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AND MERGERS
IN HONG KONG

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Contents

K&L Gates.....	v
Grant Thornton.....	vii
1 Local Economic, Political and Cultural Aspects.....	1
1.1 Political System.....	1
1.2 Legal System.....	5
1.2.1 Sources of Law.....	5
1.2.2 Law Enforcement.....	6
1.2.3 Judicial and Arbitral Proceedings.....	7
1.2.4 Recognition of Judgments and Arbitration Awards.....	9
1.3 Economic Environment.....	9
1.3.1 Economic Indicators.....	9
1.3.2 Regulatory Climate.....	10
1.3.3 Major Industries.....	11
1.3.4 Relationship with Mainland China.....	12
1.4 Cultural Aspects.....	13
1.5 Bribery, Corruption, Money Laundering and Terrorist Financing.....	14
1.5.1 FATF Rules in Hong Kong.....	14
1.5.2 Anti-bribery and Anti-corruption Laws.....	15
2 Regulatory Framework.....	16
2.1 Overview.....	16
2.1.1 M&A Transactions in Hong Kong.....	16
2.1.2 Business Vehicles in Hong Kong.....	17
2.1.3 M&A Laws and Regulatory Bodies.....	19
2.1.4 Due Diligence.....	27
2.1.5 M&A Practice Notes.....	30
2.2 Regulations Applicable to Business Entities.....	30
2.2.1 General.....	30
2.2.2 Private Companies.....	31
2.2.3 Public Companies.....	34
2.2.4 Listed Companies.....	35
2.3 Regulations Applicable to Transactions.....	40
2.3.1 General.....	40
2.3.2 Acquisition of Hong Kong Shares.....	41
2.3.3 Acquisition of Hong Kong Businesses.....	49
2.3.4 Acquisition of Hong Kong Licenses.....	50
2.3.5 Acquisition of Hong Kong-Listed Shares.....	51
2.3.6 Acquisition of Assets from Hong Kong-Listed Companies.....	57
2.4 Regulations Applicable to Business Controllers.....	61

	2.4.1	Directors.....
	2.4.2	Responsible Persons
	2.4.3	Controlling Persons of Listed Companies....
3		Antitrust/Competition Issues.....
	3.1	Competition Ordinance
	3.1.1	Conduct Prohibited by the Ordinance.....
	3.1.2	Consequences of Anti-competitive Conduct
	3.1.3	Leniency Policy
	3.1.4	Enforcement.....
	3.2	Contract Law.....
	3.2.1	Piercing of Corporate Veil
	3.2.2	Distressed Sale.....
	3.2.3	Governing Law and Forum.....
	3.2.4	Restrictive Covenants
	3.2.5	Environmental Warranties
	3.3	Employment Considerations
	3.3.1	General.....
	3.3.2	Termination of Employees.....
	3.3.3	Transfer of Employees.....
4		Taxation Aspects
	4.1	General.....
	4.2	Taxes Relevant to M&A.....
	4.2.1	Taxes on Business Operations.....
	4.2.2	Taxes on Corporate Transactions.....
	4.3	Taxation Matters in M&A.....
5		Accounting Treatment
	5.1	General.....
	5.2	Accounting Treatment for Business Combinations....
	5.3	Treatment of Key Items.....
	5.4	Merger Relief
6		Recent Developments
	6.1	Special Purpose Acquisition Companies.....
	6.2	Secondary Listings.....

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The K&L Gates Hong Kong office was established in 1996. The office has over thirty legal professionals providing the full range of corporate legal services to clients based in Asia as well as those investing in the region. The office's core practices are corporate and securities, private equity investments, cross-border mergers and acquisitions (M&A), intellectual property law, international arbitration and commercial disputes. One of the primary focuses of the Hong Kong office is assisting clients with M&A transactions, particularly those involving China. The office works with clients to facilitate the structuring, financing and successful completion of the full range of acquisitions, divestitures, public offerings, private placements, joint ventures/strategic alliances, re-financings, cross-border transactions and other transactions undertaken by clients.

[14] The Court of Final Appeal hears appeals involving important questions of law in particular questions on points of public and constitutional importance, or where leave to appeal has otherwise been granted for some special reason.

[15] Immediately beneath the Court of Final Appeal is the High Court, which consists of two courts:

- The Court of Appeal of the High Court, which hears appeals on civil and criminal matters from the Court of First Instance, the District Courts and the Lands Tribunal. The court also makes rulings on questions of law referred to it by the lower courts.
- The Court of First Instance of the High Court, which has unlimited jurisdiction in civil and criminal matters, as well as admiralty, bankruptcy, company winding-up, family, adoption, probate and mental health matters. The court also hears appeals on rulings from the Magistrates' Courts and various specialist tribunals and public bodies.

