciary duties to the company, the provisions of the shareholders' agreement or the signature of confidentiality undertakings may be considered.

Professional advisers such as private banks and M&A boutiques lead the process for larger transactions.

Vendor's due diligence is usually handled by independent advisers for finance, operations, tax, social and legal. The involvement of the company's usual advisers

should be handled with care, as it will increase the number of persons informed of the sale project.

2.3 Can the seller pay adviser costs or is this limited by rules against financial assistance or similar?

The payment of the seller's adviser cost is limited by rules on financial assistance in Hong Kong and any commercial agreement between the parties on the subject should be reviewed by a local solicitor.

3. Due diligence

3.1 What due diligence is typically conducted in private M&A transactions in your jurisdiction and how is it typically conducted?

In the context of private M&A, a company in Hong Kong is likely to be a holding company with the role of regional headquarters. The scope of due diligence of the holding company and its subsidiaries will depend on:

- their business; and
- the commercial and financial relationships between the group companies.

Essential due diligence regarding companies in Hong Kong encompasses the following:

- Compliance with tax and social obligations:
 - an annual audit of financial statements by a certified public accountant;
 - timely filing of profits tax returns, including the audited annual financial statements;
 - social contributions, insurance and filings required from employers; and
 - correspondence with the Inland Revenue Department and insurers relating to social contributions.
- Compliance with Companies Ordinance obligations:
 - corporate registers – members, directors, company secretaries, significant controllers and charges;
 - board and members' resolutions; and
 - filings with the Companies Registry.

The vendor's team typically coordinates the vendor's due diligence, adopting a critical approach to identify and remedy potential gaps.

Buyers tend to instruct different service providers for due diligence (commercial, financial, tax, social and legal) and for the transaction itself.

3.2 What key concerns and considerations should participants in private M&A transactions bear in mind about due diligence?

Due diligence is a critical part of the M&A process which conditions the pursuit or completion of the acquisition project as outlined in the letter of intent.

Vendors that prepare comprehensively for due diligence reduce the risk of a potential buyer walking out of the acquisition due to the disclosure of unanticipated information in the due diligence.

On the other hand, buyers should carefully monitor the due diligence process to ensure that their questions are answered and there are no potential roadblocks to the success of the acquisition.

3.3 What kind of scope in relation to environmental, social and governance matters is typical in private M&A transactions?

In addition to the statutory requirements for private companies in Hong Kong, buyers should consider the culture of local companies. Especially in Hong Kong, after the acquisition of independent companies by international groups, cultural gaps may cause:

- past performance to collapse;
- employees to become demotivated; or
- key managers to leave.

4. Corporate and regulatory approvals

4.1 What kinds of corporate and regulatory approvals must be obtained for a private M&A transaction in your jurisdiction?

The acquisition of a company whose activity is regulated must be anticipated and notified to the relevant authority according to the applicable rules. The table below contains a non-exhaustive list of regulated activities.

Nature of business	Licence or authorisation required	Competent authority(ies)	Local/qualified person requirement	Regulatory approval / notice requirement for private M&A
Making loans or advertising or holding itself out as carrying on the business of making loans	Money lenders licence	Money Lenders Section of the Companies Registry and Licensing Office (Money Lender Licensing Section) of the Hong Kong Police Force	<ul style="list-style-type: none"> The compliance officer and money laundering reporting officer must be appropriately qualified and normally based in Hong Kong Each officer, controller and manager must be fit and proper 	The change of shareholder must be notified to the Companies Registry within 21 days after the date of the change
Operating a currency exchange service and/or cross-border money remittance service	Money service operator licence	Commissioner of Customs & Excise	<ul style="list-style-type: none"> The compliance officer and money laundering reporting officer must be appropriately qualified and normally based in Hong Kong Each director and ultimate beneficial owner must be fit and proper At least one senior management member must pass an in-person competence assessment 	Prior approval from the Commissioner of Customs and Excise must be obtained to add an ultimate beneficial owner
Trust and company services	Trust and company service	Companies Registry (CR)	<ul style="list-style-type: none"> The compliance officer and money 	Prior approval from the CR must be

