

# Asset Purchases: Overview (Hong Kong)

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A Practice Note providing an overview of the typical transaction process when acquiring a Hong Kong business as a going concern by way of a purchase of assets (as opposed to shares), including putting in place preliminary agreements, carrying out [due diligence](#), obtaining deal consents and regulatory approvals, preparing the requisite asset purchase agreement and other ancillary documents, and dealing with [completion](#) and post-completion steps.

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This Practice Note provides an overview of the typical transaction process when acquiring or selling a Hong Kong business as a going concern by way of a purchase of assets. It focuses on transactions involving a sale by private treaty, under which the buyer and the seller negotiate and enter into a detailed asset purchase agreement (APA) to record and implement the transaction.

The Note also focuses on the transaction process when the acquisition is being made by a [strategic buyer](#).

The transaction process differs depending on whether the seller intends to negotiate a deal with a single potential buyer or run an auction sale under which several prospective buyers are invited to submit bids for the target business in a competitive tender process. This Note is primarily concerned with the transaction process when the seller is negotiating exclusively with one buyer, though many of the issues addressed are also relevant for auction sales.

## Planning a Business Acquisition or Disposal

### Reasons for Making an Acquisition or Disposal

The parties' commercial objectives are key considerations when structuring and negotiating the transaction. It is important for the parties' legal advisers to ensure that they understand the key commercial drivers for the deal.

#### Buyer's Objectives

There are many ways in which a buyer may seek to develop its business. One is to expand by acquisition. In many situations, a target business is particularly valuable to the buyer because of its own business operations and strategic goals. For example:

- The target business may complement the buyer's business because it manufactures and supplies a critical part of the buyer's products.
- The buyer may be able to benefit from economies of scale and other efficiencies where it acquires business of a competitor.

Whatever the buyer's reason for the acquisition, it should have a clear acquisition strategy from the outset, which justifies the acquisition and sets out criteria for finding an appropriate target. The buyer should also have a clear idea of:

- What drives the value of the target business.
- What it can afford to pay for the target business (for example, from cash reserves or debt finance).
- The nature, size, and type of business it is looking to acquire.
- The proposed timetable for carrying out the acquisition.

Once a specific target has been identified, the buyer can begin to assess its value. There are various valuation methods, but the four most commonly used are discounted cash flows, market multiples, net asset valuations, and [dividend](#) yields. Different methods and multiples may be used according to the industry sector of the target business. A prudent buyer may compare the results of using more than one method. Value does not necessarily equate to price, which is affected by the individual circumstances of the parties.

### **Seller's Objectives**

While a buyer may have several reasons for wishing to expand, a seller's motives are likely to be financial or commercial ones or, as is often the case in a family business, entirely non-commercial ones such as poor health, lack of management succession, or simply a wish to focus on something different.

The financial or commercial reasons for selling may be voluntary or involuntary. Voluntary reasons include the desire to release funds for other investment or to move out of the business area because, for example, it no longer fits within the business strategy. Involuntary reasons include the desire to ease financial pressures or to ward off predators who might wish to break up the business. The reason for a sale can obviously have a substantial impact on the negotiation process.

### **Shares or Assets**

There are two principal methods of acquiring a business:

- **Asset purchase.** The buyer acquires a bundle of assets and rights, and sometimes assumes certain liabilities, which together comprise the target business.
- **Share purchase.** The buyer acquires the shares in the company which carries on the target business.

The two are fundamentally different. If shares in a company are purchased, all its assets, liabilities and obligations become those of the buyer's (even those that the buyer does not know about). If assets are purchased, only the assets that the buyer specifically agrees to take on, and such liabilities (if any) that it specifically agrees to assume, are acquired (subject to the [Transfer of Business \(Protection of Creditors\) Ordinance](#) (Cap 49) (TBPCO)).

An asset purchase is often more complex than a share purchase due to the need to transfer each of the separate assets constituting the business. More consents and approvals are likely to be required than on a share purchase; for example, the consent of customers and suppliers to the [assignment](#) or [novation](#) of existing contracts and the approval of lessors of real property. In addition, whenever any business (or part of a business) is transferred in an asset sale, the parties must notify the target business' [creditors](#) of, among other things, the intended transfer of assets from the seller to the buyer in accordance with the TBPCO (see [Notification of Creditors: Transfer of Businesses \(Protection of Creditors\) Ordinance](#)). There is, however, a greater amount of flexibility on an asset purchase. If, for example, a target company has liabilities that cannot be easily quantified or identified, or if only part of the business of the target company is to be acquired, then an asset purchase may be the favoured option.

Another key commercial difference between the two types of transactions is in the nature of what the buyer acquires. On a share purchase, it acquires a company owning a business and running it as a going concern (subject to any [change of control](#)

[provisions](#)). In contrast, an asset purchase does not automatically transfer [contracts](#) (including employment contracts) or existing trading arrangements to the buyer. Special provision will need to be made in respect of the contracts or arrangements that the buyer wants or needs to take on. Whether this is an advantage or a disadvantage depends on the attitudes of third party customers and suppliers, the buyer's strategy for the acquisition and how it intends to integrate the new business. For more information, see [Practice Note, Acquisition structures: comparing asset purchases and share purchases](#).