[16] Beneath the High Court are the District Courts. Many civil cases in Hong Kong are handled by District Courts. District Courts have jurisdiction to adjudicate only certain civil cases, such as contractual disputes not exceeding HKD3 million, equity claims over land not exceeding HKD7 million.¹⁵ Civil cases falling outside the scope of jurisdiction of District Courts are heard in the Court of First Instance of the High Court. Jury trials for civil cases are rare and are limited to cases such as actions for defamation or malicious prosecution, where a party may elect to have the issues of fact tried by a jury.

[17] Beneath the District Courts are the Magistrates' Courts. Many criminal cases in Hong Kong are handled by Magistrates' Courts and District Courts with a jury. These courts do not have jurisdiction over the most serious criminal offences such as murder and complex commercial fraud, which are tried by judges in the Court of First Instance of the High Court sitting with a jury.

[18] Cases involving offences endangering national security are tried by designated judges in the respective courts, and the NSL Committee may be consulted before making such designation.¹⁷ Designated judges have the overall jurisdiction over offences under the National Security Law, except that jurisdiction will be transferred to the NSL Office under limited circumstances.

[19] Some cases are adjudicated not before the courts but before judicial or administrative tribunals set up under specific statutes, such as the following:

- The Labour Tribunal (for specific matters relating to employment).
- The Lands Tribunal (for specific matters relating to construction, occupation and land use).
- The Obscene Articles Tribunal (for the classification of publications or exhibitions of obscenity or indecency arising in court proceedings).

¹⁵ Section 32, District Court Ordinance.

¹⁶ Section 37, District Court Ordinance.

¹⁷ Articles 44 and 45, the National Security Law.

- The Market Misconduct Tribunal (for specific matters relating to misconduct in the securities markets).

[20] Arbitration in Hong Kong is governed by the Arbitration Ordinance. The Ordinance is based in part on the UNCITRAL Model Law, the model law drafted by the United Nations Commission on International Trade Law. The Hong Kong International Arbitration Centre facilitates arbitration in Hong Kong by offering panels of international and local arbitrators and mediators. Other arbitration centres in Hong Kong include the Hong Kong office of the International Chamber of Commerce and the Hong Kong Arbitration Centre of the China International Economic Trade Arbitration Commission.

1.2.4 Recognition of Judgments and Arbitration Awards

[21] Hong Kong is not a party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Judgments and awards of the High Court and above may be enforced in most common law jurisdictions through common law principles or as a consequence of international agreements and arrangements between various foreign countries.

[22] Similarly, foreign judgments may be enforced in Hong Kong through common law principles or, where applicable, the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319), a statutory registration system based on the principle of reciprocity.

[23] Hong Kong currently has reciprocal arrangements for the enforcement of judgments with fifteen countries under the Foreign Judgments (Reciprocal Enforcement) Ordinance, including France, Germany and Italy. These arrangements provide for the enforcement in Hong Kong of the judgments of the superior courts of those countries, and the enforcement of Hong Kong's judgments in those countries. These reciprocal arrangements, however, only apply with respect to Hong Kong monetary judgments in civil and commercial matters.

[24] Arbitration awards made in Hong Kong can be enforced in more than 120 jurisdictions that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Arbitration awards made in mainland China and Hong Kong are also mutually enforceable through a mechanism under the Arbitration Ordinance.

1.3 Economic Environment

1.3.1 Economic Indicators

[25] Hong Kong has a developed banking sector, a well-regarded legal system, a low incidence of corruption and a simple taxation system. Hong Kong economy is the fortieth largest economy globally by gross domestic product (GDP), compared to twelfth for South Korea, thirtieth for Singapore and twenty-first for Taiwan,

as a group is the second largest trading partner of Hong Kong.²⁸ 'Transport, storage, postal and courier services' and 'import/export and wholesale trade' together contribute more than 90% of the total trade value.²⁹

[37] Hong Kong has a large financial services industry. According to the Global Financial Centre Index 2023, Hong Kong is ranked fourth among the leading global financial centres in the world.³⁰ The Hong Kong Stock Exchange is the largest in the world and the third largest in Asia by market capitalization.³¹ There were 2 597 companies listed on Hong Kong Stock Exchange, and the total market capitalization of Hong Kong's stock market was HKD35 trillion as of the end of 2022.