	provider licence		<p>laundrying reporting officer must be appropriately qualified and normally based in Hong Kong</p> <ul style="list-style-type: none"> Each director and ultimate beneficial owner must be fit and proper 	obtained to add an ultimate beneficial owner
Issuance of stored value facilities (including e-wallets and prepaid cards)	Store value facility licence	Hong Kong Monetary Authority (HKMA)	<ul style="list-style-type: none"> The compliance officer and money laundrying reporting officer must be appropriately qualified and normally based in Hong Kong Each chief executive, director, ultimate beneficial owner and manager must be fit and proper The chief executive and alternate chief executive must be Hong Kong residents 	The change of shareholder must be notified to the HKMA within six days after the date of the change
Activity regulated by the Securities and Futures Commission	Licence from the Securities and Futures Commission	Securities and Futures Commission (SFC)	<ul style="list-style-type: none"> The compliance officer and money laundrying reporting officer must be appropriately qualified and normally based in Hong Kong Each substantial shareholder, officer and personnel carrying on regulated activities must be fit and proper 	Prior approval from the SFC must be obtained to add a substantial shareholder and the change of shareholder must be notified to the SFC within seven business days after the date of the change

			<ul style="list-style-type: none"> • At least two responsible officers must be appointed, at least one of which must be an executive director and one of which must be available at all times to supervise the business • At least one manager-in-charge must be appointed for each core function listed by the SFC 	
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Corporate approvals are usually required from the board or members, depending on the provisions of the company's organisational documents (articles of association and shareholders' agreement).

4.2 Do any foreign ownership restrictions apply in your jurisdiction?

There are no foreign ownership restrictions in Hong Kong.

Foreign ownership restrictions would derive from international law – for instance, sanctions against persons and places outside China arising from Chapter 7 of the [Charter of the United Nations](#).

4.3 What other key concerns and considerations should participants in private M&A transactions bear in mind in relation to consents and approvals?

In Hong Kong, licences are usually dependent on a responsible person who must:

- be a resident of Hong Kong; and
- have adequate qualifications.

The table in question 4.1 provides some examples.

5. Transaction documents

5.1 What documents are typically prepared for a private M&A transaction and who generally drafts them?

The key document in private M&A transactions is the share purchase agreement (SPA) or asset purchase agreement (APA). It is generally drafted by the buyer. However, some sellers try to speed up the process by having the SPA or APA prepared in advance.

Other documents typically prepared for a private M&A in Hong Kong include the following:

- non-disclosure agreement (buyer);
- letter of intent (buyer);
- closing checklist (buyer);
- SPA or APA (buyer);
- disclosure letter (seller);
- corporate resolutions for the transfer (seller);
- corporate resolutions for the change of director(s) (seller);
- corporate resolutions for other changes (eg, company secretary, registered office, bank authorisations) (buyer);
- corporate resolutions to approve the acquisition (seller and buyer);
- completion memorandum agreement (if completion takes place after signing, subject to conditions precedent).

5.2 What key matters are covered in these documents?

The transaction documents cover the same matters as in other jurisdictions – that is, the parties' rights and obligations concerning the contemplated acquisition.

The imposition of restrictive covenants on a seller who is both an employee and a shareholder should be approached with care. Hong Kong courts tend to exercise greater flexibility when assessing the enforceability of restrictive covenants applicable to former employee-shareholders as opposed to employees who do not hold a share ownership.

5.3 On what basis is it decided which law will govern the relevant transaction documents?

The straightforward approach is that transaction documents concerning companies or assets in Hong Kong will be subject to Hong Kong law. Hong Kong is a common law jurisdiction with robust courts and well-regarded alternative dispute resolution centres, such as:

- the Hong Kong International Arbitration Centre;
- the China International Economic and Trade Arbitration Commission; and
- the International Chamber of Commerce.

For international transactions involving multiple jurisdictions, it is standard practice to choose:

- the law of the place of incorporation of the buyer; or
- the law of a global hub which is familiar with multi-jurisdictional disputes, such as Hong Kong, London or Paris.

6. Representations and warranties

6.1 What representations and warranties are typically included in the transaction documents and what do they typically cover?

Representations and warranties included in the transaction documents always cover essential aspects of the transaction such as:

- the existence of the assets or shares sold;
- their ownership by the seller; and
- the seller's right to sell them without restrictions.

Other representations and warranties will depend on the history and activity of the target.

6.2 What are the typical circumstances in which the buyer may seek a specific indemnity in the transaction documentation?

A specific indemnity is sought where:

- a potential liability arising before completion is identified; and
- the uncertainty lies merely on the timing and quantum.

6.3 What remedies are available in case of breach and what is the statutory timeframe for bringing a claim? How do these timeframes differ from the market standard position in your jurisdiction?

The general statutory timeframe for bringing claims in Hong Kong is:

- six years for civil cases; and
- 10 years for tax cases.

The Hong Kong courts may grant a wide range of judgments and/or relief to the parties, depending on the nature of the dispute, including:

- damages;
- a judgment for a specific sum;
- declarations;
- injunctions;
- specific performance;
- restitution; and
- account of profits.

