# PRIVATE M&A

## Singapore

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Getting The Deal Through

Consulting editor
*Davis Polk & Wardwell LLP*

# Private M&A

Consulting editors

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*Davis Polk & Wardwell LLP*

Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

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## Singapore

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## STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

### Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

The acquisition of shares or the business and assets of privately owned companies is usually effected by a sale and purchase agreement entered into between the relevant parties. Acquisitions may also be structured as put-and-call arrangements, but these are less common.

While uncommon, the acquisition of privately owned companies can also be structured by way of a 'contractual offer', which is followed by a minority squeeze-out (in accordance with section 215 of the Companies Act 1967 (Companies Act)), a scheme of arrangement under section 210 of the Companies Act or the statutory amalgamation procedures under sections 215A to 215K of the Companies Act.

The transaction process depends on the transaction structure (including any pre-completion restructuring), the complexity of the issues, the type of business that the target operates, the number of parties involved, and whether the transaction involves a bilateral negotiation or a formal auction sale process.

Parties would typically enter into a confidentiality or non-disclosure agreement at the outset of the acquisition transaction.

In bilateral acquisition transactions, at the preliminary negotiation phase, it is fairly common for the parties to enter into a preliminary arrangement (eg, via a heads of agreement, a term sheet, a memorandum of understanding or a letter of intent). Such preliminary arrangement is often stated as 'subject to contract' and will set out the parties' understanding and the principal commercial terms of the transaction.

The preliminary arrangement is usually non-legally binding except for certain key provisions relating to confidentiality, costs and expenses, exclusivity, and governing law. Break fees are uncommon in private acquisition transactions.

After the preliminary arrangement is entered into, due diligence (typically, legal, financial, tax and accounting due diligence) will often take place and will be followed by the drafting, negotiation and execution of the definitive transaction documents (eg, sale and purchase agreement, disclosure letter and, where applicable, shareholders' agreement). Completion of the transaction may be simultaneous with the execution of the definitive transaction documents or may occur after the satisfaction of conditions precedent.

A formal auction sale process would, at the initial transaction phase, typically involve the preparation of an information memorandum on the company, or the business or assets to be sold; legal and financial due diligence reports (prepared by the vendor's advisers); and draft transaction documents (eg, a sale and purchase agreement, a disclosure letter and, where applicable, a shareholders' agreement). The information memorandum will be distributed by the vendor's financial advisers to potential buyers, with the aim of soliciting bids.

Potential buyers will be invited to submit a 'round-one' non-binding offer or expression of interest, from which selected bidders will be granted access to undertake due diligence (which may be facilitated by the provision of a vendor due diligence report). During the due diligence phase, the draft transaction documents are provided to the selected bidders.

At the end of the due diligence phase, selected bidders submit their binding offers, together with markups of the transaction documents, for the vendor's consideration. Based on these 'round-two' offers, one or more bidders will be chosen to continue negotiations until the final transaction documentation is entered into with one party.

At the final negotiation phase, the final bidders sometimes undertake confirmatory due diligence on sensitive information (which was not provided in the earlier due diligence phase).

The time required to complete the acquisition depends on, among other things, the size or international presence of the target company, business or assets, and the complexity of the transaction. Generally, an acquisition may take three to six months to complete and may be longer where multi-jurisdictional regulatory approvals (eg, antitrust clearance) are required. A bilateral acquisition transaction may take longer to complete owing to the lack of a controlled and competitive process (unlike the formal auction sale process for disposals).

*Law stated - 18 July 2023*

## Legal regulation

### Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Parties are generally free to negotiate the terms and conditions of the sale and purchase agreement for private M&A transactions. In doing so, they must take into account the Companies Act, which is applicable to all companies incorporated, registered or carrying on business in Singapore. Other statutes and regulations that may be applicable or relevant to private M&A transactions include those relating to transfer of employees, data protection, ownership and transfer of real estate, and competition.

Where the target, buyer or seller operates in a regulated sector, the relevant statutes and rules issued by the regulator are also applicable. Where the buyer or the seller is a company listed on the Singapore Exchange Securities Trading Limited (SGX-ST), the SGX-ST's listing rules will also be applicable in relation to acquisitions and disposals made by the parties.

Parties are free to decide on the governing law of the transaction documents. Most transaction documents for the sale of Singapore companies are governed by Singapore law. The legal formalities and procedures for the transfer of shares, business, assets or liabilities that are subject to Singapore law must be complied with.

*Law stated - 18 July 2023*

## Legal title

### What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

Under Singapore law, there are no statutorily prescribed terms on the extent or content of the seller's title to the shares that a buyer acquires. As such, it is common practice for express wording to be included in sale and purchase agreements as contractual assurance to the buyer.