Tax considerations often influence the structure of a transaction and it is prudent for the parties to obtain early professional tax advice in respect of Hong Kong and any other relevant tax jurisdiction. For example, *ad valorem* (meaning, based on the value of the property transferred) [stamp duty](#) must be paid on the transfer of shares in a Hong Kong target company in accordance with the [Stamp Duty Ordinance](#) (Cap 117). However, if the asset which is being transferred relates to landed property or an interest in land in Hong Kong, no *ad valorem* stamp duty will be payable in Hong Kong on the transfer of the asset.

Financing considerations, including the restrictions imposed on companies as to providing financial assistance for acquisition of their own shares as set out in the [Companies Ordinance](#) (Cap 622) (CO), may also be relevant. No such statutory restrictions apply to an asset purchase unless the asset comprises of shares. Companies should consider at an early stage if the [Sale of Goods Ordinance](#) (Cap 26) (SGO) applies to the sale of any of the sale assets, which may include goods for which there may be implied [warranties](#), for example, in respect of quality or fitness.

## Seller's Preparatory Steps

Whatever the reason for selling, a seller should be sure of its objectives, make sure that its advisers understand them and how it plans to achieve them.

One of the issues for a seller, assuming a sale is voluntary and has no particular time pressures, will be to decide whether to market the target business actively and openly, perhaps by holding a sale by auction, or whether to approach potential buyers individually. A company may already be aware of interested parties such as competitors, suppliers or distributors, or the business' own management. Otherwise, professional advisers can help unearth a wider field of buyers.

The following are a variety of steps that a corporate seller can take to prepare a business for sale, particularly if the seller is part of a group:

- Effect a pre-sale reorganisation by transferring assets intra-group.
- Identify and consider how to deal with assets which are shared by the business to be sold and other businesses within the group. These may include, for example, intellectual property, employees, or premises.
- Ensure that information which the buyer is likely to require as part of its [due diligence](#) exercise is readily available and up-to-date. This includes, for example, information about properties, financial information, key contracts, and actual, threatened, or pending litigation.

## Overview of the Transaction Process

While no two asset purchases are the same, most transactions include the following broad phases:

- Dealing with pre-contract documents, such as confidentiality agreements, heads of terms, and exclusivity agreements. For further information on this phase, see [Preliminary Agreements](#).

- Carrying out [due diligence](#) on the target business and, as necessary, the seller. For further information, see [Due Diligence](#).
- Obtaining any third-party consents and approvals that are required before the transaction can proceed or that must be made a condition of the deal. For further information, see [Timing and Approvals](#).
- Preparing and agreeing the documentation required to implement the transaction. In most instances, this will include a detailed APA which records the terms on which the seller agrees to sell and where the buyer agrees to purchase the target business. For further information, see [Documenting the Transaction](#).
- Signing and exchanging the transaction documents so that they have legal effect.
- Giving a notice of transfer of business (or part thereof) to the [creditors](#) of the target business in the form and manner prescribed by the TBPCO (see [Notification of Creditors: Transfer of Businesses \(Protection of Creditors\) Ordinance](#)).
- After the notice of transfer of business has become "complete" under the TBPCO (see [Notification of Creditors: Transfer of Businesses \(Protection of Creditors\) Ordinance](#)), completing the transfer of the target business to the buyer and dealing with any applicable post-completion formalities.

## Preliminary Agreements

Before the seller and buyer get as far as negotiating the APA, there are a variety of agreements that they might sign, such as the following:

- **A confidentiality agreement.** To evaluate and negotiate the proposed transaction, the buyer and its advisory team will require access to a significant amount of information relating to the target business, some of which will be confidential. Before making this information available, it is standard practice for sellers to require a prospective buyer to enter into a confidentiality agreement (also known interchangeably as a non-disclosure agreement or NDA), which imposes contractual controls over the prospective buyer's use and disclosure of any confidential information relating to the target business (and the seller) that it receives during the transaction process.

While it is usual practice for the confidentiality arrangements to be dealt with in a separate agreement, they can also be set out in heads of terms for the transaction or combined with an exclusivity agreement.

- **An exclusivity agreement.** Before committing significant time or expenditure to the transaction, some buyers will require an exclusivity commitment from the seller. A typical exclusivity agreement (also known interchangeably as a lock-out or no-shop agreement) involves the seller agreeing that it will not seek, negotiate, or otherwise deal with other prospective buyers for a specified period of time. This gives the buyer a period of exclusivity in which to negotiate and conclude a transaction with the seller.

While exclusivity commitments are often dealt with in a separate agreement, they can also be incorporated into another preliminary agreement. For example, if the parties are negotiating heads of terms for the transaction, it can often be more convenient to deal with the exclusivity arrangements within the heads of terms. Indeed, in some instances, the buyer may not be prepared to finalise heads of terms unless the seller agrees to grant the buyer some degree of exclusivity. Conversely, the seller may not be prepared to grant exclusivity to a prospective buyer until the heads of terms are finalised.

- **Heads of terms.** The parties often reach agreement in principle on the key deal terms of the proposed transaction at the very outset of the sale process, and before detailed [due diligence](#) or negotiation of the definitive transactions documents commences. In these instances, the parties may want to record the agreed terms in a written document,

commonly referred to as head of terms (also known interchangeably as a term sheet, letter of intent, or memorandum of understanding).