[38] Hong Kong is also an important financial centre in the Asia Pacific. As of August 2023, 179 authorized institutions and 35 representative offices were registered with the Hong Kong Monetary Authority.³²

1.3.4 Relationship with Mainland China

[39] For a long period of time in the territory's history, Hong Kong has functioned mostly as a trading port connecting mainland China with the rest of the world. Following the transfer of sovereignty in 1997 and the rapid economic growth of China in the past two decades, Hong Kong's economic ties with China have become stronger, closer and more sophisticated. The two governments have entered into various bilateral agreements governing their economic, legal and social relations. Below is a summary of the arrangements between the two governments on various matters.

[40] The Hong Kong government maintains a series of trade and economic arrangements with the PRC government under the Closer Economic Partnership Arrangement (CEPA). CEPA is a free trade agreement intended to facilitate the trading of goods and services and the joint development of trade and investment between Hong Kong and mainland China. Many types of goods made in Hong Kong enjoy zero import tariff in mainland China under CEPA. Service providers based in Hong Kong enjoy preferential treatment, usually in the form of less stringent ownership and capital restrictions, in various industry sectors in mainland China. Some professional qualifications, most of which are related to engineering and financial services, enjoy mutual recognition in both places.

[41] Hong Kong is an important platform for Chinese companies to raise funds from the international capital markets. As of the end of 2022, 1,409 mainland companies were listed in Hong Kong with a total market capitalization of USD3.5 trillion.

²⁸ <https://research.hktdc.com/en/article/MzEzODkxODY0>.

²⁹ <https://www.censtatd.gov.hk/en/EIndexbySubject.html?pcode=FA100282&scode=230#section>.

³⁰ The Global Financial Centres Index Report, published on 28 Sep. 2023.

³¹ *Ibid.*

³² <https://www.hkma.gov.hk/eng/data-publications-and-research/data-and-statistics/monthly-statistical-bulletin/>, accessed 7 Sep. 2023.

accounted for about 77% of the Hong Kong Stock Exchange's market capitalization.³³ Hong Kong's capital markets have been increasingly integrated with those in mainland China in the past decade. In 2014, the Shanghai-Hong Kong Stock Connect was launched to establish mutual stock market access between Hong Kong and mainland China. In 2016, the Shenzhen-Hong Kong Stock Connect was launched to further facilitate two-way investment flows and consolidate Hong Kong's development as the global offshore renminbi (RMB) (China's legal currency) business hub. In 2017, the mutual bond market access between Hong Kong and the Chinese mainland was launched to further promote the development of bond markets in both Hong Kong and mainland China. The recent expansion of the Stock Connect scheme further expands trading access of foreign investors to Chinese companies listed on the Shanghai Stock Exchange or the Shenzhen Stock Exchange via the Stock Connect link in Hong Kong. Complemented by the newly launched HKD-RMB Dual Counter Model, the expansion allows mainland investors to trade RMB-denominated Hong Kong-listed stocks on the Stock Connect.

[42] In 2017, the PRC government officially recognized Hong Kong's role and full participation in the Belt and Road Initiative, a plan on a transcontinental scale targeting to enhance regional cooperation and connectivity involving more than sixty-five countries in Southeast Asia and Europe.

[43] In 2020, the People's Bank of China, the Hong Kong Monetary Authority and the Monetary Authority of Macao announced the implementation of the two-way cross-boundary wealth management connect pilot scheme ('Wealth Management Connect') in the Greater Bay Area, giving residents in Hong Kong, Macao and nine cities in the Guangdong Province the option of making cross-boundary investment in wealth management products distributed by licensed banks in the area.

[44] Hong Kong is a designated offshore centre for RMB. Cross-border RMB businesses, such as the taking of RMB deposits, the offering of RMB-denominated corporate and Chinese government bonds and trade settlements in RMB, have been encouraged in recent years through the gradual relaxation of the restrictions against RMB's free flow.

1.4 Cultural Aspects

[45] The vast majority of residents in Hong Kong are Chinese. Because Hong Kong had been a colony of the United Kingdom for around 150 years before sovereignty was transferred back to China, the territory has a separate cultural identity from mainland China and Taiwan. Elements of traditional Chinese values and western values combined have shaped the residents of Hong Kong.

³³ Economic and Trade Information published by the Hong Kong Trade Development Council on 23 Aug. 2023.