Generally, legal title to shares, a business or assets does not transfer automatically. In the case of the transfer of shares in a private company incorporated under the Companies Act, such transfer does not take effect until the electronic register of members (EROM) of the company maintained by the Accounting and Corporate Regulatory Authority of Singapore (ACRA) is updated. The buyer will be registered as the legal owner of the shares only when the EROM of the company is updated.

In the case of a business or asset acquisition, while title to some assets (eg, stock, equipment and machinery) can be transferred by simple delivery (in accordance with the terms of the sale and purchase agreement), others such as land must be formally transferred or assigned, be registered with the Singapore Land Authority (SLA) (if necessary) and may require third party consents.

There are distinctions between legal and beneficial titles under Singapore law. A person registered as holding the legal title to a share in a company incorporated under the Companies Act may be a nominee, while another party has the right to receive the economic benefits of the share. Accordingly, the beneficial interest can be transferred without having to update the EROM of the company. Interests in other assets, such as real estate, can be held in the same way, subject to statutory requirements on the creation of trusts in certain cases.

Under the Companies Act, a person holding beneficial title to shares in a company may, in certain circumstances, be registrable as a 'controller' in the company's register of controllers, and a person who holds shares in a company as a nominee should be named in the company's register of nominee shareholders. These registers are maintained by the company and are not available to the public.

*Law stated - 18 July 2023*

## Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

Where the terms of the acquisition are substantially the same and there are no confidentiality concerns about differing terms, buyers would typically prefer that all the sellers agree to sign and be bound by the same set of transaction documents.

If the company's constitution (or where applicable, the shareholders' agreement) contains drag-along provisions, minority shareholders may be required to sell their shares along with the selling shareholders if the conditions of the drag-along provisions are met.

Additionally, section 215 of the Companies Act contains squeeze-out provisions that are typically used in connection with public takeovers but can also apply in the context of a share acquisition in a privately owned company. The buyer can make an offer to acquire all the remaining shares (other than those shares already acquired by the buyer) under the squeeze-out provisions.

If the buyer obtains acceptances from shareholders who hold not less than 90 per cent of the total number of shares to which the offer relates (other than shares already held, or treated as held, by the buyer as at the date of the offer and excluding any shares held as treasury shares), the buyer will be entitled to give notice to the remaining shareholders to compulsorily acquire their shares. However, section 215 confers on a dissenting shareholder the right to apply to court to object to such a squeeze-out.

Following recent amendments to the Companies Act, in respect of an offer made on or after 1 July 2023, the categories of shares that are treated as held by the buyer have been expanded and now comprise shares held by:

1. its nominees;
2. its related corporations or their nominees;
3. a person who is accustomed or is under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the buyer in respect of the target company;
4. the buyer's spouse, parent, brother, sister, son, adopted son, stepson, daughter, adopted daughter or stepdaughter;
5. a person whose directions, instructions or wishes the buyer is accustomed or is under an obligation, whether formal or informal, to act in accordance with in respect of the target company; or
6. a body corporate that is controlled by the buyer or a person mentioned in points(3), (4) or (5) above.

If the acquisition is structured as a scheme of arrangement under section 210 of the Companies Act, and the scheme is approved by a majority in number representing 75 per cent of the total value of the shareholders present and voting (in person or proxy) at the meeting ordered by the court, the scheme effecting the acquisition shall be binding on all shareholders (including the minority shareholders).

*Law stated - 18 July 2023*

## Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

A buyer can generally choose which assets or liabilities it wishes to acquire where the acquisition is structured as a business or assets sale. This will be set out in the definitive transaction documents. There are, however, obligations relating to certain employees (covered under section 18A of the Employment Act 1968 ) engaged in the business that will automatically transfer on completion of the sale of the business.

The transfer of assets or liabilities may require customary third-party consents, such as a landlord's consent to the assignment of a lease, or a counterparty's consent to the assignment or novation of a contract.

*Law stated - 18 July 2023*

## Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Selling shareholders of a company may be subject to sale or transfer restrictions that are set out in the company's constitution or a shareholders' agreement. Such restrictions would typically include a moratorium period where no shares can be sold or transferred, the pre-emptive rights of other existing shareholders to require the selling shareholders to offer their shares to existing shareholders before the shares can be sold to a third party, and tag-along rights of other existing shareholders, which would restrict the ability of selling shareholders to transfer their shares in a transaction that excludes other shareholders.