For private M&A transactions in Hong Kong, the market standard position is an 18 to 24-month limitation period for notification of potential claims for breach of representations and warranties.

6.4 What limitations to liability under the transaction documents (including for representations, warranties and specific indemnities) typically apply?

It is standard practice for sellers to seek to limit their liability for claims under the warranties in the share purchase agreement by, for example:

- excluding liability for small claims;

- stipulating a monetary threshold that the damage suffered must exceed before a warranty claim can be brought;
- specifying a limitation period during which warranty claims must be notified to the seller;
- imposing a financial cap on the seller's aggregate liability for all warranty claims (which is commonly set as a specified proportion of the purchase price paid);
- restricting the seller's liability to matters within its knowledge;
- where there are multiple sellers, limiting their individual liability to a specified proportion of the aggregate consideration;
- preventing double recovery under more than one warranty or under a warranty and indemnity addressing the same subject matter;
- requiring the buyer to exhaust its rights against insurers and other relevant third parties before recovering under the warranties; and/or
- giving the seller conduct of any third-party claims that may give rise to liability under the warranties.

6.5 What are the trends observed in respect of buyers seeking to obtain warranty and indemnity insurance in your jurisdiction?

Warranty and indemnity insurance has become increasingly popular in recent years, with a core set of specialist insurers offering insurance tailored to specific transactions. These policies cover either the buyer or the seller for the risk of loss resulting from breach of the seller's warranties.

6.6 What is the usual approach taken in your jurisdiction to ensure that a seller has sufficient substance to meet any claims by a buyer?

The usual approach is the retention of part of the purchase price by the buyer to secure the seller's liability for warranty or indemnity claims. The retained sum may be paid into an escrow account on completion.

Alternatively, a buy-side warranty and indemnity insurance policy enables the buyer to claim directly against the insurer in respect of any loss flowing from a breach of warranty, thereby facilitating a clean exit for the seller (ie, without any need for it to retain any meaningful liability for warranty breach under the terms of the share and purchase agreement).

6.7 Do sellers in your jurisdiction often include restrictive covenants in the transaction documents? What timeframes are generally thought to be enforceable?

Post-completion restrictive covenants are standard in Hong Kong. They typically cover:

- non-compete clauses;
- non-poaching and non-solicitation covenants; and
- other restraint of trade clauses.

They are often drafted to be enforceable by group companies.

Timeframes ranging from 12 months to three years are generally thought to be enforceable for the protection of the legitimate interests of the buyer or the target.

6.8 Where there is a gap between signing and closing, is it common to include conditions to closing, such as no material adverse change (MAC) and bring-down of warranties?

In Hong Kong, MAC provisions remain uncommon and heavily resisted by sellers.

Bring-down of warranties are formalised as a reiteration of the representation and warranties on completion. This reiteration is common practice in Hong Kong.

6.9 What other conditions precedent are typically included in the transaction documents?

Conditions precedent will typically cover business unit carveouts or other actions agreed upon by the parties that need some time to implement.

7. Financing

7.1 What types of consideration are typically offered in private M&A transactions in your jurisdiction?

Payment by cash, securities or a combination of both is typically offered as consideration in private M&A transactions in Hong Kong.

7.2 What are the key differences and potential advantages and disadvantages of the various types of consideration?

Cash payment provides for a higher level of certainty, subject to currency exchange rate fluctuations. US dollars are the preferred currency for international transactions. Since 1983, the Hong Kong dollar has been pegged to the US dollar.

Payment by securities such as shares issued by the buyer, loan notes issued by the buyer or loan notes convertible into shares of the buyer results in more sophisticated transaction terms to incorporate terms typical of those securities:

- for shares, investment and shareholders' agreements;
- for loan notes, a facility agreement; and
- for convertible loan notes, a convertible note agreement.

For loans, the seller may request:

- a charge or mortgage; or
- another form of guarantee.

7.3 What factors commonly influence the choice of consideration?

The key difference from a seller's point of view is whether it wants a clean-cut outcome. If so, payment in cash in full on completion is optimal.

However, the seller may wish to retain an interest in the target, which may lead to:

- an agreement for part of the consideration to be a contingent amount depending on financial or other performance (eg, an earnout); or
- an agreement for a consideration in securities (shares or options).

From a buyer's point of view, the decisive factors are typically:

- the amount of cash that the buyer has available (itself or through third-party acquisition finance); and
- the buyer's appreciation of the value in retaining the seller's involvement in the target.