[46] Since the sovereignty transfer in 1997, the government has maintained a 'bilingual and trilingual' policy. Under the policy, Chinese and English are the official written languages. Most Hong Kong residents speak, or are acquainted with, English, while Cantonese Chinese and Mandarin Chinese are the main spoken dialect/language. In schools, Mandarin Chinese is a core subject, and more and more local schools have chosen to adopt Mandarin Chinese as the medium of instruction in Chinese and Chinese history lessons. Cantonese Chinese remains the local dialect most used by the majority of the residents of Hong Kong in daily life.

[47] Religious freedom is one of the fundamental rights enjoyed by residents of Hong Kong and is protected by the Basic Law and the relevant legislation. A large variety of religious groups are found in Hong Kong, including Buddhism, Taoism, Confucianism, Christianity, Islam, Hinduism, Sikhism and Judaism. Many schools and health and welfare facilities in Hong Kong are operated by religious bodies.

[48] Other than the traditional western holidays such as Christmas and Easter, Hong Kong residents also celebrate traditional Chinese holidays, including the Chinese New Year, which is celebrated during the first day of the Lunar Year; the Dragon Boat Festival, which is celebrated on the fifth day of the fifth lunar month to honour an ancient Chinese poet, Qu Yuan; the Mid-Autumn Festival, which is celebrated on the fifteenth day of the eighth lunar month where mooncakes, a traditional festival delicacy, are eaten; and the Ching Ming Festival in spring and the Chung Yeung Festival in autumn, both of which are marked by visits to ancestral graves.

[49] Hong Kong does not have significant cultural facets which affect the conduct of business transactions. Subject to a certain degree of influence from the PRC, gift-giving and acceptance of gifts may be featured in the private sector during festive seasons and generally in transactions involving a Chinese element. As Hong Kong's anti-corruption regime has extensive provisions against the receipt of 'undue advantage' by an agent, the giving and acceptance of gifts is generally not a salient feature of business transactions in Hong Kong.

1.5 Bribery, Corruption, Money Laundering and Terrorist Financing

1.5.1 FATF Rules in Hong Kong

[50] Hong Kong is a member of the Financial Action Task Force (the 'FATF'), an intergovernmental body set up to combat money laundering. Consistent with its obligations as a FATF member, Hong Kong has promulgated anti-money laundering legislation along the lines of recommendations published by the FATF to combat money laundering and terrorist financing. The main legislation consists of the following:

- *Drug Trafficking (Recovery of Proceeds) Ordinance and Organized and Serious Crimes Ordinance*. The ordinances prohibit a person from dealing with a

property, including money, that he knows or has reasonable grounds to believe in representing (directly or indirectly) the proceeds of a serious crime (essentially any indictable offence in Hong Kong or any conduct that would be an indictable offence if committed in Hong Kong) or drug trafficking. The ordinances require a report be made if a person knows or suspects that property represents the proceeds of, or was or is intended to be used in connection with, a serious crime³⁴ or drug trafficking.³⁵

- *United Nations (Anti-Terrorism Measures) Ordinance*. The ordinance prohibits a person from providing or collecting any property where the person intends or knows that the property will be used to commit terrorist acts³⁶ (the key terms here are defined broadly) or is terrorist property. It also prohibits a person from making property or financial services available to or for the benefit of someone where the person knows that or is reckless as to whether the other person is a terrorist or a terrorist associate³⁷ (again, these terms are defined broadly). The ordinance requires a report be made if a person knows or suspects that property is terrorist property.³⁸
- *Anti-Money Laundering and Counter-Terrorist Financing Ordinance*. The ordinance applies to most types of financial institutions and providers of financial services in Hong Kong, including remittance agents and money-changers. It sets out the standards applicable to these institutions and service providers in terms of customer and transactional due diligence and ongoing relationship monitoring.

1.5.2 Anti-bribery and Anti-corruption Laws

[51] The local anti-corruption regime consists of the Prevention of Bribery Ordinance (Cap. 201) (PBO), as enforced by the Independent Commission Against Corruption, a public agency.

[52] Following international trends, enforcement of anti-corruption laws is rigorous in Hong Kong. With regard to gift-giving, the legal definition of 'advantage' includes any gift, loan, fee, reward, commission, service and favour but excludes 'entertainment', which covers the provision of food and drink for consumption on a given occasion and any accompanying entertainment under the PBO. An 'offer of advantage' will be caught under the PBO if the offeror believes that the advantage given is a reward or inducement for favours for him in business dealings, but may be permissible if the offer is unrelated to the acceptor's business dealings. In a Court of Final Appeal case involving a large local property developer, even the offering of gifts to a public official without a specific quid pro quo deal led to a

³⁴ Section 25, Organized and Serious Crimes Ordinance.