There are no general regulatory restrictions on the transfer of shares in a company and, in particular, there are no general foreign investment notification or approval requirements applicable to such transfers; however:

- the transfer of shares in companies that operate in certain specified sectors are subject to foreign ownership restrictions (eg, newspaper and broadcasting companies); and
- the transfer of shares in companies that operate in certain regulated sectors are subject to regulatory approval or notification requirements (eg, licensed banks and insurers incorporated in Singapore, capital markets services licence holders, trust companies and certain designated telecommunications and electricity licensees).

Buyers may wish to consult the Ministry of Manpower in relation to transfers of employees who require work passes to work in Singapore.

In addition, mergers (including an acquisition of control via a share acquisition) that substantially lessen competition in any market in Singapore are prohibited under the Competition Act 2004 . While there is no mandatory requirement for mergers to be notified to the Competition and Consumer Commission of Singapore (CCCS), merger parties may voluntarily notify their transaction to the CCCS for a decision on whether the transaction will substantially lessen competition in Singapore.

The CCCS has also indicated that parties that do not notify mergers that raise competition concerns risk the CCCS subsequently investigating the transaction on its own initiative. Should the CCCS find that the merger will likely lead or has led to a substantial lessening of competition in Singapore, the parties could face financial penalties or other directions, or both, imposed by the CCCS, including divestiture orders.

*Law stated - 18 July 2023*

### Are any other third-party consents commonly required?

Existing contractual arrangements of a company (eg, those with landlords, lenders, creditors, suppliers and customers) are typically examined to determine if any other third-party consents are required. Existing contractual arrangements may contain 'change of control' clauses, which provide that the consent of counterparties must be obtained prior to a share transfer of a certain threshold, or give counterparties a contractual right to terminate if a share transfer results in a change in control of the company.

The constitution of a company or a shareholders' agreement may also contain restrictions on a share transfer, such as a moratorium period on share transfers, pre-emption rights or tag-along rights. The consents of other shareholders will be required to waive such restrictions specified in the company's constitution or shareholders' agreement, to allow the selling shareholders to sell their shares to a third party.

Where the business or asset acquisition involves the disposal by a Singapore company of the whole or substantially the whole of its undertaking or property, the prior approval of the shareholders of the Singapore company must be obtained at a general meeting pursuant to section 160 of the Companies Act. The approval required under section 160 is a simple majority vote of the shareholders present and voting at such general meeting.

*Law stated - 18 July 2023*

## Regulatory filings

### Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Stamp duty is payable on a transfer of shares in a Singapore company. Thereafter, the Singapore company must update ACRA (via the lodgement of a notice of transfer of shares) when there is a transfer of its shares, and ACRA will update the EROM of the Singapore company to register the new holder of shares.

For transactions involving a subscription of new shares, a form relating to the return of allotment must be filed with ACRA. Details such as the total number of allotted shares, a description of the shares allotted and a statement of capital that shows the company's latest capital structure must be provided in the aforementioned form.

In the case of a sale and purchase of immovable property in Singapore, a deed or other written instrument (eg, a transfer instrument) is required to be executed for the transfer of interest in the immovable property. The document will need to be lodged with the SLA. There are lodgement fees (which are generally nominal amounts) payable to the SLA for the registration of the document. Registration is mandatory to effect the transfer of an estate or interest in land and for the fresh certificate of title to be issued to reflect the new owners.

*Law stated - 18 July 2023*

## ADVISERS, NEGOTIATION AND DOCUMENTATION

### Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In addition to external lawyers, parties customarily appoint financial advisers and accountants to assist with a transaction.

Financial advisers typically provide strategic input on transaction structure, provide valuation advice, assist in negotiations and manage the transaction (in particular, in a formal auction process, where there are strict timelines).

Accountants typically assist with accounting and tax-related matters, the undertaking of financial and tax due diligence, and tax structuring (in particular, where the transaction involves multiple jurisdictions).

The advisers typically have a set of standard terms of engagement to be entered into with the buyer or seller, which will include terms relating to the scope of work, the fee structure, confidentiality and conflicts of interest. The fees of the advisers depend on the scope of work, the complexity of the issues and the size of the deal.

*Law stated - 18 July 2023*

### Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Under Singapore law, parties are not subject to a duty to negotiate in good faith in transactions; however, an express agreement to negotiate in good faith has been held by the Singapore courts to be enforceable.

Directors of a Singapore company owe both fiduciary and statutory duties to the company (under the Companies Act 1967). This includes the duty to act honestly and to exercise their powers with reasonable care, skill and diligence for a proper purpose and in good faith, in the best interest of the company.