7.4 How is the price mechanism typically agreed between the seller and the buyer? Is a locked-box structure or completion account's structure more common?

Locked box structure pricing is common in Hong Kong M&A private transactions. This:

- provides certainty on the purchase price on completion; and
- avoids the complexity of the completion accounts mechanism.

Both characteristics are perceived as advantages over the completion accounts mechanism.

However, completion accounts are a better option for a buyer that may have worries about:

- the accuracy of historical financial statements presented by the seller; and/or
- the risk of adverse events in the company in the period leading up to completion.

7.5 Is the price typically paid in full on closing or are deferred payment arrangements common?

Deferred payment arrangements are common. There are various possible methods for deferred payment, including:

- a price mechanism;
- a guarantee mechanism; or
- a performance mechanism.

7.6 Where a deferred payment/earn-out payment is used, what typical protections are sought by sellers (eg, post-completion veto rights)?

The typical protection granted to sellers consists in information and audit rights to ensure that the conditions for the deferred payment/earnout payment have been respected by the buyer.

7.7 Do any rules on financial assistance apply in your jurisdiction, and what are their implications for private M&A transactions?

Subject to certain exceptions, it is generally unlawful for a Hong Kong company or its subsidiaries to give financial assistance – by way of gift, guarantee, security, indemnity, release, waiver, loan novation or assignment of a loan, or any other financial assistance given by a company whose net assets are thereby reduced – directly or indirectly to a buyer for the acquisition of its shares (Section 275 of the Companies Ordinance).

However, the rules on financial assistance do not have extraterritorial effect and a subsidiary incorporated outside of Hong Kong thus may provide financial assistance for the acquisition of shares in its parent company.

7.8 What other key concerns and considerations should participants in private M&A transactions bear in mind from a financing perspective?

Structuring discussions resulting in a structuration memorandum and a detailed closing checklist are essential for any cross-border transaction to anticipate legal, tax and financial questions.

8. Deal process

8.1 How does the deal process typically unfold? What are the key milestones?

- The seller conducts its vendor's due diligence (see question 2.1).
- The seller prepares a data room with:
 - limited data for potential buyers that have not issued a letter of intent accepted by the seller; and
 - full access once the potential buyer has executed such a letter with the seller.
- The seller identifies:
 - key criteria for a successful sale from its point of view (eg, target price, warranties and indemnities, key terms); and
 - points open for negotiation (eg, a transition period for the seller to remain active or involved).
- The seller or its agent (typically an M&A firm) contacts potential buyers.
- The potential buyer enters into a confidentiality agreement to access the limited data room.

- The potential buyer issues a letter of intent.
- The letter of intent is negotiated with the seller.
- The seller accepts the terms of the letter of intent outlining:
 - the proposed transaction structure;
 - the consideration and terms of payment;
 - other key non-binding terms; and
 - binding terms, such as the exclusivity period and conditions for proceeding to acquisition.
- The buyer conducts its due diligence.
- The legal documentation is drafted and negotiations thereon take place.
- The signing takes place.
- Confirmation is issued as to whether conditions precedent have been met or waived.
- Completion takes place.
- The transaction enters the post-closing phase.

8.2 What documents are typically signed on closing? How does this typically take place?

The documents typically signed on closing include:

- the share purchase or asset purchase agreement;
- a disclosure letter;
- an escrow agreement or other agreement serving as guarantee;
- corporate authorisations for the buyer:
 - approval of the terms of the acquisition; and
 - signature authorisations;
- corporate authorisations for the seller:
 - approval of the terms of the acquisition; and
 - signature authorisations; and
- corporate authorisations for the target – approval of:
 - a change of shareholding (or transfer of assets);
 - a change of director(s);
 - a change of company secretary;

- a change of auditor; and
- a change of bank signatories.

8.3 In case of a share deal, what is the process for transferring title to shares to the buyer?

In Hong Kong, title to shares is transferred only once stamp duty has been paid to the Stamp Duty Bureau of the Inland Revenue Department. Stamping documents require careful consideration to ensure that this progresses smoothly. Two sticking points should be highlighted:

- As the basis for the amount of stamp duty is the higher of either the net asset value of the shares or the consideration agreed by the parties, the following documents must be presented to the Stamp Duty Bureau in a satisfactory form:
 - the latest audited financial statements;
 - management accounts for any full financial year after the latest audited financial statements have been made up to; and
 - management accounts from the date of the last full financial year until a date falling less than three months before the date of the transfer of shares.
- The documents for stamping must be signed by hand (also described as 'wet-ink signature').