Heads of terms can be drafted to be non-binding, partially binding, or fully binding. Their legal effect depends on whether, on a proper interpretation of the document concerned, and applying the usual contract formation principles, an enforceable contract has been created. In corporate transactions, the most common approach is for the heads of terms to be drafted so that they are partially binding, as the parties usually expect them to be non-binding as a whole, but they may include certain clauses that are intended to have legal effect (such as costs, confidentiality, exclusivity, or governing law provisions).

While confidentiality agreements are a routine feature of corporate acquisitions and will be put in place in most transactions, whether or not heads of terms or an exclusivity agreement are required will depend on the circumstances of the transaction.

## Due Diligence

Once the confidentiality agreement and any other preliminary documents have been dealt with, the buyer will usually commence its due diligence.

Due diligence is the term used to describe the information-gathering process by which a prospective buyer investigates the affairs of the target business and, as necessary, the seller, before making a contractual commitment to proceed with the acquisition. Through this process, the buyer aims to gain a complete picture of the target business and its critical success factors, strengths, and weaknesses. The information obtained through due diligence will help the buyer to decide whether it wants to proceed with the acquisition and, if so, at what price and on what terms.

For more information, see [Practice Note, Due Diligence for Private Acquisitions \(Hong Kong\)](#).

## Objectives

The buyer's due diligence exercise typically includes an assessment of all aspects of the target business that are likely to be relevant to the buyer, such as the nature and condition of and title to assets, transfer issues and details such as timing and regulatory consents. It is usually carried out by the buyer's financial and legal advisers in conjunction with its own personnel.

The business may consist of a number and variety of different assets, including tangible assets such as land, machinery, vehicles, fixtures and fittings, raw materials, stock, work-in-progress, and office equipment and intangible assets such as the benefit of [contracts](#), [goodwill](#), and [intellectual property rights](#).

The buyer should focus on the key asset or assets that it wishes to acquire early in the due diligence process and ensure that title can be effectively passed to it. Different businesses may be based on one or a combination of key assets, such as:

- **Property:** for example, a hotel where the key asset is the building itself.
- **Employees:** for example, a computer consultancy business or modelling agency.
- **Intellectual property:** for example, a computer [software](#) company, record company, or literary agency where the business is composed of [copyright](#), or a pharmaceutical company whose [patents](#) are likely to be crucial.
- **Customers:** for example, a manufacturer for a large retail outlet.

- **Licence from an authority:** for example, a restaurant [licence](#), food factory licence, or liquor licence.

The information-gathering process aims to find out information in a number of specialist areas which may impact the negotiation process and, in particular, on the price which the buyer is prepared to pay and the protection the buyer will seek from the seller in the form of [warranties](#) and [indemnities](#).

Although the seller usually gives warranties that provides the buyer some comfort if a problem arises after completion, most buyers will prefer to find out about serious problems before the purchase and be able to negotiate an appropriate reduction in purchase price or, in extreme cases, pull out of the acquisition. However, the extent to which a due diligence investigation is possible may depend on the nature of the purchase. In certain circumstances, for example, where the potential buyer is a competitor, the seller may be reluctant to make sensitive commercial information, such as customer lists, available until a later stage in the negotiation process.

Depending on the nature of the target business, the buyer may also need to involve experts such as accountants, valuers, environmental or business consultants, and surveyors.

If the buyer is acquiring from the seller any information which contains [personal data](#) such as customer lists, the [Personal Data \(Privacy\) Ordinance](#) (Cap 486) and data privacy laws of other jurisdictions could be relevant. The buyer should ensure that the seller has obtained all necessary consents from any persons whose personal data is being transferred as part of the transaction.

## Information Sources

The buyer is likely to rely on a variety of information sources as part of its due diligence.

### Information Memorandum

This is an information pack on the target business, put together by the seller and its advisers. Information memoranda are often used when the seller is actively marketing a business and, in particular, when it is embarking on an auction process.

The format and content of the information memorandum is a matter for the seller to decide. Essentially, however, it is a selling document and is likely therefore to summarise for a prospective buyer all of the key investment considerations. It may also have appended to it recent financial information, sales analyses, details of key personnel and descriptions of property and other key assets.

### Buyer's Enquiries

The buyer's own enquiries will focus on material made available by the seller, together with searches of publicly available material (for example, company searches, [bankruptcy](#) searches, [winding up](#) searches, litigation searches, land registry searches and searches of intellectual property registers). The cornerstone of the exercise is an information request, which it will submit to the seller. This may seek to elicit much more information about the business than a seller may have included in its own information memorandum.

Under the [Bills of Sale Ordinance](#) (Cap 20) (BSO), "personal chattels" includes certain goods, furniture, trade machinery, **fixtures** (other than fixtures that are assigned together with any interest in any land or building to which they are affixed), and other articles that are capable of complete transfer by delivery, and the BSO applies to every bill of sale whereby the holder or grantee has power to seize or take possession of any personal chattels within Hong Kong. A seller will not be able to transfer the full legal and beneficial title to any personal chattel which is the subject of a bill of sale that has been duly registered under the BSO, unless the holder of the [security](#) (the [creditor](#)) has either released and discharged the security in full before the asset transfer, or the parties (including the security holder) have put in place new arrangements for the security in question (which

will often take effect on [completion](#) of the asset transfer transaction). A bill of sale is essentially a document or agreement (except those that are excluded under the BSO) which confers on the holder of the security a right in equity to any personal chattels or to any charge or security thereon.

If the buyer is purchasing any personal chattels within the meaning of the BSO, the buyer's lawyers should make enquiries with (and seek appropriate representations and [warranties](#) in the APA from) the seller to confirm that the personal chattels concerned are not subject to any bill of sale (as defined in [section 2](#) of the BSO). The buyer's lawyers should also search the bills of sale register maintained by the Registrar of the High Court to confirm that no bills of sale have been registered under the BSO.

Where the seller is a company registered in Hong Kong, a [charge](#) created or evidenced by an instrument that, if executed by an individual, would require registration as a bill of sale under the BSO, is a "specified charge" under [section 334\(1\)\(b\)](#) of the CO and must be registered at the Companies Registry. As such, the buyer's lawyers should check the results of the company search to confirm that no relevant charges have been registered in respect of any of the sale assets. The buyer's lawyers should also check the land registry and the intellectual property registers if any of the sale assets include land, property, or intellectual property.

### Data Room

A third way in which information may be made available to a buyer is in a [data room](#). These are commonly used on auction sales and larger deals. The idea of a data room is that the seller retains physical control of all the information and can ensure that, where there are a number of prospective buyers, they all have access to the same information. Access to a data room is usually strictly controlled, for example, copying documents is usually prohibited and the use of recording devices may also be forbidden. A buyer may also be given a limited time in which to carry out its review, so careful planning is needed to ensure this is not wasted. If faced with a data room, a buyer should not be afraid to raise questions or ask for more information.

Virtual data rooms are common, with the buyer and its representatives being able to access materials online in a secure virtual data room.

### Accountants' Report

Part of the [due diligence](#) process may involve instructing accountants to prepare a report on the target business. The aim of the accountants' due diligence is to help the buyer evaluate the financial risks and opportunities of the deal. Also, the accountants' report may help identify:

- The value of the target business and the apportionment of the total purchase price among the different assets to be acquired by the buyer.
- Potential synergies arising from the acquisition.
- How to structure the acquisition and any related financing.
- The impact of the acquisition on the buyer's performance metrics, including any adjustments necessary to measure the true impact of the acquisition.

### Due Diligence Findings

The findings of the legal due diligence assist the buyer's lawyers in drafting appropriate [warranties](#), and other provisions of the APA, to cover specific situations. However, it is often the case that a first draft of the APA is circulated before the legal [due diligence](#) is completed. If so, the buyer's lawyers should make it clear that further provision may be required once legal due diligence has been completed. As the due diligence exercise tends to proceed in parallel with the negotiation of the APA, it is vital that the negotiating team are alerted without delay of any issues of importance that are surfaced through due diligence.



Although due diligence is an important fact-finding exercise for the buyer, it is only as good as the seller's will to co-operate. The seller may have doubts about the buyer's intentions or be reluctant to disclose sensitive information to a competitor in case the transaction falls through. On one hand, if the seller wishes to succeed in selling the target business, it has every incentive to co-operate but, as a matter of law, it is generally under no obligation to respond to due diligence enquiries (although this would not stretch to sanctioning dishonest concealment of material facts).

Buyers often require their legal advisers to prepare a legal due diligence report.

## Timing and Approvals

A variety of consents and approvals are likely to be required for an asset purchase. These fall into several categories, such as:

- **Board approval.** If the transaction involves a corporate buyer and seller, it will usually be necessary for the board of [directors](#) of the relevant corporate party (or a duly appointed committee of the board) to consider and approve:
  - the transaction as a whole; and
  - the [execution](#) of the APA and any other ancillary documents required to implement the transaction.

Directors (including [shadow directors](#)) need to declare their material interests (whether direct or indirect) in any proposed transaction, arrangement, or contract with the company that is significant in relation to the company's business for the purposes of [section 536](#) of the CO and any relevant provision of the company's [articles of association](#). Whether or not the relevant director can count towards the [quorum](#) for a meeting to approve a transaction or vote on any particular resolution to approve it depends on the company's articles.

Minutes should be taken of any board meetings which are held for this purpose. These minutes are important because they are evidence of the board's decision to enter into the transaction, and of the designated signatories' authority to bind the company by signing the transaction documents. Counterparties to the transaction will usually request a copy of these minutes as part of the documents delivered at completion (see [Completion and Post-Completion](#)). For general information on how boards may take decisions and the requirements for a properly constituted board meeting (and the legal requirements with regards to keeping minutes), see [Practice Note, Board meetings](#).

- **Shareholder approval.** Shareholder approval for the deal may be required under a company's [articles of association](#) or shareholders' agreement (if any). If the buyer or seller is a Hong Kong listed [public company](#), shareholder approval for the transaction may also be required under the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited or the Rules Governing the Listing of Securities on GEM of The Stock Exchange of Hong Kong Limited.
- **Statutory and regulatory approvals.** Once the buyer has established which assets it is to acquire, it should consider whether the acquisition will trigger the need for any regulatory approval. For example, approvals may be required if the target business carries on any business or activity which is regulated under any of the following ordinances:
  - [Banking Ordinance](#) (Cap 155);
  - [Broadcasting Ordinance](#) (Cap 562);
  - [Insurance Ordinance](#) (Cap 41);
  - [Mandatory Provident Fund Schemes Ordinance](#) (Cap 485);



- [Money Changers Ordinance](#) (Cap 34);
- [Money Lenders Ordinance](#) (Cap 163);
- [Securities and Futures Ordinance](#) (Cap 571);
- [Telecommunications Ordinance](#) (Cap 106); and
- [Trustee Ordinance](#) (Cap 29).

The above list is not exhaustive.

If the target company is carrying on business in a regulated sector, prior approvals may also be required from the relevant regulator for any change in the beneficial owners or key personnel of the business.

- **Landlord's consent.** If the target's business property includes leasehold premises, it is likely that the landlord's consent will be required for the assignment.
- **Lenders.** The consent of lenders may be required if the transaction breaches borrowing [covenants](#) or the terms of [security](#) taken over the assets of the parties which are to be transferred. Any charged assets will need to be released from any [fixed charge](#) (with the release documented in writing and, where applicable, registered with the relevant authority) and a written consent or approval from the security holder to any transfer of an asset which is subject to a [floating charge](#). Alternatively, a non-crystallisation certificate may need to be obtained for those assets which are subject to a floating charge.
- **Contracts.** The parties should review major contracts with customers and suppliers. Some contracts (for example, [licences](#) of intellectual property) may require the approval of the other party for [assignment](#). The other party will be required to agree to the [novation](#) of a contract.
- **Competition approval.** Under the [Competition Ordinance](#) (Cap 619), there is a limited merger control regime which regulates [mergers](#) involving the disposal or acquisition of a telecommunications licence carrier within the meaning of the [Telecommunications Ordinance](#) (Cap 106).

The nature and extent of the approvals required have an important bearing on the timing and structure of the transaction, as does the level of due diligence required. There is no standard timescale for an acquisition, which can take from a few days (which is usually the case on the purchase of assets of an [insolvent](#) company) to many months. Subject to commercial considerations, it is clearly advisable to approach landlords, key suppliers, customers, and other relevant third parties as early as possible so that their consent does not delay the transaction. Before approaching any third parties such as landlords, key suppliers and customers for consent, the parties to the asset transfer transaction should consider whether to put in place a confidentiality agreement or a non-disclosure agreement in order to protect confidential information concerning the transaction.

## Documenting the Transaction

The APA (interchangeably referred to as a business purchase agreement or sale and purchase agreement) is the principal contractual document in an asset purchase transaction. The APA is usually accompanied by several important documents, including:

- A [disclosure letter](#) (see [Disclosure Letter](#)).
- Various forms of asset transfer and other ancillary documents (see [Completion and Post-Completion](#)).

## Asset Purchase Agreement

As the [due diligence](#) process progresses, the parties will usually begin negotiation of the APA, which is the key document for transferring the assets or business to the buyer. This is traditionally drafted by the buyer and is usually fairly lengthy.

Key provisions of an APA include:

- **Parties.** If the buyer is a group, it should decide which company within the group should make the acquisition. This will be determined by commercial and tax considerations. The intra-group transfer of assets after an acquisition may compromise potential [warranty](#) claims.

Both parties should consider requiring the obligations of the other to be [guaranteed](#) by third parties (for example, a [holding company](#)). For example, if a [subsidiary](#) company sells its entire assets and [undertaking](#), a buyer would usually obtain a guarantee by the holding company in respect of its subsidiary's potential liability under warranties in the APA.

- **Assets to be transferred.** As the only assets transferred are those that are agreed to be transferred, particular care must be taken to identify and define those assets in the APA; similarly any liabilities that the buyer is to assume must also be specifically identified and defined. This is usually be done in the definitions section and, in the case of assets, by reference to specific schedules listing them within certain categories.
- **Agreement to sell.** A clause under which the seller agrees to sell and the buyer agrees to purchase the business and assets on completion. Title to some assets will pass on completion pursuant to this clause. Further formalities and documents will be required to transfer legal title to other assets (see [Completion and Post-Completion](#)).
- **Consideration.** The parties should consider the nature (for example, cash, shares, or [loan notes](#)) and timing of payment of the [consideration](#). It is common on asset sales for part of the consideration to be withheld pending the production of [completion accounts](#) or a completion statement valuing the assets at the completion date.

The consideration should be apportioned between the various assets. This has important tax implications that should be discussed with a tax advisor.

- **Conditions precedent to completion.** These are determined largely by the consents and approvals referred to above. They may, for example, include shareholder approval, the removal of fixed charges over assets being purchased, and antitrust or other regulatory clearances. However, the most common [condition precedent](#) to the completion of a sale of a Hong Kong business by way of an asset transfer (as opposed to a sale of shares in the target company) is the giving of a notice of transfer of business (or, as the case may be, part of the business) to the [creditors](#) of the target business in the form and manner prescribed by the TBPCO (see [Notification of Creditors: Transfer of Businesses \(Protection of Creditors\) Ordinance](#)).
- **Mechanics.** The agreement should set out how the various assets are to be transferred (such as by formal transfer, [assignment](#), delivery and so on) and the obligations of the parties before and after completion to perfect transfers and ensure the smooth transfer of the business. For example:
  - where there is a gap between signing and completion, the seller should undertake to continue the business in the normal course and inform the buyer of any material adverse change in its trading position;
  - in giving a notice of transfer of business to the creditors of the target business in accordance with the TBPCO, the seller and the buyer (or in the case of a sale under or pursuant to a charge, the charge-holder and the buyer) must both sign the agreed form of the notice (which must contain certain mandatory particulars) and publish it in the Hong Kong government Gazette (Gazette) and two Chinese language newspapers and one English language

newspaper circulating in Hong Kong, no earlier than four months and not later than one month before the date of the transfer of the business (or part thereof);

- a completion clause (or schedule) to provide for various documents to be produced and executed at completion to transfer legal title to assets. For example, conveyances of real property or an interest in land (which are required to be in writing); and
  - there are likely to be provisions relating specifically to the collection of **book debts**, payment of creditors, and how business contracts should be dealt with.
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- **Warranties and indemnities.** Most arm's length transactions include full warranties relating to the assets being acquired. But limited or no warranties may be given in some circumstances (for example, on a sale to management or where the seller is a [receiver](#) or administrator). The buyer may require [indemnities](#) to cover some potential liabilities (such as taxes, pre-acquisition trading, and environmental clean-up costs).

If any of the sale assets come within the statutory definition of goods, certain terms (including implied warranties as to quality or fitness) may be implied as a matter of law under the SGO.

It should be established as soon as possible whether either the seller or buyer propose warranty and indemnity insurance (see also [Practice Note, Warranty and indemnity insurance: a broker's perspective](#)).

- **Debts and cash.** The APA should address how the parties will deal with the receivables and cash of the target business prior to, during the period between the signing date of the APA and the completion date of the transaction (assuming they do not occur simultaneously) and post-completion. For example, the parties must specify how the cash will be apportioned and who is to collect the receivables owed to the seller by third parties in relation to any sales contract concluded by the seller on or before the signing date of the APA, but which remain outstanding after the APA has been signed. If the seller is to collect the receivables, the parties to the asset purchase transaction may find that third party debtors with knowledge of the impending acquisition may refuse to pay the seller or just prefer to pay the outstanding amounts to the buyer instead. Therefore, the parties may include a term in the APA that the buyer is to collect all receivables arising from the conduct of the business prior to completion and pay the same over to the seller.
- **Restrictive covenants.** To protect the [goodwill](#) of the target business, the buyer will usually want to impose contractual restrictions on the seller's ability to establish a competitive business following completion of the transaction.
- **Costs of giving the notice of transfer.** The costs of publishing the notice of transfer of business will need to be paid. For clarity, the APA should specify which party (or parties) will pay such costs.

### Climate Change-Aligned Clauses

There is increasing awareness of climate change and the need to take action to mitigate it. Parties to acquisition transactions are increasingly focused on taking positive steps to address climate change and other environmental, social, and governance (ESG) issues. Such action can be embedded in all commercial contracts, including asset purchase agreements, to help focus the parties' minds on ESG issues and assist them to make real change to address climate change risks.

The [Chancery Lane Project \(TCLP\)](#) have put together climate-aligned resources that parties seeking to be market leaders in this area may wish to consider when entering into an asset purchase agreement. In particular, [Green Acquisition Obligations \(Sienna's clause\)](#) requires the buyer to maintain or improve the green credentials or behaviours of the asset or business following completion. The clause is also linked to the payment mechanism, with funds released from an escrow account if the post-completion climate targets and obligations are met.

For more information about TCLP and a full list of TCLP model clauses that are relevant to a wide range of commercial arrangements, including commercial due diligence, see [The Chancery Lane Project: model climate clauses Toolkit](#).

## Disclosure Letter

The [disclosure letter](#) qualifies [warranties](#) given in the APA. It will normally be divided into two sections: general disclosures (relating to matters on public record and information to which the buyer has had access) and specific disclosures (relating to specific issues).

The importance of the disclosure letter is sometimes overlooked. The buyer should seek to limit general disclosures and consider the specific disclosures carefully.

## Ancillary Documents

Ancillary documents are usually required to perfect the transfer of assets; for example, property transfers or lease assignments, [assignments](#) or [novations](#) of contracts, assignments of intellectual property and so on. Other ancillary documents include board minutes, releases from charges and (where necessary) a transitional services agreement.

## Notification of Creditors: Transfer of Businesses (Protection of Creditors) Ordinance

The TBPCO seeks to protect [creditors](#) on the transfer of a business including, without limitation, the Inland Revenue Department.

[Section 2\(1\)](#) of the TBPCO defines a "business" as "a business, or any part thereof, consisting of a trade or occupation (other than a profession) whether or not it is carried on with a view to profit".

According to [section 3\(1\)](#) of the TBPCO, the buyer of a business (whether it is transferred with or without the [goodwill](#) thereof) is, notwithstanding any agreement to the contrary, liable for all debts and obligations, including liability for tax charged or chargeable under the [Inland Revenue Ordinance](#) (Cap 112), arising out of the carrying on of the business by the seller. However, the buyer of a business will not become liable for such debts and obligations if a notice of transfer (Notice) is given in the form and manner required by TBPCO ([section 4\(1\)](#), [TBPCO](#)) and the Notice becomes "complete." This is done by publishing the Notice in the *Gazette* and in any two approved Chinese language newspapers and one approved English language newspaper circulating in Hong Kong.

Since the buyer usually does not want to assume all of the debts and obligations arising out of the conduct of the business by the seller before the completion of the asset transfer transaction, the giving and completion of the Notice in accordance with TBPCO is normally be a condition precedent to the closing of the transaction. It is common for the buyer's lawyers to be tasked with publishing the Notice as the buyer will want to ensure that it is done properly.

## Mandatory Contents of the Notice

To be legally effective, the Notice must contain all of the mandatory particulars set out in [section 5](#) of the TBPCO.

In the case of a transaction not involving a transfer by way of sale under or pursuant to a [charge](#), the particulars that must be included in the Notice are:

- The full name and address of the transferor (the seller).

- The nature of the business and the name or style under which, and the full address at which, it has been carried on during the period of six months immediately preceding the date of transfer.
- The date of transfer.
- The full name and the residential and business addresses of the transferee (the buyer).
- If the transferee:
  - intends to carry on or is carrying on the business, the full address where, and the name and style under which, the transferee is carrying it on or intends to carry it on; or
  - is not carrying on the business and does not intend to carry it on, a statement to that effect.
- A statement that at the expiration of one month after the date of the last publication of the Notice under [section 5\(3\)](#) of the TBPCO, the liability of the transferee for all the debts and obligations arising out of the carrying on of the business by the transferor will cease by virtue of the TBPCO unless proceedings are instituted prior to the expiration.

In the case of a transfer by way of sale under or pursuant to a charge, the Notice must contain the following particulars:

- The nature of the business, and the name or style under which, and the full address at which, it has been carried on during the period of three months immediately preceding the date of transfer.
- The full name and address of the person whose business has been, or is intended to be, transferred by way of sale under or pursuant to the charge.
- Details of the charge under or pursuant to which the transfer by way of sale has been or is to be made, sufficient to enable any document creating or evidencing the charge to be readily identified and, without limiting the generality of the foregoing, such details must include:
  - the date when the charge was made, given, executed, or came into existence;
  - the [consideration](#) for which the charge was executed, made or given or, if there was no such consideration, the circumstances in which it came into existence; and
  - in the case of a registered charge, the date of the registration of the charge, the title of any enactment under which it was registered, and any number or other means of identifying the charge assigned to it upon registration.
- The date of transfer.
- The amount of money, payment of which has been secured by the charge and which was owing:
  - at the date of the publication of the notice of transfer; or
  - if the transfer has already taken effect, at the date of the transfer so taking effect.

A "charge" means a [debenture](#) within the meaning of the CO, a [mortgage](#), a bill of sale, a [lien](#) or any document under or pursuant to which a business or any of its assets are charged as security for the payment of money or the performance of an obligation, and includes an equitable charge ([section 2\(1\)](#), *TBPCO*).

A "registered charge" includes a charge registered under the CO (or its predecessor ordinance), the [Land Registration Ordinance](#) (Cap 128), the BSO or any other enactment ([section 2\(1\), TBPCO](#)).

## Steps for Giving a Notice

Generally, the main steps for giving a Notice are:

- **Prepare the Notice.** The parties usually prepare the Notice alongside the APA and the other transaction documents. The agreed form may be annexed to the APA as a schedule. Although it is not a requirement of the TBPCO, the common practice in Hong Kong is for the Notice to be prepared in both English and Chinese because the Notice will eventually be published in the *Gazette* and certain English and Chinese language newspapers circulating in Hong Kong.
- **Execute the Notice.** After the APA is signed by the parties but before the completion date of the asset transfer transaction, the execution version of the Notice (in both the English and Chinese language) will be prepared and signed by both the seller and the buyer (or, in the case of a sale under or pursuant to a charge, by both the charge-holder and the buyer). The original signed Notice should be kept by the buyer or its lawyers.
- **Publish the Notice.** No earlier than four months and no later than one month before the date of transfer of the business (in other words, the completion date), the parties will publish the Notice in the *Gazette* and in any two approved Chinese language newspapers and one approved English language newspaper circulating in Hong Kong ([section 5\(3\), TBPCO](#)). In practice, the buyer's lawyers will want to ensure that the Notice is published on the same date in the *Gazette* and all the newspapers. The Hong Kong government normally publishes the *Gazette* once every week on Friday, but lawyers must check with the Government Logistics Department of Hong Kong for any changes to the publication schedule (and submission deadlines therefor) due to public holidays in Hong Kong.
- **Wait one month for the Notice to "complete."** Unless legal proceedings are instituted by any third party creditors against the seller or the buyer (as applicable) within one month after the date of the last publication of the Notice, the Notice becomes "complete" and the buyer will cease to be liable for the debts and obligations of the seller (see [section 4\(4\), TBPCO](#)). In this connection, if the Notice was published in the *Gazette* and the newspapers on different dates, the one-month period will only start to run from the date of the last publication of the Notice. Assuming all other conditions precedent are satisfied, the parties can proceed to complete the asset transfer transaction after the expiration of the one-month period on the completion date as stated in the Notice.

