

Public mergers and acquisitions in Hong Kong: overview

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

Public M&A activity in Hong Kong was robust in 2015. According to the HKEX Fact Books published by Hong Kong Exchanges and Clearing Limited, there were 50 offers closed in 2015 in respect of companies listed in Hong Kong (compared to 40 in 2014).

Listed companies that were targeted with offers in 2015 covered a broad range of industries including consumer goods/services, financials, properties and construction. There were only a small number of private equity backed deals.

The more notable and high-profile M&A deals in 2015 included the following:

- The merger of China CNR Corporation Limited with CSR Corporation Limited by way of absorption by CSR Corporation Limited involving a share exchange offer.
- The merger of CK Hutchison Holdings Limited (which replaced Cheung Kong (Holdings) Limited as the holding company of the Cheung Kong Group by way of a scheme of arrangement) and Hutchison Whampoa Limited involving a share exchange offer for the cancellation of shares in Hutchison Whampoa Limited by way of a scheme of arrangement.
- The attempted merger of Cheung Kong Infrastructure Holdings Limited and Power Assets Holdings Limited involving a share exchange offer for the cancellation of shares in Power Assets Holdings Limited by way of a scheme of arrangement.

2. What are the main means of obtaining control of a public company?

The two most common means of obtaining control of a public company (target) are by way of:

- General offer.
- Scheme of arrangement.

The availability of some of the options (compulsory acquisition and scheme of arrangement) depend on the local laws of the jurisdiction in which the target is incorporated.

General offer

Voluntary offer. A bidder can make a voluntary offer to all shareholders to acquire their shares in the target.

Mandatory offer. A bidder can acquire shares from existing shareholders or subscribe for new shares in a target in order to obtain control of it. The Hong Kong Code on Takeovers and Mergers (Takeovers Code) requires a general offer to be made by a person or group of persons acting in concert to acquire all the remaining shares of a target not already held by them when they acquire 30% or more of the voting rights in the target (see *Question 16*).

An offer can be made for cash, or for securities with or without a cash alternative (see *Questions 17 and 18*). All offers must be conditional on the bidder having received acceptances in respect of shares that will result in the bidder and persons acting in concert with it holding more than 50% of the voting rights of the target. A voluntary general offer can be made conditional on an acceptance level of shares carrying a higher percentage of the voting rights (see *Question 13*).

Compulsory acquisition. If the bidder aims to acquire 100% control of the target but its offer is not accepted by all the shareholders, it can exercise its compulsory acquisition right to compel the shareholders who have not accepted the offer to sell the remaining shares to it. This right is subject to the relevant requirements of the local laws of the jurisdiction in which the target is incorporated and the Takeovers Code (see *Question 20*).

Scheme of arrangement

A bidder can also acquire 100% control of a target using a scheme of arrangement. This is a statutory procedure involving a court sanctioned arrangement between the target and its shareholders. It is typically implemented by cancelling all the shares of the target for cash, or for securities with or without a cash alternative, followed by issuing new shares to the bidder.

The Takeovers Code requires that a scheme of arrangement can only be implemented if approved by at least 75% of the votes attaching to the shares not already held by the bidder and persons acting in concert with it (disinterested shares) cast at a meeting of the holders of the disinterested shares. The number of votes cast against the resolution to approve the scheme at the meeting cannot be more than 10% of the votes attaching to all disinterested shares. The local laws in some jurisdictions may also require the scheme to be approved by a majority in number of the shareholders attending the meeting.

In contrast to a general offer (which is made by the bidder to the target's shareholders directly and may therefore be either a recommended offer or a hostile takeover), a scheme of arrangement is technically an arrangement entered into with the target's shareholders and is not normally used for effecting a hostile takeover.