*Law stated - 18 July 2023*

### Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

When acquiring shares, a business or assets, parties to a transaction will customarily enter into, during the preliminary negotiations phase:

- a confidentiality or non-disclosure agreement governing the exchange of confidential information relating to the transaction; and
- a heads of agreement, term sheet, memorandum of understanding or letter of intent outlining the parties' understanding and the principal commercial terms of the transaction.

Following completion of due diligence and at the conclusion of the negotiation phase, parties to a transaction will customarily enter into:

- a sale and purchase agreement setting out the transaction terms, which will be substantially similar regardless of whether shares, a business or assets are being acquired, except that in respect of a business or asset acquisition, there will be detailed provisions defining the scope of the assets and liabilities that are to be transferred to the buyer and mechanisms for the transfer and delivery of those assets and liabilities;
- a disclosure letter in which general and specific disclosures are made by the seller qualifying the warranties included in the sale and purchase agreement;
- if required by the buyer, a transitional services agreement specifying the basis upon which the seller will ensure the continued provision of certain services to the target company or business by the seller or its affiliates following completion of the transaction;
- in respect of an acquisition of shares, a shareholders' agreement governing the shareholders' relationship and the conduct of the target company's business (where the buyer is not acquiring 100 per cent of the shareholding of the target company);
- if required by the buyer, employment agreements for key personnel;
- in respect of a business or asset acquisition, assignment or novation agreements for the transfer of existing third-party contracts; and
- documents to transfer or register title to assets (ie, a share transfer form or, in respect of the acquisition of a business or assets, a deed of assignment or, in respect of real property and intellectual property rights, a transfer instrument).

*Law stated - 18 July 2023*

## Are there formalities for executing documents? Are digital signatures enforceable?

Under Singapore law, there is a distinction between the execution of simple contracts and the execution of deeds. Generally, if only one party under a contract is receiving a real benefit from an agreement, the contract would need to be executed as a deed so that it is not void for lack of consideration.

Additionally, certain documents, such as an instrument transferring interests in immovable property, mortgages and powers of attorney (if it confers power on or authorises the donee to execute a deed or deliver a deed on the donor's behalf), must also be executed as deeds.

Execution of simple contracts is effected by the signature of a duly authorised person of the company. Additional formalities must be observed for the execution of deeds by a Singapore company, which include affixing a company seal to the document or, in the absence of such a seal, execution by at least two directors, a director and a company secretary, or a director in the presence of a witness who attests the signature.

Deeds to be executed by a natural person are usually executed in the presence of a witness. The failure to observe any applicable formalities for execution could cause a document to be invalid and unenforceable.

Singapore law does not prescribe the formalities for execution of deeds by companies incorporated outside Singapore (corporations). Accordingly, the formalities for execution of deeds by a corporation will be in accordance with the requirements of the relevant laws of the jurisdiction of its incorporation.

The Electronic Transactions Act 2010 (ETA) provides a legislative framework to support the usage of electronic and digital signatures in Singapore. Subject to certain exceptions, the ETA provides that if a rule of law requires a signature or provides for certain consequences if a document or record is not signed, that requirement is satisfied in relation to an electronic record if:

1. a method is used to identify the person and to indicate that person's intention in respect of the information contained in the electronic record; and
2. the method used is either reliable and appropriate for the purpose for which the electronic record was generated or communicated, in light of all the circumstances, including any relevant agreement, or is proven in fact to have fulfilled the functions described in item (1) by itself or together with further evidence.

The ETA essentially provides that a contract shall not be denied validity or enforceability solely on the ground that electronic communication was used for that purpose, and facilitates electronic transactions by recognising two non-exhaustive ways of ensuring the authenticity and integrity of electronic records, in establishing the requirements for creating 'secure electronic signatures' and 'secure electronic records'. However, if other Singapore legislation requires a signature to be in non-digital form, that other legislation will apply.

The ETA extends to negotiable instruments, documents of title, bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts and any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money, but it does not apply to certain categories of transactions and documents, such as the creation and execution of a will, the creation of indentures, trust documents or powers of attorney, with the exception of implied, constructive and resulting trusts and lasting powers of attorney defined under section 2(1) of the Mental Capacity Act 2008 , and transactions relating to land. For such excluded documents and transactions, one cannot rely on the provisions in the ETA to satisfy the legal requirements for writing and signature.

However, where legal form requirements apply, these exclusions may not necessarily prevent those transactions from being carried out electronically: it may be possible for electronic records or signatures to satisfy the requirements for writing or signature without reliance on the provisions of the ETA, and it would be a matter for legal interpretation to assess whether an electronic form satisfies a particular legal requirement for writing or signature.

*Law stated - 18 July 2023*

## DUE DILIGENCE AND DISCLOSURE

### Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Due diligence provides prospective buyers with the opportunity to evaluate, among other things, the legal, financial, tax and commercial position of the target company, business or assets.

Due diligence is often divided into legal, financial, tax and accounting due diligence exercises and is carried out by the appropriate advisers. Legal due diligence will generally cover the following information in relation to the target (and the extent of legal due diligence may depend on the buyer's budget restrictions as well as time constraints):

- corporate information (eg, title to shares, the constitution and the share capital structure of the target);
- regulatory approvals;
- licences or permits held by the target or its subsidiaries that prohibit or restrict a change in control of the target and its subsidiaries or that impose shareholding thresholds or foreign ownership limits;
- contracts with suppliers, customers and employees (in particular, whether there are change of control provisions or restrictions on transfer or assignment);
- information relating to the target's assets (including intellectual property, real properties and leases) and liabilities, including whether the target has title to those assets;

- banking and financing (in particular, whether there are financial covenants and change of control provisions);
- employee matters (eg, employment agreements of key personnel, employee share plans and other benefits);
- insurance;
- litigation that the target is involved in or may potentially be involved in; and
- whether a change in control of the target will lead to an obligation to make a takeover offer (or its equivalent in the relevant foreign jurisdictions) of any of its listed subsidiaries or associated companies.

The scope of legal due diligence would be customised to reflect the prospective buyer's concerns in respect of the target company, business or assets and industry practices.

It is uncommon for sellers to provide vendor due diligence reports to prospective buyers in private M&A transactions in Singapore. Where vendor due diligence reports are provided by the sellers to prospective buyers, it is typically in connection with a controlled auction process of sale. In those instances, buyers are typically not able to rely on due diligence reports produced for the seller.

*Law stated - 18 July 2023*

## Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller can be liable for pre-contractual misrepresentations, although, except with respect to fraudulent misrepresentations, sale and purchase agreements usually limit a seller's liability to claims for breach of contract and exclude liability for pre-contractual and misleading statements.

*Law stated - 18 July 2023*

## Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Singapore-incorporated companies are required to make extensive filings with the Accounting and Corporate Regulatory Authority of Singapore. Publicly available information on Singapore-incorporated companies includes:

- details on share capital, and any change in or transfer of share capital;
- particulars of directors and shareholders;
- business profiles;
- company information, such as dates and descriptions of lodgements such as annual returns (which include certain financial statements), the company's constitution, details of changes to the company's directors and name changes;
- the register of charges over the company's assets; and
- the electronic register of members.

Details of the ownership of real property and registered leases, and encumbrances on the property (such as mortgages and caveats lodged against the real property) can be obtained from the Singapore Land Authority's Integrated Land Information Service.

Details of registered intellectual property – namely patents, trademarks, geographical indications and registered designs – can be obtained from the Intellectual Property Office of Singapore's online portal.

Searches of the information mentioned above are customarily carried out by the buyer before entering into a sale and purchase agreement. Litigation, enforcement and insolvency searches are also typically conducted to determine whether there are any ongoing or former claims that may have been made by or against the target company, or winding-up proceedings or petitions against the target company.

*Law stated - 18 July 2023*

### Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

A buyer's actual or deemed knowledge at the time of entering into an acquisition may preclude claims being brought against the seller in respect of the relevant representations and warranties. However, as this point has not yet been fully tested under Singapore law, the practical approach is for the buyer to raise such matters with the seller prior to signing and to seek contractual protections via indemnities or a reduction in the purchase price.

*Law stated - 18 July 2023*

## PRICING, CONSIDERATION AND FINANCING

### Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Pricing mechanisms with post-completion net cash or debt adjustments and working capital adjustments with reference to completion accounts are more common in private M&A transactions in Singapore than locked-box structures.

Auctions of companies, particularly those conducted by private equity funds, typically use locked-box pricing as this forces a buyer to conduct due diligence on the accounts before agreeing to the deal, thus providing greater certainty for the seller on an exit.

*Law stated - 18 July 2023*

### Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash is the most common form of consideration in private M&A transactions in Singapore. Other forms of consideration include shares and a combination of cash and shares. Factors taken into account when selecting the form of consideration include the availability of financing to the buyer and the tax implications of different methods of payment.

There is no obligation to pay multiple sellers the same consideration in respect of an acquisition by way of a sale and purchase agreement. Where the transaction is structured as a contractual offer and the Singapore Code on Take-overs and Mergers (the Take-over Code) is applicable to the target company, the buyer would have to adhere to the general principle under the Take-over Code to treat all shareholders of the target company equally, which includes offering the same consideration to all shareholders.

*Law stated - 18 July 2023*

## Earn-outs, deposits and escrows

### Are earn-outs, deposits and escrows used?

Deposits are not common features of private M&A transactions in Singapore. Earn-outs are negotiated where parties intend for pricing to reflect expectations of significant growth or where the target company is to achieve certain agreed profit targets. Escrow arrangements are used in respect of earn-out structures, and more commonly as security for purchase price adjustments and for claims by the buyer against the seller arising under the sale and purchase agreement.

*Law stated - 18 July 2023*

## Financing

### How are acquisitions financed? How is assurance provided that financing will be available?

Financing for private M&A transactions in Singapore is typically via cash reserves of the buyer, loans obtained from a bank or financing institution, or a combination of these. Buyers are increasingly borrowing from alternative finance providers, such as direct lending funds and institutional investors.

Parties are free to determine the assurance that the seller requires in respect of financing being available. There are cases in which a seller would require the buyer to obtain commitment letters from banks and present them to the seller before executing the definitive transaction documents.

It is possible but uncommon to include the availability of financing as a condition precedent to the closing of the transaction, as such a condition would typically not be acceptable to most sellers in practice.

*Law stated - 18 July 2023*

## Limitations on financing structure

### Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

A Singapore public company or a subsidiary company (whether incorporated as a private or public company in Singapore) of a Singapore public company cannot, directly or indirectly, give financial assistance to potential buyers in connection with the acquisition of its own shares or the shares of its Singapore public holding company. Section 76(1) of the Companies Act 1967 (Companies Act) sets out this prohibition against financial assistance.

While 'financial assistance' is not expressly defined, it includes the making of a loan, the provision of a guarantee, the provision of a security or an indemnity, and the waiver or release of an obligation or debt or otherwise.

Section 76 of the Companies Act also sets out specific exceptions to the prohibition against financial assistance, and the 'whitewash' procedures to be complied with in order for such companies to provide financial assistance.

Singapore private companies that do not fall within the above-mentioned companies are free to provide financial assistance to potential buyers in connection with the acquisition of their own shares and shares in their holding companies. Prior to providing such financial assistance to a potential buyer, the directors of a target company must consider their duties and obligations under the Companies Act and the common law to act in the best interests of the company.

*Law stated - 18 July 2023*

## CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

### Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Yes, transactions are normally subject to closing conditions. Signing and completion of a transaction can take place on the same day if there are no specific legal (eg, third-party consents) or regulatory obligations (eg, antitrust clearance) to satisfy before completion of the transaction. In such instances, customary closing obligations include the seller providing duly executed transfer instruments (eg, share transfer forms), title documents (eg, share certificates) and relevant corporate resolutions (eg, board resolutions of the target company approving the transfer of shares and the updating of the electronic register of members).

Should there be specific legal or regulatory obligations to be satisfied before completion, parties would typically (in particular, from a deal certainty perspective for the buyer who has committed resources to the transaction) sign the definitive transaction documents first and have completion take place upon satisfaction of conditions precedent relating to such legal or regulatory obligations (in addition to the other closing obligations mentioned above). Such conditions are customarily acceptable to the seller.

A buyer may seek conditions regarding the accuracy of fundamental (relating to a seller's title to shares, capacity and authority) and business warranties at completion and the absence of any material adverse change since entering into the transaction, although the inclusion of any such conditions and their scope will be subject to negotiation with the seller.

Sale and purchase agreements will typically contain a long-stop date by which the closing conditions must be fulfilled, failing which the agreement will terminate.

*Law stated - 18 July 2023*

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

The standard of obligations imposed depends on the relative bargaining power of the parties and whether the client is the buyer or seller. Parties are generally expected to use reasonable endeavours to ensure the satisfaction of closing conditions for which they are responsible. In some cases, a best endeavours standard may be agreed upon, which is more onerous than a reasonable endeavours standard.

However, under Singapore law, there is no practical difference between clauses that require parties to use all reasonable endeavours and best endeavours, as both essentially require parties to take all reasonable steps that a prudent and determined person, acting in the counterparty's interests and taking into account the available time for procuring the contractually stipulated outcome, would have taken.

Typically, the buyer and the seller are strictly required to satisfy the closing obligations involving the payment of purchase consideration and the delivery of title documents.

*Law stated - 18 July 2023*

## Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Where there is a time gap between the signing of the definitive transaction documents and the completion of the transaction, the buyer will typically insist on restrictions being imposed on the seller's conduct of the business during this period. Such pre-closing covenants typically include the following:

- to operate the target business in the ordinary course of business and in a manner consistent with past practice;
- not to alter the share capital or make distributions to shareholders;
- not to amend the constitution;
- not to acquire or dispose of assets, incur liabilities, enter into material agreements or commit to capital expenditures in excess of a specified value;
- not to create encumbrances;
- to maintain, without alteration, insurance policies and to renew insurance policies in a timely manner;
- not to alter terms of employment or benefit entitlements or hire new employees on salaries in excess of a specified amount;
- to make public announcements relating to the transaction only with the other party's consent;
- not to commence litigation or waive any claims;
- not to solicit competing proposals and to notify the buyer of any unsolicited approaches in respect of the target company, business or assets;
- to conduct the target business in accordance with applicable law; and
- to grant access to the target company's books, records and premises.

A breach of a pre-closing covenant will result in a claim for damages that is typically uncapped (unlike a claim for breach of warranty). Alternatively, parties may seek an order for specific performance to the extent that damages are not an adequate remedy.

It is not uncommon for a buyer to negotiate for the right to terminate the transaction if there is a breach of a pre-closing covenant or undertaking, although the seller will typically resist this or seek to limit such right of termination to material breaches.

*Law stated - 18 July 2023*

## Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

The circumstances in which parties can terminate the transaction are negotiated and will depend on whether the client is the buyer or seller. Generally, parties would regard that risk with respect to the company, business or assets passes to the buyer from the date of signing of the definitive transaction documents. Parties typically cannot terminate a transaction in advance of an agreed long-stop date, except to the extent that any condition (ie, specific conditions precedent and closing deliverables or obligations) is or becomes incapable of satisfaction.

A seller will typically seek to limit the ability of the buyer to terminate the transaction after signing, with the buyer's remedies being damages subject to limitations. It is not uncommon for a buyer to negotiate for the right to terminate the transaction if there is a breach of warranty or a covenant or undertaking, although the seller will typically resist this

or seek to limit such right of termination to material breaches.

A buyer may also seek a termination right in the event of a material adverse change, although the scope of such right (in particular, the circumstances that would constitute a material adverse change) would be subject to negotiation.

*Law stated - 18 July 2023*

### Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees and reverse break-up fees are generally allowed but are not common in Singapore for private M&A transactions. If a break-up fee is contemplated, the directors of the company must be satisfied that agreeing to a break-up fee is consistent with their fiduciary and statutory duties to the company.

Where the acquisition involves a target company to which the Singapore Code on Take-overs and Mergers (the Take-over Code) applies, the Take-over Code sets out certain rules governing break-up fees. A break-up fee must be minimal and usually not more than 1 per cent of the value of a target company, calculated by reference to the offer price (guidelines regarding how this 1 per cent limit should be calculated are set out in the Take-over Code).

The board of a target company and its financial adviser must also provide certain written confirmations to the Securities Industry Council (SIC), including confirmations that the break-up fee arrangements were agreed as a result of normal commercial negotiations and that they each believe the break-up fee is in the best interest of the shareholders of the target company. Additionally, the break-up fee arrangement must be fully disclosed in the offer announcement and the offer document.

The SIC should be consulted at the earliest opportunity if a break-up fee or similar arrangements are proposed.

*Law stated - 18 July 2023*

## REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

### Scope of representations, warranties and indemnities

### Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

A seller typically gives representations and warranties and, subject to the negotiating position of the parties and specific issues arising from due diligence, indemnities to the buyer. A buyer-friendly sale and purchase agreement may include a general indemnity for any liability arising from a breach of representations and warranties, in addition to the specific indemnities for specific issues arising from due diligence.

The representations and warranties given by a seller typically pertain to:

- title, capacity and authority;
- corporate information (eg, share capital);
- accounts;
- banking and finance;
- business contracts;
- assets (including immovable properties and leases);
- intellectual property;
- employees and employee benefits;

- legal compliance;
- environment;
- litigation;
- insurance;
- tax; and
- insolvency.

Parties are generally free to negotiate the representations, warranties and indemnities. The scope of representations, warranties and indemnities varies widely from transaction to transaction and will depend on the relative bargaining power of the parties. In a formal auction sale process or where the seller is a private equity fund, a narrower scope of warranties will be expected.

Sellers will typically limit their liabilities in relation to representations and warranties to contractual remedies and exclude tortious remedies. In terms of quantum of damages, the principle underlying the measure of damages in a contract is that the buyer must, as far as possible, be put in the same position as if the breach of warranty had not occurred. Thus, for a breach of representation or warranty, this would be the difference between the value of the assets bought and the value the assets would have had if such representation or warranty had been true.