³⁵ Section 25A, Drug Trafficking (Recovery of Proceeds) Ordinance.

³⁶ Section 7, United Nations (Anti-Terrorism Measures) Ordinance.

³⁷ Section 8, United Nations (Anti-Terrorism Measures) Ordinance.

³⁸ Section 12, United Nations (Anti-Terrorism Measures) Ordinance.

court finding that the official was 'favourably disposed' to the gift offeror (and was thus a violation of the PBO).³⁹

[53] While the PBO does not apply to bribery or corruption taking place outside the Hong Kong jurisdiction (except with respect to Hong Kong public servants), the FCPA and the Bribery Act 2010 ('Bribery Act') have extraterritorial effect. Depending on the involvement of any foreign counterparties, an M&A transaction may also need to comply with the Foreign Corrupt Practices Act (FCPA) (for US counterparties) or the Bribery Act (for UK counterparties).

[54] What this means for the potential acquirer is the need for a heightened diligence process, as the acquirer would wish to avoid entering into transactions tainted by target companies' breach of bribery or corruption laws before acquisition.

2 REGULATORY FRAMEWORK

2.1 Overview

2.1.1 M&A Transactions in Hong Kong

[55] 'Acquisitions' and 'mergers' do not have statutory meanings under Hong Kong law, but they are terms used frequently in the local market when describing the transfer of ownership, interests or control in a business from one person to another through a legal process. Because there is no simple, court-free amalgamation procedure for the combination of unaffiliated entities under Hong Kong law, acquisitions of Hong Kong entities are generally structured as a stock transfer, an asset purchase, or a scheme of arrangement.

[56] As Hong Kong functions as the gateway to mainland China and its history as a trading port, M&A transactions in Hong Kong often involve laws of other jurisdictions. The cross-border element is found in various transaction aspects. Hong Kong businesses owned by offshore companies; Hong Kong companies with offshore operations; and shares in offshore companies that are listed on the Hong Kong Stock Exchange. A corporate transaction labelled as a 'Hong Kong M&A transaction' may require the engagement of offshore legal advisors. Similarly, a cross-border M&A transaction could trigger a Hong Kong regulatory issue even when none of the parties involved has substantial operations in Hong Kong.

[57] Hong Kong is an international financial centre with an established rule of law. Hong Kong law is sometimes chosen as the governing law for cross-border M&A transactions with no connections to Hong Kong. Similarly, Hong Kong courts and Hong Kong arbitration centres are often chosen as the dispute resolution forums for these transactions. In this context, Hong Kong functions as an international

³⁹ HKSAR v. Kwok Ping-kwong Thomas (2017) 20 HKCFAR 264.

⁴⁰ Section 4 of the Prevention of Bribery Ordinance (Cap. 201).

hub for transactional work, sources of financing and dispute resolution, and is often compared to London, New York and Singapore.

[58] The Hong Kong Stock Exchange is one of the largest securities exchanges in the world. A large portion of the companies listed on the exchange have minimal business operations in Hong Kong. For M&A transactions that are made with the expectation that the target will apply for a listing on the exchange, the feasibility of this exit plan is often evaluated as a due diligence item.

[59] This chapter will cover the regulatory framework relevant to M&A transactions that fall within one or more of the categories above. For the convenience of readers, the terms below have meanings ascribed to them unless the context requires otherwise:

- 'assets' include shares in a Hong Kong company; shares listed in Hong Kong; properties located or registered in Hong Kong; ownership, contract and similar rights governed by Hong Kong law; and licenses and permits issued by Hong Kong authorities;
- 'persons' include companies and other corporate entities incorporated or registered in Hong Kong; partnerships and other unincorporated entities established or registered in Hong Kong; companies whose shares are listed in Hong Kong; sole proprietorships operating in Hong Kong; and individuals residing in Hong Kong;
- 'laws' include the common law and statutory laws of Hong Kong, and the regulations promulgated by Hong Kong authorities;
- 'government authorities' include the Hong Kong government and the regulatory agencies established under Hong Kong laws.

References to 'company' are to a company incorporated under Hong Kong laws, and to 'ordinance' are to a statutory law enacted by the Hong Kong legislature.

2.1.2 Business Vehicles in Hong Kong

[60] Businesses may be operated in Hong Kong in the form of sole proprietorship, partnership, branch office, or corporate entity.

[61] Business vehicles are administered by the Companies Registry, a government body. With the exception of sole proprietorship and partnerships, the formation, operation and dissolution of business vehicles are governed by the Companies Ordinance.

[62] The following diagram summarizes the different types of business vehicles available under Hong Kong law: