Milbank Insights

Global Corporate/M&A Group

Earn-outs in Asian M&A: Bridging Valuation Gaps in a Volatile Deal Environment

June 5, 2025

Earn-outs in Asian M&A: Bridging Valuation Gaps in a Volatile Deal Environment

Ongoing macroeconomic volatility, rising interest rates and persistent geopolitical undercurrents have widened valuation gaps across Asia's M&A landscape. Buyers, wary of paying for projections that may never materialize, are negotiating harder on headline price. Sellers, reluctant to lock in discounts at the bottom of the cycle, are searching for a mechanism that will reward them if their optimism proves justified. Into that impasse steps the earn-out, now a mainstream structuring tool rather than an exotic contingency clause.

An earn-out arrangement, in essence, defers a portion of the consideration and ties its release to post-closing milestones, whether financial metrics, operational triggers or external events. In today's tight-liquidity environment an earn-out is increasingly viewed as both a price-adjustment valve and a form of low-cost financing, allowing buyers to conserve cash while giving sellers a path to additional value down the road.

Yet flexibility breeds complexity. Earn-out disputes are among the most common post-closing flashpoints. In cross-border Asian deals the risk is amplified by divergent legal systems, uneven enforcement and currency controls. Experience from recent transactions across the region—from South Asia to the Far East—offers guidance on how to craft an earn-out that bridges valuation gaps, contains buyer-seller friction and remains enforceable.

Observations Across Asia

Throughout the region dealmakers are adapting earn-outs to local realities and tailoring terms to close gaps for both sides of the table. In an industrials acquisition in a rapidly developing Southeast Asian market, the parties embedded the contingent payment in a royalty stream tied to intellectual property the seller chose to retain. By excluding the value of that IP and its future revenue from the headline price, the buyer reduced immediate funding pressure. Linking the royalty uplift to transparent sales thresholds meanwhile gave the seller upside that is easy to monitor and less exposed to accounting judgment than a single deferred cash amount.

Another transaction, centered on a resource-oriented business headquartered in an emerging market, demonstrated the value of offshore safeguards. The parties linked a contingent top-up payment to two-year revenue performance but, to account for enforceability risks associated with enforcing the agreed terms in local courts, further agreed to deposit a portion of the funds tied to the contingent payment in an interest-bearing offshore escrow account, with Singapore law governing the terms of the sale and the parties having agreed to SIAC arbitration for disputes. Keeping the money offshore and grounding the procedure in a respected forum gave the seller the much needed confidence of prompt collection if the targets were met.

In two transactions that hinged on equity retention rather than cash, the rationale for adopting an equity-based earn-out differed by jurisdiction. In the first deal, local regulations capped deferred cash consideration at 25% of the price and required payment within 18 months. The commercial milestones under discussion, however, stretched well beyond that window and could yield far greater value than the 25% cap mandated under law. The parties therefore agreed that the seller would keep a minority stake capable of ratcheting up if revenue targets were met and key customer contracts were renewed. Any additional value would materialize as extra shares delivered rather than a specific dollar-based contingent model, thereby respecting the statutory cap while giving the seller equity-denominated upside tied to longer-dated events. In the second deal, the primary driver was statutory foreign-ownership limits. Local law obliged the buyer to maintain a minimum domestic shareholding, so a portion of the consideration took the form of a continuing minority interest for the seller. The sticking point became how to price that residual equity to be kept by the seller. The solution was an "accordion" feature: the seller's stake could expand or contract depending on post-closing revenue and customer-retention outcomes. By allowing the future to determine the size —and value—of the minority block, the parties preserved the mandatory ownership balance and bridged their valuation gap without breaching local restrictions or assuming premature forecasts.

Northeast Asia, in contrast, presents a different cultural and legal backdrop. Japanese transactions have traditionally resisted contingent pricing, favoring certainty, but earn-outs are gaining traction in venture and R&D-heavy acquisitions where value unfolds over time. Korea has long accepted earn-outs in technology and healthcare deals; and disputes typically hinge on accounting definitions rather than enforceability. China's valuation adjustment mechanisms serve a similar purpose but with distinct regulatory inflection points. Chinese courts have ruled that a target company may not guarantee its own performance because doing so breaches capital-maintenance principles, whereas buyers and sellers may absorb that obligation. Cross-border payments also require clearance from the State Administration of Foreign Exchange (SAFE). Because SAFE endorsement is not automatic, parties usually cap contingent amounts, align payment dates with the standard approval window and, where feasible, place funds in offshore vehicles so that release of the earn-out does not hinge on subsequent currency remittance. These work-arounds respect regulatory guardrails while still conveying commercial intent.

A recent multijurisdictional carve-out added another dimension. The target operated across several Asia-Pacific jurisdictions and needed multiple antitrust and industry consents. To accelerate closing the buyer agreed to pay supplemental consideration for approvals gained before agreed threshold dates. The seller, remaining in control of filings, thereby acquired a tangible incentive to mobilize resources and cooperate fully with regulators. Because approvals lay partly outside either party's control, the earn-out was buttressed by a back-stop escrow and a narrowly drawn material-adverse-effect clause to prevent either side from bearing undue blame if an agency moved slowly. The example illustrates how earn-outs can encourage affirmative conduct rather than merely compensate past performance.

Enforceability, Dispute Resolution and Safeguards

Four themes dominate enforceability analysis. First, local legal limits can unravel well-drafted provisions, so early engagement with local counsel is essential. In jurisdictions such as India, caps apply to deferred consideration in cross-border share deals on both quantum (a fixed percentage of the purchase price) and timing (payment must be made within a set period after closing). Any contingent arrangement that would exceed either threshold requires regulatory approval; without that approval, a seller risks holding an unenforceable promise of payment. In jurisdictions such as China, capital-maintenance rules restrict the guarantees a target company may give, limiting direct recourse against the target and forcing parties to devise alternative structures—typically shareholder guarantees, offshore escrows or parent-company support—to make a contingent payout enforceable.

Second, precision in determining milestone outcomes and calculating the earn-out is non-negotiable. Tying a payout to EBITDA, for instance, without specifying accounting standards, permitted adjustments or audit rights invites creative interpretation—buyers naturally lean toward lower figures, sellers toward higher. Clear definitions, robust access to financial information and covenants that prevent business manipulation are essential. Whether a transaction is in Asia-Pacific or elsewhere, these mechanics anchor the contingent payment to objective data and keep post-closing disputes to a minimum.

Third, governing law and forum selection demand careful thought. English, Singapore and Hong Kong law are favored because they recognize contingent-price constructs and supply a predictable body of precedent. Singapore and Hong Kong remain the arbitral seats of choice: their rules are well tested, their courts grant supportive interim relief and awards benefit from New York Convention enforcement.

Fourth, recovery mechanics must be built in at signing rather than litigated later. Offshore escrows, parent-company guarantees and share pledges give sellers a tangible source of recovery if a buyer resists payment and reduce the need to test contractual rights in a potentially biased home court.

These themes converge in practice. A robust earn-out pairs precise drafting with a layered security package: escrowed cash released on auditor confirmation, preferred shares or convertible notes that embed upside in corporate statutes and staged closings or put-call options that convert contingent amounts into follow-on equity purchases. Expert determination for accounting disputes can streamline disagreements on numbers, leaving broader legal issues to arbitration. Together, these measures translate contractual promises into practical, enforceable outcomes.

Looking Ahead

Earn-outs have become an essential part of the Asian dealmaker's toolkit. They align economic interests when forecasts are cloudy, blunt the impact of financing constraints and can even accelerate regulatory timetables. Their growing popularity, however, places a premium on thoughtful design. Parties must select metrics that genuinely track value creation, draft covenants that prevent deliberate underperformance and embed enforcement pathways that work in practice, not just on paper. When these elements are in place, an earn-out is more than a bridge over a valuation gap – it is a catalyst that turns uncertainty into shared opportunity, allowing deals to close today while leaving tomorrow's value to prove itself.

Contacts

David Zemans
Partner
+65 6428 2555
dzemans@milbank.com

Jacqueline Chan
Partner
+65 6428 2433
jchan@milbank.com

David Cho
Partner
+82 (2) 6137 2611
dcho@milbank.com

Andrew Whan
Partner
+852 2971 4880
awhan@milbank.com

Neeraj Budhwani
Partner
+852 2971 4881
nbudhwani@milbank.com

Spencer Park
Special Counsel
+82 (2) 6137 2612
spark@milbank.com

Min Kim
Special Counsel
+65 6428 2429
mkim@milbank.com

Hua Chan
Senior Associate
+65 6428 2579
hchan@milbank.com

Erin Zhang
Associate
+65 6428 2469
ezhang@milbank.com

Authored by Jacqueline Chan, Min Kim, Hua Chan and Erin Zhang with input from Milbank's Global Corporate/M&A Group.

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Global Corporate/M&A Group.

Milbank Insights