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids are allowed but not common in Hong Kong because many public companies in Hong Kong are owned by shareholders with significant or controlling stakes, potentially affecting the chance of successful hostile bids.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

Laws and regulations

The following laws and regulations are applicable:

- **Hong Kong Code on Takeovers and Mergers (Takeovers Code).** This applies to takeovers and mergers affecting Hong Kong public companies in Hong Kong and companies with a primary listing of their equity securities in Hong Kong. The Takeovers Code does not have the force of law.
- **Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (Main Board Listing Rules).** These apply to all companies listed on the Main Board of The Stock Exchange of Hong Kong Limited (SEHK). Such companies must comply with the disclosure and shareholders' approval requirements, dealing restrictions, public float requirements and de-listing procedures under the Main Board Listing Rules when they are involved (either as bidder, target or seller) in public takeovers and mergers. The Main Board Listing Rules have no force of law.
- **The Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited (GEM Listing Rules).** These apply to all companies listed on the Growth Enterprise Market of the SEHK. Such companies must comply with the disclosure and shareholders' approval requirements, dealing restrictions, public float requirements and de-listing procedures under the GEM Listing Rules when they are involved (either as bidder, target or seller) in public takeovers and mergers. The GEM Listing Rules have no force of law.
- **Companies Ordinance (Chapter 622, Laws of Hong Kong).** This applies to companies incorporated in Hong Kong and contains the relevant statutory provisions regulating compulsory acquisitions and schemes of arrangement.
- **Securities and Futures Ordinance (Chapter 571, Laws of Hong Kong) SFO.** This sets out the laws relating to the regulation of the securities and futures market and the protection of investors. In the context of public takeovers and mergers involving companies listed on the SEHK, this legislation contains the relevant statutory provisions regulating:
 - disclosure of interests in listed companies;
 - disclosure of inside information relating to listed companies;
 - insider dealing and other market misconduct in relation to the securities of listed companies.

Regulatory bodies

The relevant regulatory bodies are the:

- Securities and Futures Commission (SFC).
- SEHK.
- Companies registry.

Industry specific regulation

Public takeovers and mergers of companies in certain regulated industries in Hong Kong are subject to certain ownership and control restrictions under the relevant Hong Kong statutory laws:

- **Banking.** The banking sector is regulated under the Banking Ordinance (Chapter 155, Laws of Hong Kong) by the Hong Kong Monetary Authority.
- **Insurance.** This sector is regulated under the Insurance Companies Ordinance (Chapter 41, Laws of Hong Kong) by the Insurance Authority.
- **Telecommunications and broadcasting.** The three main statutes governing this sector are:
 - Telecommunications Ordinance (*Chapter 106, Laws of Hong Kong*);
 - Broadcasting Ordinance (*Chapter 562, Laws of Hong Kong*);
 - Competition Ordinance (*Chapter 619, Laws of Hong Kong*).The Competition Ordinance currently applies only to mergers involving carrier licensees in the telecommunications sector. The regulators are the:
 - Communications Authority;
 - Competition Commission.Both regulators have concurrent jurisdiction in respect of the anti-competitive conduct of certain undertakings operating in the telecommunications and broadcasting sectors.
- **Securities.** This sector is regulated under the SFO by the SFC.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

In general, a bidder makes financial, business and legal due diligence enquiries that allow it to assess the risks involved before making a bid. The due diligence responses will help the bidder to understand:

- The obligations it will assume.
- The nature and extent of the target's contingent liabilities.
- Third party consents required for the acquisition.
- The target's potential for growth.
- Intellectual property issues.
- Litigation risks.

Where the target is a listed company, a bidder can also conduct due diligence based on information available in the public domain.

In a recommended bid, a bidder can directly request from the target certain additional due diligence information not available in the public domain. This can include, among other things:

- Statutory records.
- Material contracts (such as customer contracts, supplier contracts, employment agreements, partnership agreements, guarantees or loan documentation, plant and machinery leases).
- Licences or permits.

- Particulars of disputes and litigation.
- Intellectual property rights.

The target may make certain information available to a bidder after the bidder has signed a confidentiality agreement. The target must be careful not to selectively disclose its inside information to the bidder.

Where there are competing bidders, the target must, on request, give equal access to the same information to all the bidders, including any who are less welcome.

The bidder's teams of legal and other advisers will review the information provided by the target and prepare due diligence reports for the bidder's consideration.

Hostile bid

In a hostile bid, it is unlikely that a bidder will have access to the due diligence information usually provided in a recommended bid. Instead, it will rely on publicly available information.

Public domain

Publicly available information on Hong Kong listed companies includes:

- Public announcements and circulars relating to their corporate actions and significant business developments and transactions.
- Financial reports published on the website of The Hong Kong Exchanges and Clearing Limited pursuant to the Main Board Listing Rules/GEM Listing Rules.
- Directors' interests and short positions in the shares and debentures of the listed companies and substantial shareholders' (5% or more) interests and short positions in the shares of the listed companies.
- Other information published on the corporate website.
- Information that can be retrieved by conducting searches at the relevant government authorities in Hong Kong, including the:
 - Companies Registry;
 - Land Registry;
 - Trade Marks Registry;
 - Official Receiver's Office; and
 - Hong Kong courts.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

The Takeovers Code requires the parties involved in a potential offer to maintain absolute secrecy before the offer is publicly announced. Any person privy to confidential information (particularly price-sensitive information concerning a potential bid) must not pass on that information to another person unless it is necessary and the other person understands the need for secrecy. All persons must conduct themselves so as to minimise the chances of an accidental leak of information. See *Question 7* for where the bidder approaches certain shareholders before a bid is made.

Given that information on a potential bid is likely to be price-sensitive and to constitute inside information, any listed company (whether it be bidder, target or seller) and its directors must take all reasonable steps to maintain strict confidentiality until it is announced pursuant to the Main Board Listing Rules/GEM Listing Rules.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

In a voluntary general offer and takeover by way of scheme of arrangement, a bidder will usually seek an irrevocable undertaking from shareholders with significant or controlling stakes to accept the offer or vote in favour of the resolution for approving the scheme.

The Takeovers Code provides that a bidder can approach a very restricted number of sophisticated investors who have a controlling shareholding to obtain an irrevocable commitment. In all cases, the Securities and Futures Commission (SFC) must be consulted before any approach is made to a shareholder.

Under a practice note issued by the SFC, a bidder can only approach shareholders within one day of the release of the offer announcement (or two days if they are overseas). The bidder can only reveal information that will eventually be set out in the announcement of a firm intention to make an offer.

In hostile bids, or where shareholders are approached before the announcement of a possible offer, the maximum number of shareholders who can be approached is six. The approached shareholders will agree to be insiders and be subject to all the rules and regulations applicable to insiders. The potential bidder must show the steps (for example, obtaining signed confidentiality undertakings from the relevant shareholders) being taken to prevent information being leaked.

Details of the irrevocable undertakings (including the circumstances in which they will cease to be binding) must be set out in the offer announcement and offer document. Copies of the undertakings must be made available for inspection on the website of the issuer of the offer document from the time the offer document is published until the end of the offer period.

If the irrevocable undertaking to accept an offer is combined with an arrangement which constitutes a "special deal" as defined in the Takeovers Code (an arrangement with favourable conditions that are not extended to all shareholders), consent must be obtained from the SFC.

The following are examples of arrangements that constitute special deals:

- An option to put the shares should the offer fail.
- Payment of finders' fees.
- An option guaranteeing that the original offer price will be a minimum.
- Disposal of the target's assets to a particular shareholder.

The SFC usually consents to a special deal if it can be established that the terms are fair and normal commercial terms, and disinterested shareholders' approval is obtained.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

A person (other than a director) has a duty under the Securities and Futures Ordinance) to disclose his interests in listed company shares when:

- His interest amounts to 5% or more of the voting shares.
- The interest increases or decreases.
- The nature of his interest changes.

A director of a listed company must disclose any interest in the shares of the listed company including when his interest increases or decreases, and when the nature of his interest changes.

When calculating the total number of shares in which a person is interested, the following must be included:

- All joint interests.
- Interests through equity derivatives.
- Any interests held by his spouse and children under the age of 18 years.
- Any interests held by controlled companies, trusts and nominees.
- Any interests held under a concert party arrangement.

Disclosure must be made to the Main Board of The Stock Exchange of Hong Kong Limited (SEHK) and the listed company concerned. The details of disclosure will be published on the SEHK's website.

If and when the bidder possesses any inside information on a listed company, it must cease dealing in its securities (including derivatives) until the inside information is publicly announced, or it commits insider dealing which constitutes a criminal offence and market misconduct.

If the stakebuilding crosses certain threshold triggers specified under the Takeovers Code, the bidder must make a mandatory general offer to all shareholders to acquire the remaining shares not held by it or persons acting in concert with it (see *Question 16*).

If the bidder is a listed company, it may be subject to the disclosure and/or shareholders' approval requirements under the Main Board Listing Rules/GEM Listing Rules depending on the value of the stakes to be acquired and the size of the target relative to the bidder.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

It is not common for a target board to enter into a formal agreement for a recommended offer.

The Takeovers Code requires the target board to establish an independent board committee to make a recommendation and to retain a competent independent financial adviser to advise it on:

- Whether the offer is, or is not, fair and reasonable.
- Acceptance or voting.

The independent financial adviser's written advice (including reasons) must be made known to shareholders by including it in the target board circular along with the recommendations of the independent board committee on the offer.

Shareholders must be informed and a detailed explanation must be given to them:

- When the target board is not able to express a view on the merits of an offer or to give a firm recommendation.
- When there is a divergence of views among board members or between the board and the independent adviser as to either the merits of an offer or the recommendation.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

Break fees are not common in Hong Kong.

If a break fee is payable by the target on the occurrence of certain specified events that prevent the offer from proceeding or cause it to fail, the target board and its financial adviser must confirm to the Securities and Futures Commission in writing that they believe the fee is in the best interests of shareholders. The fees must be minimal (normally no more than 1% of the offer value).

Committed funding

11. Is committed funding required before announcing an offer?

Committed funding is required before the bidder can announce its firm intention to make an offer.

The bidder's financial adviser must provide written confirmation to the Securities and Futures Commission that it is satisfied that there are sufficient resources available to satisfy acceptance of the offer in full. This confirmation must also be set out in the offer announcement and offer document.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

An announcement of a firm intention to make an offer setting out the terms of the offer and other details required under the Takeovers Code should only be made when the bidder has every reason to believe that it can and will continue to be able to implement the offer.

Before an announcement of a firm intention to make an offer is made, there may be circumstances where the bidder/potential bidder or the target must make an announcement of a possible offer when, for example:

- The target is the subject of rumour or speculation about a possible offer.
- There is undue movement in its share price or volume of share turnover.
- Negotiations or discussions are about to be extended to include more than a very restricted number of people.

Before the target board is approached, the responsibility for making an announcement will normally rest with the bidder or potential bidder. Following an approach to the target board (which

may or may not lead to an offer) the primary responsibility for making an announcement will normally rest with the target board.

This is an indicative timetable of a general offer following an announcement of the terms of the offer is set out below:

- **Day 0.** Offer document is posted by the bidder or a composite document (combining the offer document and the target board circular) is posted by the bidder and the target (see *Question 14*) within 21 days (or, for a securities exchange offer, 35 days) of the date of the announcement of the terms of the offer.
- **Day 14.** Last day for posting the target board circular.
- **Day 21.** First permitted closing date if the target board circular is posted on the same day as the offer document, or combined in a composite document.
- **Day 28.** First permitted closing date if a target board circular is posted after the offer document.
- **Day 35.** First permitted closing date of the offer if it is declared unconditional on Day 21.
- **Day 39.** Last day for target to announce material new information.
- **Day 42.** First permitted closing date of the offer if it is declared unconditional on Day 28. Last day for accepting shareholders withdrawing their acceptance if the first closing date of offer is Day 21.
- **Day 46.** Last day for revision of the offer if the offer has not by then become unconditional as to acceptances.
- **Day 49.** Last day for accepting shareholders withdrawing their acceptance if the first closing date of offer is Day 28.
- **Day 60.** Last day for the offer to become or be declared unconditional as to acceptances. Last day for accepting shareholders to withdraw their acceptance.
- **Day 81.** Last day for all other conditions to the offer to be fulfilled.

If a competing offer has been announced, both bidders will normally be bound by the timetable established by the posting of the competing offer document. If a competitive situation continues to exist in the later stages of the offer period, the Securities and Futures Commission (SFC) will normally require revised offers to be published in accordance with an auction procedure, the terms of which will be determined by the SFC. That procedure will normally require final revisions to competing offers to be announced by the forty-sixth day following the posting of the competing offer document, but will enable a bidder to revise its offer within a set period in response to any revision announced by a competing bidder on or after the forty-sixth day.

In certain circumstances, the prescribed time requirements may be waived or extended on a case-by-case basis by the SFC.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Voluntary offer

A voluntary offer must be at least conditional on the bidder receiving acceptances that result in the bidder and persons acting in concert with it holding more than 50% of the voting rights in the target. A voluntary offer can be made conditional on an acceptance level of shares carrying a higher percentage of the voting rights, but bidders must comply with the public float requirements under

the Main Board Listing Rules/GEM Listing Rules if the target is intended to remain listed after the takeover.

Other conditions (except those that depend on the bidder's own judgement or the fulfilment of which is in his control or discretion) can be specified in a voluntary offer. Common conditions include, among other things:

- Regulatory approvals.
- Anti-trust approvals.
- Target's shares remain listed/traded on The Stock Exchange of Hong Kong Limited.
- No material adverse change in the business, financial or trading position or prospects of the target.

Pre-conditional offers are permitted when potential bidders are considering making a possible offer but do not want to be bound to it. The Takeovers Code provides that the Securities and Futures Commission (SFC) must be consulted prior to making a pre-conditional possible offer announcement.

To ensure that shareholders can accurately assess whether a pre-conditional possible offer will be forthcoming, the announcement must state whether or not the pre-conditions must be satisfied before an offer can be made, or whether they are effectively waivable. Unlike offer conditions (which must be objective and not solely within the bidder's control) the pre-conditions for a possible offer can be subjective.

Mandatory offer

A mandatory offer can only be conditional on the bidder receiving acceptances that result in it and persons acting in concert with it holding more than 50% of the voting rights in the target. Unlike a voluntary general offer, the SFC's consent is needed to impose a higher acceptance condition.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

The Takeovers Code requires a bidder to post an offer document within 21 days (or, in the case of a securities exchange offer, 35 days) of the date of the announcement of the terms of the offer. The offer document must contain information specified in the Takeovers Code to enable the target's shareholders to reach a properly informed decision. Such information includes:

- Details of the offer and accompanying conditions.
- The bidder's future plans regarding the target and its employees.
- Whether the bidder intends to avail itself of any powers of compulsory acquisition.
- Shareholding and dealing disclosures.

The target board must respond to the offer in a circular (or response document) to its shareholders within 14 days of the offer document being posted. The target board circular must also contain information specified in the Takeovers Code including:

- The target board's recommendations and advice to shareholders on whether to accept the offer.
- The independent financial adviser's advice.
- Shareholding and dealing disclosures.
- Financial information and details of the target's material contracts.

In a recommended bid, the offer document will typically be a composite document prepared by both the bidder and the target setting out all the information required in the offer document and the target board circular.

In a hostile bid, the offer document and the target board circular will normally be issued separately.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are no requirements for a target's board to inform or consult its employees about the offer.

If the target has adopted a share option scheme and has granted options to employees under it, its terms may provide for lapse of the options if they are not exercised during a prescribed period on a takeover offer is made. In such circumstances, the target must inform its employees about timing so they can exercise the options before they lapse.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

The Takeovers Code provides that unless a waiver is granted by the Securities and Futures Commission (SFC), a mandatory general offer must be made to all other target shareholders in the following circumstances:

- When a person or group of persons acting in concert acquire (whether by a series of transactions over a period of time or not) 30% or more of the voting rights of the target.
- When any person or group of persons acting in concert already holds not less than 30% and not more than 50% of the voting rights of the target, they acquire additional voting rights that increase their holding by more than 2% from the lowest percentage holding by that person or group of persons acting in concert in the preceding 12-month period.

The Takeovers Code specifies certain circumstances in which the SFC can waive the mandatory obligation to make a general offer. For example, when issuing new securities as consideration for an acquisition, or a cash subscription, or taking a scrip dividend otherwise results in an obligation to make a mandatory offer, the SFC normally waives the obligation if there is an independent vote at a shareholders' meeting. This is known as a "whitewash waiver".

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

The consideration commonly offered on a public takeover is cash and/or securities.

Voluntary offer

A bidder can offer cash or securities, or both, subject to the following:

- If the bidder (or any person acting in concert with it) has acquired target shares with 10% or more of the voting rights for cash during the offer period or six months before it, the consideration for the offer must be in cash or accompanied by a cash alternative, at not less than the highest price paid for the target shares. The Securities and Futures Commission (SFC) may also require the offer to be in cash where less than 10% has been purchased in the six months before the start of the offer

period from directors or other persons closely connected with the bidder or the target.

- If the bidder (or any person acting in concert with it) has acquired target shares with 10% or more of the voting rights in exchange for securities during the offer period or three months before it, the securities must be offered to all other shareholders of the target. In the case of a purchase from directors or persons closely connected with the bidder or the target, the SFC may require securities to be offered on the same basis where less than 10% has been purchased or where the purchase was made more than three months before the offer period. Unless the seller is required to hold the securities received until either the offer has lapsed or the offer consideration has been posted to accepting shareholders, the bidder will also be required to make an offer in cash or to provide a cash alternative.

Mandatory offer

The offer consideration must be wholly in cash or accompanied by a cash alternative.

18. Are there any regulations that provide for a minimum level of consideration?

Voluntary offer

The offer price in a voluntary offer cannot be more than a 50% discount to the target shares' market price (being the lesser of the closing price of the target's shares on the day before the offer announcement or the previous five days' average closing price).

If the bidder or persons acting in concert with it have purchased the target shares either within three months before the start of the offer period or during the period between the announcement of a proposed or possible offer and the announcement of a firm intention to make an offer, the offer price must not be less than the highest price paid by the bidder or persons acting in concert with it for such shares.

If, after an announcement of a firm intention to make an offer and during the offer period, the bidder or any person acting in concert with it purchases target shares above the offer price, the bidder must increase the offer price to the highest price (excluding stamp duty and dealing costs) paid for such shares. Target shareholders who accepted the original offer are entitled to receive the revised price.

Mandatory offer

Except with consent from the Securities and Futures Commission, the consideration price for a mandatory offer must not be less than the highest price paid by the bidder or persons acting in concert with it for the target shares during the offer period and for six months before it. If the voting rights were acquired for consideration other than cash, the offer price must be determined by independent valuation.

For both voluntary offer and mandatory offer, where the target has outstanding convertible securities, the bidder must make an offer for those securities for a minimum price based on the "see-through" price for the relevant equity share capital.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders.

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

The availability of compulsory acquisition rights depends on the local laws of the jurisdiction in which the target is incorporated.

If, within four months of the offer, the bidder acquires 90% of the shares not already held by it, the Takeovers Code provides that the bidder can, subject to any additional requirements imposed by law, exercise its compulsory acquisition right to compel the shareholders who have not accepted the offer to sell the remaining shares to it.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

If an offer is withdrawn or lapses before it becomes unconditional, the bidder is restricted for 12 months from:

- Launching a new offer.
- Acquiring shares that trigger a mandatory offer.

Where a privatisation offer has been unsuccessful, the bidder will normally be precluded from buying any shares in the target within 12 months of the offer lapsing if the result would be a de-listing of the target's shares on The Stock Exchange of Hong Kong Limited (unless previously approved by shareholders in accordance with the Main Board Listing Rules/GEM Listing Rules).

De-listing

22. What action is required to de-list a company?

The Main Board Listing Rules/GEM Listing Rules provide that a listed company can voluntarily withdraw its listing on The Stock Exchange of Hong Kong Limited (SEHK) in either of the following circumstances:

- Following a general offer, a right to compulsory acquisition is exercised under applicable laws and regulations, resulting in the acquisition of all the listed securities in the company.
- The company is privatised by way of a scheme of arrangement or capital reorganisation under the Takeovers Code and all the relevant requirements (including the shareholders' approval requirements) have been complied with.

A company must give its shareholders notice of the proposed withdrawal by announcing it and stating it in a circular to shareholders.

A company can also voluntarily withdraw its listing on the SEHK in other circumstances subject to certain shareholders' approval and other requirements under the Main Board Listing Rules/GEM Listing Rules, depending on whether the company has an alternative listing or not.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Other than stating its views against the bid in the target board circular, a target's board has limited options to defend a hostile bid. A general principle of the Takeovers Code provides that without shareholders' approval, a target's board cannot take any action resulting in any offer being frustrated, or deny shareholders an opportunity to decide on an offer's merit, including a hostile offer.

The target's board can respond to a hostile bid by approaching other friendly investors and, in consultation with the Securities and Futures Commission, propose an inducement fee to solicit a higher competing offer. Any such inducement fee must be minimal and normally no more than 1% of the offer value.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

Hong Kong stamp duty is payable on the transfer of shares in a company incorporated in Hong Kong. It is also payable on the transfer of shares registered in the branch register of members in Hong Kong of a company incorporated elsewhere but listed in Hong Kong. Stamp duty is currently calculated at 0.2% of the value of the shares or the purchase price paid, whichever is higher.

Stamp duty is usually split between the bidder and the selling shareholder. The amount payable by the selling shareholder is usually deducted from the amount payable to him on acceptance of the offer and the bidder will arrange for payment of the stamp duty on behalf of the selling shareholder.

As a scheme of arrangement (see *Question 2*) does not involve a transfer of shares, no stamp duty is payable in a takeover structured this way.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Other regulatory approvals are necessary when acquiring targets in certain industries (see *Question 4*).

Where specific regulatory approvals are required, the bidder should make either a pre-conditional offer (where it is a pre-condition to the offer that the specific regulatory approvals are obtained) or a conditional offer (where an offer is subject to obtaining specific regulatory approvals).

The consent of the Securities and Futures Commission (SFC) is required if an offer is subject to the prior fulfilment of a pre-condition and the pre-condition cannot be fulfilled within the time limit for posting the offer document under the Takeovers Code. Under these circumstances, the SFC normally requires that the offer document be posted within seven days of fulfilment of the pre-condition.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are generally no restrictions on foreign ownership of shares in Hong Kong, except for companies in certain specific sectors, such as the following:

- The aggregate of the voting shares in a sound broadcasting licensee to or in which foreign investors have, directly or indirectly, any right, title or interest, must not at any time exceed 49% of the total number of voting shares in the licensee.
- A foreign corporate investor cannot, without prior approval from the Communications Authority hold, acquire or exercise 2% or more of the total voting control of a licensee of domestic television programme services.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no specific restrictions in Hong Kong on repatriation of profits or exchange control rules for foreign companies.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

Restrictions

The Takeovers Code imposes restrictions against the following dealings during the offer period (except with the prior consent of the Securities and Futures Commission (SFC):

- Selling any securities in the target by the bidder or persons acting in concert with it.
- Where the consideration under an offer includes the securities of the bidder (or persons acting in concert with it), dealing in those securities by the bidder or its concert parties.

- Purchasing a target's shares or dealing in convertible securities, warrants, options or derivatives in respect of such shares by the financial adviser or stockbroker (except for exempt fund managers and exempt principal traders) to the target (or any of its parents, subsidiaries or fellow subsidiaries, or their associated companies or companies of which such companies are associated companies).
- Entering into or unwinding borrowing or lending arrangements for securities of the target (and in the case of securities exchange offers, the bidder) by the bidder, the target, their respective concert parties, the bidder's or the target's parents, subsidiaries or fellow subsidiaries, or their associated companies or companies of which such companies are associated companies, or a financial or professional adviser to any of those parties.

Disclosure

The Securities and Futures Ordinance imposes statutory obligations on a person to disclose his interests and dealings in the securities of a listed company once he (not being a director of the listed company) has an interest of 5% or more of the voting shares of the listed company or, if he is a director of the listed company (see Question 8).

The Takeovers Code also requires certain persons to make public or private dealing disclosures during the offer period in relation to their dealings in the relevant securities of the target or (in the case of a securities exchange offer) the bidder. These include the target, the bidder and their respective associates (which has a very broad definition under the Takeovers Code).

These dealings should be publicly disclosed (except for certain exceptions which can be privately disclosed) no later than 10.00 am on the business day following the date of the dealing. Public disclosure must be made in writing to the bidder and the target or their respective financial advisers, as well as to the SFC using the prescribed forms on the SFC's website. Private disclosures should be made in writing to the SFC using the prescribed forms on the SFC's website, but they are not published.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are no current proposals for reform.

THE REGULATORY AUTHORITIES

The Securities and Futures Commission (SFC)

W www.sfc.hk/web/EN/index.html

Main area of responsibility. The SFC is an independent statutory body responsible for regulating Hong Kong's securities and futures markets through, among other things, exercising oversight of regulations governing takeovers and mergers of public companies and of The Stock Exchange of Hong Kong Limited regulation of listing matters. It also sets and enforces market regulations, including investigating breaches of rules and market misconduct.

The Stock Exchange of Hong Kong Limited (SEHK)

W www.hkex.com.hk/eng/index.htm

Main area of responsibility. The SEHK is the primary regulator of listed companies.

ONLINE RESOURCES

Bilingual Laws Information System (BLIS)

W www.legislation.gov.hk/blis/eng/index.html

Description. BLIS is an electronic database of the legislation of Hong Kong established and updated by the Department of Justice. It provides English and Chinese texts (equally authentic) of ordinances and subsidiary legislation in force on or after 30 June 1997.

The Securities and Futures Commission (SFC)

W www.sfc.hk/web/EN/index.html

Description. The SFC's website contains the Takeovers Code, related practice notes and guidelines on disclosure of interests under the SFO.

Hong Kong Exchanges and Clearing Limited (HKEX)

W www.hkex.com.hk/eng/index.htm

Description. The HKEX website contains the Main Board Listing Rules/GEM Listing Rules and related guidance materials on the interpretation and administration of such rules.

Practical Law Contributor profiles



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Professional qualifications. Hong Kong, Solicitor, 1997; England and Wales, Solicitor (non-practising), 2001

Areas of practice. Public and private M&A; private equity transactions; securities law and regulatory compliance; capital markets.

Recent transactions

- Representing a subsidiary of state-owned JIC Capital Management on its US\$1.8 billion acquisition of power amplifier business from NXP Semiconductors NV (NASDAQ: NXPI).
- Advising China LVGEM Property Holdings on its HK\$1.5 billion takeover of a listed company (SEHK stock code: 95).
- Acting for SkyOcean Investment Holdings on its HK\$2 billion takeover of a listed company (SEHK stock code: 593).
- Advising a company indirectly controlled by the People's Government of Hebei Province of the PRC on its HK\$547 million takeover of a listed company (SEHK stock code: 1236).
- Representing Cosway Corporation Limited (HKSE stock code: 288) on the HK\$3.5 billion general offer and privatisation.

Publications

- M&A Squeeze-out Guide for Hong Kong, International Bar Association (2010 and 2014).
- Negotiated M&A Guide for Hong Kong, International Bar Association (2010 and 2014) (co-authored with Rhoda Yung).
- Treasury Shares Guide for Hong Kong, International Bar Association (2012 and 2014).
- New York Stock Exchange: Corporate Governance Guide, Hong Kong section (2014).

Professional qualifications. New South Wales, Australia, Legal Practitioner, 1996; Hong Kong, Solicitor, 1998

Areas of practice. Public and private M&A; private equity transactions; securities law and regulatory compliance; capital markets.

Recent transactions

- Advising China XLX Fertiliser (SEHK stock code: 1866) on its voluntary delisting in Singapore and S\$105.36 million cash exit offer for the company.
- Representing Chongbang Holdings (International) Limited on its US\$920 million capital raising from, among others, Ivanhoe Cambridge and APG Asset Management NV
- Acting for Nan Fung Group on its HK\$1.57 billion acquisition of certain units of Forterra Trust (a business trust registered and listed in Singapore) and the entire interest in the holding company of the trustee-manager and property manager of Forterra Trust
- Acting for SFC-licensed AMTD Group Company Limited and its management shareholder on Morgan Stanley Private Equity Asia's strategic investment in the company.
- Advising Sound Global (SEHK stock code: 967) on its voluntary de-listing in Singapore and S\$326.65 million cash exit offer for the company.

Publications

- Negotiated M&A Guide for Hong Kong, International Bar Association (2010 and 2014) (co-authored with Alexander Que).
- The Float Guide for Hong Kong, International Bar Association (2011).
- The Float Guide, Deacons (2014) (co-authored with Ronnie Bow).