Where a Notice has been given but the parties have completed the transfer of the business before the expiration of the one-month notice period, the liability of the buyer will cease with effect from the date on which the Notice actually becomes complete ([section 4\(2\), TBPCO](#)). If the parties give Notice after the date of the transfer, the liability of the buyer will cease with effect from the date on which the Notice becomes complete ([section 4\(3\), TBPCO](#)).

## Creditors: Limitation of Time for Instituting Proceedings Against the Buyer

Generally, after one year of the date of the transfer of a business, no action can be instituted by a third party [creditor](#) to recover any debt from or to enforce any obligation against a buyer for which it would not otherwise have been liable but for the TBPCO ([section 9, TBPCO](#)).

## Transfer of Employees

With a change of ownership of a business carried out by a transfer of assets, there is no automatic transfer of employment. Therefore, the process of transferring an employee in an asset sale situation requires careful planning and coordination between the seller (being the current employer) and the buyer (the new employer). Briefly, the process involves the seller terminating the

employee's employment by giving to the employee the requisite period of notice in accordance with the terms of the employee's employment contract and the [Employment Ordinance](#) (Cap 57) (EO), and the buyer (being the new employer) making a written offer of employment to that employee which complies with the requirements under the EO not less than seven days before the relevant date (usually the date on which the seller's notice of termination of employment is due to expire) ([section 31J, EO](#)). The employee will not be entitled to any statutory severance pay if the employee unreasonably refuses the buyer's employment offer where:

- The seller has lawfully terminated the employee's employment contract by serving the requisite period of notice on the employee.
- The buyer's new offer of employment to such employee is:
  - suitable in relation to that employee; and
  - on the same terms or on terms and conditions no less favourable to the employee than those of their existing employment contract with the seller.
- The buyer's offer of employment takes effect on or before the relevant date (usually the date on which the seller's notice of termination of employment expires).

([Sections 31J, 31C and 31D, EO](#).)

However, an employee who qualifies for statutory long service pay may unreasonably refuse the buyer's offer and still be entitled to long service pay ([sections 31R and 31Z, EO](#)).

If a business is transferred by way of an asset sale and the above procedure is followed, the period of continuous employment of an employee in the business at the time of the transfer counts as a period of employment with the buyer of the business, and the transfer does not break the continuity of the period of employment ([paragraph 5, Schedule 1, EO](#)). This recognition of an employee's years of service is relevant to, among other matters, the employee's entitlements to statutory paid sick leave, paid annual leave, and to the calculation of any statutory severance pay or long service pay after completion of the change of business ownership.

Generally, there is no duty on the seller or buyer to consult with employees or their representatives (whether individually or collectively) in the event of a change of ownership of a business resulting from a transfer of assets.

## Completion and Post-Completion

Concluding an asset purchase transaction usually involves a two-stage process:

- **Exchange.** This involves the parties making a legally binding commitment to proceed with the transaction by signing and dating the APA. If there is a disclosure letter, it will also be signed and delivered at the same time as the APA.
- **Completion.** The steps required to implement and conclude the transaction are performed at completion. This will include the seller delivering (a) the relevant asset to a particular place or (b) any required forms or instruments (including instruments of assignment) for transfer of title or other interests in the relevant asset.

Due to the potential risk of a buyer being liable for the debts and obligations of the seller pursuant to [section 3](#) of the TBPCO, an asset transfer transaction in Hong Kong often involves a gap between exchanging the APA and completing the transaction.



This also arises because one or more conditions need to be satisfied after the APA has been signed and before the transaction can be completed.

Where there is split exchange and completion, the APA sets out the conditions that must be satisfied before completion can take place and usually provides that neither party is obliged to complete the transaction unless and until the conditions are fulfilled.

Most APAs specify in some detail what must happen at completion, including the documents that need to be delivered by each party and the buyer's payment obligations.

Usually, the parties' lawyers also prepare a documents list or completion agenda (see, for example, Standard document, Completion agenda: asset purchases), which sets out all the:

- Documents that need to be prepared and produced for completion.
- Actions that need to be taken at completion, including the order in which they must occur.

Among the various post-completion matters, matters to attend to will generally be:

- Announcing the transaction.
- [Stamp duty](#), if relevant.
- [Assignments](#) and [novations](#) of contracts with customers and suppliers or other third parties in relation to the business which is transferred.
- Administrative matters such as insurance, payroll, mandatory provident fund schemes, and occupational retirement schemes (if applicable).
- Producing a bible of the transaction documents for each of the parties and their lawyers.

The end of the sale process represents the beginning of the new business for the buyer. Although the temptation may be to put the acquisition documents to one side, in practice, the buyer should ensure that developments are monitored with an eye on [warranty](#) deadlines and [restrictive covenants](#).

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END OF DOCUMENT
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