Other documents are required for stamping, but these are not usually regarded as sticking points. Once stamping is effective, the company secretary of the target appointed by the seller is responsible for updating:

- the register of transfers;
- the register of members; and
- the register of significant controllers of the target.

Once those changes are effected, the company secretary selected by the buyer and appointed in the closing documents will take over.

8.4 Post-closing, can the seller and/or its advisers be held liable for misleading statements, misrepresentation, omissions or similar?

Hong Kong being a common law jurisdiction, case law on consent, contract formation and tort apply to share and asset purchase agreements subject to Hong Kong law.

It is standard practice for professionally drafted contracts to include provisions limiting the liability of the seller and/or its advisers. However, these provisions cannot exclude liability for fraud and they are subject to the Control of Exemption Clauses Ordinance (Cap 71), which governs the fairness and reasonableness of exclusion of liability clauses. Hong Kong courts consistently uphold sellers' liability for fraudulent misrepresentation or undue influence resulting in damages for the buyer (see for illustration (*Landway Investments Ltd v Area Asia Ltd* - (安域亞洲有限公司) [2021] HKCU 745).

8.5 What are the typical post-closing steps that need to be taken into consideration?

Typical post-closing steps that need to be taken include the following:

- The Stamp Duty Bureau of the Inland Revenue Department may require a few days or additional documents to determine the amount of stamp duty due; and
- There may be bank delays (see also question 15).

9. Competition

9.1 What competition rules apply to private M&A transactions in your jurisdiction?

In Hong Kong, the Competition Ordinance (Cap 619) provides for three main prohibitions:

- Restrictive agreements and concerted practices – the First Conduct Rule: Under this rule, an exemption is available for an agreement between undertakings if their combined turnover does not exceed HK\$200 million.
- Abuse of a substantial degree of market power – the Second Conduct Rule: Under this rule, an exemption is available for an undertaking whose annual turnover does not exceed HK\$40 million.
- Mergers and acquisitions that substantially lessen competition – the Merger Rule: This applies only to transactions in the telecommunications sector.

9.2 What key concerns and considerations should participants in private M&A transactions bear in mind from a competition perspective?

In Hong Kong, participants in private M&A transactions should keep in mind the following prohibitions:

- Examples of conduct that may contravene the First Rule of Conduct (see question 9.1) include:
 - price-fixing;
 - market-sharing;
 - bid-rigging; or
 - restricted output.
- Examples of conduct that may contravene the Second Rule of Conduct (see question 9.1) include:
 - predatory pricing;
 - anti-competitive tying and bundling;
 - margin squeeze;
 - refusals to deal; and
 - exclusive dealing.

10. Employment

10.1 What employee consultation rules apply to private M&A transactions in your jurisdiction?

There are no statutory consultation rules that apply to private M&A transactions in Hong Kong. However:

- a buyer should be attentive to maintain the assets that it is purchasing, including the workforce and their know-how; and
- adequate communication should be considered.

10.2 What transfer rules apply to private M&A transactions in your jurisdiction?

In Hong Kong, there is no principle of automatic transfer of employees upon a business transfer. There is no equivalent to the transfer of undertakings regime in the United Kingdom.

- Share purchase transaction: After the purchase, there is continuity in employment, as the target remains the employer, whether it is owned by the seller or the buyer.

As such, according to the employment contracts entered into by the target, the buyer can choose whether to:

- retain the employees;
 - terminate the employees; or
 - change the terms of their employment contracts (with the employees' consent).
- Asset purchase transaction: For employees to be transferred to the buyer:
 - the seller should terminate the existing employment contracts; and
 - the buyer should execute new employment contracts with each employee.

Where new contracts are executed with the buyer, the employees' period of employment does not break upon the transfer.

10.3 What other protections do employees enjoy in the case of a private M&A transaction in your jurisdiction?

In relation to termination, generally speaking, Hong Kong employees enjoy protection against termination in certain situations, such as pregnancy and while on sick leave, as provided for under the Employment Ordinance (Cap 57).

In relation to a transfer of business, the protections under the Employment Ordinance that protect the employees' continuity of employment ensure that certain statutory benefits can still be claimed from the buyer. These include:

- entitlement to claim statutory long-service payment, where there is a minimum requirement of five years of continuous service; or
- entitlement to claim statutory severance payment, where there is a redundancy and the employee is employed continuously for 24 months.

Where employment contracts have been lawfully terminated by the seller, an employee will not be entitled to statutory severance payment if:

- the buyer:
 - recognises the employee's previous years of service with the seller;
 - renews the employee's employment contract or makes a new offer of employment not less than seven days before the termination date by the seller; and
 - makes the new offer on the same terms or on no less favourable terms; and
- the employee unreasonably rejects the new offer.

The same rule applies to long service payment payable to employees employed under a fixed-term employment contract.

In terms of liability, generally speaking:

- the buyer is liable for all employment entitlements accrued pre-transfer; and
- the seller is liable for entitlements accrued post-transfer.

However, this is a complex area of law which is highly fact sensitive.

10.4 What is the impact of a private M&A transaction on any pension scheme of the seller?

In Hong Kong, employers' pension schemes are managed by regulated financial services providers under the Mandatory Provident Fund Schemes Ordinance (Cap 485) (MPFSO).

The minimum contribution for the employer is 5% of the employee's salary on a monthly basis, with a monthly cap currently at HK\$1,500. The employee's minimum contribution is the same amount monthly.

- Share purchase transaction: Since the employer remains the same corporate entity (ie, the target), there is no change to notify to the MPFSO service provider with this regard.
- Asset purchase transaction: The buyer should:
 - plan to continue with the same MPFSO service provider as the seller; or
 - arrange to appoint a new one.

Buyers should note that an employer's failure to enrol an employee in a mandatory provident fund (MPF) scheme is a serious offence, punishable by:

- imprisonment for up to three years; or
- a fine of up to HK\$350,000.

The seller is responsible for compliance with the MPFSO prior to the transfer of business. The purchase agreement should ideally contain a warranty by the seller of such compliance. As part of the due diligence process, the buyer should also have a complete record of the MPF contributions of each employee to ensure compliance with the MPFSO and the Employment Ordinance.

Buyers should also be attentive to the change in the MPF offsetting statutory regime in Hong Kong. Currently, the employer can use its accrued MPF contributions to offset statutory severance or long-service payment that is due to an employee on termination of employment. From 1 May 2025, employers will no longer be allowed to deduct MPF contributions to cash out such severance or long-service payments due to employees.

10.5 What considerations should be made to ensure there are no concerns over the potential misclassification of employee status for any employee, worker, director, contractor or consultant of the target?

In Hong Kong, in determining such classification, the courts adopt a 'substance over form' approach, assessing the level of supervision, control and integration. It follows that the buyer should conduct thorough factual due diligence to verify such status beyond what is stated in the paperwork.

Where the actual relationship differs from the status in the contract (eg, 'employee' or 'freelancer'), the buyer potentially risks exposure to significant liabilities related to non-compliance with the Employment Ordinance. In this case, the buyer should negotiate the signature of new contracts:

- as a condition precedent (with an effective date from completion); or
- as part of the completion deliverables.

10.6 What other key concerns and considerations should participants in private M&A transactions bear in mind from an employment perspective?

Hong Kong has an employee-friendly system for filing claims at the Labour Tribunal that is relatively easy and inexpensive compared to other jurisdictions.

As such, the buyer should conduct adequate due diligence, including but not limited to the following high-risk areas:

- Termination of employees: Ensure that termination payments legally due to employees have been:
 - calculated accurately (which is often subject to dispute); and
 - paid in accordance with the statutory deadlines under the Employment Ordinance (for most payments, seven days after the effective date of termination).
- Restrictive covenants: Check that they are enforceable and not an unreasonable restraint of trade.

- Annual leave: Check:
 - that the buyer's policies (eg, on carrying forward leave entitlements) are compliant with the Employment Ordinance; and
 - whether any outstanding payments for accrued but untaken annual leave are due.
- End-of-year payments: Check that employees have been paid any bonuses to which they are legally entitled.
- Pension/MPF scheme: Check that:
 - no delays have been incurred; and
 - adequate contributions have been made in compliance with the MPFSO.

Historic risks should be clearly borne by the seller as part of the warranty and indemnity provisions in the purchase agreement. The buyer should hit the ground on the first day after completion on a healthy basis, with adequate employment contracts, policies and a staff handbook to provide clear guidance for both mundane and exceptional work situations.

11. Data protection

11.1 What key data protection rules apply to private M&A transactions in your jurisdiction?

Roles of the parties: The role of each party to the M&A determines:

- its responsibilities;
- which agreements may be required; and
- its potential liability.

Under Section 2 of the Personal Data (Privacy) Ordinance (Cap 486) (PDPO), each company will have one of the following roles for each use it makes of personal data:

- Data user: A person that, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data, deciding how and why to use any personal data, including processing personal data in line with its own professional judgement and obligations.
- Authorised person: A person authorised in writing by the data user to collect, hold, process or use the data under the direct control of the data user, or on behalf of the data user; it only uses data on behalf of the data user (to provide a basic service to the data user).

In an ordinary M&A deal, we might expect to see the following:

Deal role	Data protection role in light of the PDPO
Seller/target	Data user
Buyer or investor	Data user
Professional adviser (lawyer, accountant)	Data user
Data room provider	Authorised person
Data room provider's vendors (cloud storage, sub-processor technical support)	Authorised person

Transfer of data outside of Hong Kong: If the target operates in Hong Kong and the due diligence or completion of the deal means that relevant personal data will be transferred outside of Hong Kong, data users must:

- notify the data subjects of the purposes of the data transfers and the classes of data transferees; and
- ensure that the transfer is for a purpose for which the data was to be used at the time of collection of the data or a directly related purpose.

The most common cross-border personal data transfer options in M&A deals include the following:

- Adequacy decision: Personal data can be transferred to countries in which the data protection requirements are substantially similar to those under Hong Kong law and serve the same purpose.
- Express consent: Personal data can be transferred outside of Hong Kong if the data user has obtained written consent to the transfer.
- Contractual requirement: The transferee is under a contractual obligation to safeguard the personal data in accordance with Hong Kong laws.

Although Section 33 of the PDPO has not yet come into effect, it is highly recommended to implement these measures now to ensure compliance with the upcoming regulations.

11.2 What other key concerns and considerations should participants in private M&A transactions bear in mind from a data protection perspective?

Data protection issues should be considered at each stage of the transaction – the following list is illustrative only:

- **Non-disclosure agreement:** Appropriate data-sharing provisions should be included, such as obligations on any potential buyers to restrict how they can use the data and manage potential risks (eg, a data breach), in addition to any transfer safeguards.
- **Data room set-up:** The company engaging the data room provider should ensure that the agreement includes appropriate provisions to authorise the collection, holding, processing and use of personal data on behalf of the data user.
- **List of documents required:** The buyer or investor should ask relevant questions to assess the target's compliance, including standard documentation and more significant risk factors (eg, internal policies, direct marketing, data transfers, records of processing, data protection agreements, data protection risk assessments, breaches, subject rights requests and the appointment of a data privacy officer or representative).
- **Population of the data room:** The target should balance full and fair disclosure with data protection principles, including:
 - taking a proportional approach; and
 - minimising the personal data that can be provided.

Avoid providing unnecessary personal data and anonymise or pseudonymise personal data – for example, by redacting it – where possible. Ensure that there is a legal basis for the disclosure, particularly for employees' personal data.

- **Legal documentation:**
 - Include appropriate data protection warranties in the share purchase agreement or asset purchase agreement (if relevant);
 - Check any disclosures carefully to ensure that they are specific and do not raise new issues; and
 - If there will be any transitional services, ensure that the data protection wording reflects the parties' roles (eg, if the processor provides services to the buyer, will the target or seller become a processor?).
- **Post-completion:**
 - Inform data subjects of the changes in controllership of their data; and
 - Update privacy policies accordingly.

12. Environment

12.1 Who bears liability for the clean-up of contaminated sites? How is liability apportioned as between the buyer and the seller in case of private M&A transactions?

There is no clear answer to the question of who is liable for the clean-up of contaminated land in Hong Kong:

- All land (with one exception on Hong Kong island) in Hong Kong is leasehold (ie, owned by the government and held by occupiers on a leased or sub-leased basis); and
- Under common law, current site developers do not generally owe a duty to future developers, but they do owe a general duty to neighbouring current and future owners.

In case of private M&A transactions, liability is apportioned as between the buyer and the seller as follows:

- Asset share: The seller and buyer are free to allocate the risk of environmental liability by agreement. In practice, it is usually the buyer that is held liable for environmental damage, so the buyer will generally want to obtain a contractual indemnity from the seller. The seller does not normally retain liability after an asset sale.
- Share sale: Environmental liability remains with the company being transferred, not the transferor or the transferee.

12.2 What other key concerns and considerations should participants in private M&A transactions bear in mind from an environmental perspective?

There is no obligation to disclose environmental information. The *caveat emptor* principle applies in Hong Kong, but if a seller refuses to disclose after a request, this may result in a transfer of liability.

Other considerations include:

- conducting a brief site visit and reviewing information (eg, historical maps, geological or hydrological surveys and process information); and
- determining and allocating responsibility for any identified environmental risks/cleanup, obtaining contractual protection where appropriate from the seller.

13. Tax

13.1 What taxes are payable on private M&A transactions in your jurisdiction? Do any exemptions apply?

The transfer of shares in a Hong Kong private company is subject to a 0.2% stamp duty. By default, the stamp duty is shared equally between buyer and seller, but the parties can agree otherwise. The basis for the stamp duty calculation is the higher of:

- the consideration for the shares; and
- the pro-rated net asset value of the company.

Exemptions are available upon application to the Inland Revenue Department where the transferor and the transferee are in the same group.

Since 1 January 2023, disposal gains from the sale of shares in a company incorporated outside Hong Kong and received by a Hong Kong company (seller) are taxable in Hong Kong as corporate profits unless one of the following exceptions applies:

- The seller meets the economic substance requirement: As defined by the new Section 15K of the Inland Revenue Ordinance (Cap 112), the economic substance requirement differs for pure equity-holding entities and non-pure equity-holding entities. This provision is modelled on the Guidance on the Interpretation of the Third Criterion of the Code of Conduct for Business Taxation issued by the Code of Conduct Group (Business Taxation) of the European Union.
- The participation exemption applies: This exemption requires:
 - a minimum threshold of detention (5%) for the past 12 months; and
 - that the company whose shares are sold have been subject to tax of substantially of the same nature as profits tax in the foreign jurisdiction at a rate of at least 15%.

13.2 What other strategies are available to participants in a private M&A transaction to minimise their tax exposure?

Commercial, financial and tax considerations should be assessed in the early stages of the M&A transaction, as part of the structuring discussions referred to in question 7.8.

13.3 Is tax consolidation of corporate groups permitted in your jurisdiction? Can group companies transfer losses between each other for tax purposes?

Although, subject to certain exceptions, group companies in Hong Kong must prepare consolidated financials for accounting purposes, Hong Kong does not allow groups of companies to file consolidated profits tax returns. There is no group loss relief (eg, loss consolidation, loss transfer) for taxpayers in group companies.

13.4 What other key concerns and considerations should participants in private M&A transactions bear in mind from a tax perspective?

Two practical considerations are relevant here:

- Tax residency: Hong Kong has entered into about 50 comprehensive double taxation agreements ([accessible here](#)). For corporate entities, the benefit of these agreements is conditional on their tax resident status. Tax resident status in Hong Kong is evidenced by a certificate of resident status issued by the Inland Revenue Department. The criteria considered for the issue of a certificate partially depend on the residence definition in the comprehensive double taxation agreement considered; the applicant must also meet minimum conditions set out by the Inland Revenue Department.
- Audit: In Hong Kong, the year of assessment runs from 1 April to 31 March. For profits tax purposes, the basis period is the accounting year of the taxpayer ending in the year of assessment. Profits tax returns are filed with audited financial statements which are conducted by certified public accountants. The audit can prove challenging for the buyer's team, with a new auditor appointed by the buyer, and this should be anticipated properly to avoid late filing and attendant penalties.

14. Trends and predictions

14.1 How would you describe the current M&A landscape and prevailing trends in your jurisdiction? What significant deals took place in the last 12 months?

In general, Asia-Pacific deals have slowed down significantly. The recent economic slowdown in China has also impacted deal value in Hong Kong.

However, as a silver lining, due to the volatile stock market and low valuations of listed companies, going-private transactions have been increasing. By March 2024, the value of such deals in Hong Kong stood at approximately US\$4 billion – more than three times the value for the whole of 2023 (US\$1.2 billion). Going-private bids have attracted companies such as French cosmetics brand L'Occitane and China-based truck manufacturer CMIC Vehicles, both of which officially delisted from the Hong Kong Stock Exchange in 2024.

Overall, the most active sectors are real estate and property, followed by technology, media telecommunications, which is underpinned by the significant growth and activity in AI.

14.2 Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

No.

15. Tips and traps

15.1 What are your top tips for the smooth closing of private M&A transactions and what potential sticking points would you highlight?

Anticipation is crucial to ensure the smooth closing of private M&A transactions. Legal transaction management platforms enable parties and their lawyers to share the draft deliverables in a structured manner in advance, to avoid unnecessary surprises.

One sticking point specific to Hong Kong is the delay in banks effecting the requisite changes and the absence of dedicated transaction teams in commercial banks. Whenever possible, parties should consider the feasibility of:

- opening a new bank account with a digital financial service provider; and
- using it until the changes of ownership, directorship and signature are effective.

The rationale is that these digital financial service providers are capable of completing the necessary compliance checks and providing online payments services within days, instead of weeks or months as for commercial banks.

The law in this respect is complex. The information provided in this article does not, and is not intended to, constitute legal advice and should not be relied upon as such.

For professional legal advice, please do not hesitate to contact us.