The breach of a warranty or representation as a misrepresentation gives rise to tortious remedies under the Misrepresentation Act 1967 . Damages for tortious misrepresentations seek to put the buyer in the position they would have been in had the misrepresentation not been made. This could be fundamentally different from the contractual quantum of damages, depending on whether a good or bad bargain has been made.

Subject to the particular drafting, an indemnity is an undertaking to pay in specific circumstances. The basis of an indemnity claim is that liability arises because the parties have agreed that the seller should pay to the buyer the amount of any loss arising in specified circumstances and the buyer should receive payment in accordance with the terms of the indemnity provision. While the need for causation remains, it is more straightforward as there is no need for the loss suffered to have been foreseeable, nor is the buyer under a duty to mitigate its losses.

*Law stated - 18 July 2023*

## Limitations on liability

### What are the customary limitations on a seller's liability under a sale and purchase agreement?

Customary limitations on a seller's liability under a sale and purchase agreement include:

- capping of the seller's aggregate liability at an amount equal to or less than the purchase price;
- a de minimis threshold whereby each individual claim must exceed a minimum monetary threshold, and that the aggregate value of such claims must exceed a certain monetary threshold (such monetary thresholds are subject to negotiation between the parties but will typically be about 0.5 per cent to 1 per cent of the purchase price for each individual claim and 5 per cent to 10 per cent of the purchase price for the aggregate value of such claims);
- a period by which the buyer must bring a claim after the completion of the transaction;
- qualifying representations and warranties with disclosures contained in the disclosure letter and information in the data room;
- knowledge qualifications in representations and warranties, and materiality qualifications in warranties and covenants;
- limitation of the seller's liabilities to contractual remedies and excluding tortious remedies; and
- debarment of double recovery, and the requirement of the buyer to exhaust other available remedies.

Fundamental warranties, indemnities and pre-closing undertakings or covenants are often carved out of the limitation regime by buyers.

*Law stated - 18 July 2023*

## Transaction insurance

### Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

The use of warranty and indemnity (W&I) insurance is increasingly being considered in private M&A transactions in and originating out of Singapore, especially as private equity firms seek exits from investments on a no or limited-recourse basis.

W&I insurance is intended to cover losses suffered by the policyholder where a successful claim can be made for breach of certain warranties. Typically, a policy will not provide the policyholder with protection in respect of specific indemnities that may arise from the buyer's due diligence or disclosure by the seller; however, it is possible to negotiate insurance for known and specific contingent risks such as tax and environmental liabilities.

W&I insurance may be arranged by either a seller or buyer. In a formal auction sale process, it is not uncommon for parties to consider using W&I insurance to address gaps in the expectations of the seller and the potential buyer.

A seller's side policy may be suitable where the seller is selling a company or business and intends to invest or distribute to its shareholders the proceeds of sale. A buyer's side policy secures greater financial recourse than is offered by a seller, in particular where there may be concerns about the creditworthiness of the seller or where low caps on liability may be offered.

A Singapore law-governed policy will typically exclude:

- known claims or knowledge of an issue or circumstances that could give rise to a claim;
- projections and forward-looking statements;
- financial obligations payable as a consequence of post-closing adjustments and completion account mechanics;
- fines and penalties that are uninsurable by law;
- consequential losses;
- liabilities arising from transfer pricing;
- issues relating to anti-competitive agreements and practices; and
- any liabilities arising from any price adjustment provisions within the sale and purchase agreement.

In addition, a buyer's side policy could include recovery by the buyer against the W&I insurance in respect of fraud by the seller, which will not be covered in a seller's side policy.

*Law stated - 18 July 2023*

## Post-closing covenants

### Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants that parties typically agree to include non-compete and non-solicitation clauses, whereby the

seller covenants not to compete with the company or business that has been sold or not to solicit certain employees, suppliers or customers. Under Singapore law, such post-closing restrictive covenants, which are regarded as 'covenants in restraint of trade', are generally only enforceable if there is a legitimate interest to be protected, and the restrictive covenant is reasonable with regard to the interests of the parties and the public.

For post-closing restrictive covenants to be enforceable, they would typically be limited to the geographical area where the target company carries on business as at the closing date and to a reasonable period. What is reasonable depends on the facts of each case. Singapore courts are generally more prepared to uphold a restrictive covenant entered into between corporations in the context of a sale of a business, as opposed to one in an employee—employer context.

Post-closing restrictive covenants are commonly drafted to be severable, so that if a provision affects, for example, public policy constraints, such provision could potentially be severed without affecting the enforceability of the other provisions.

*Law stated - 18 July 2023*

## TAX

### Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Stamp duty is payable on certain written agreements and transfer documents for the sale of shares. A disposal of shares effected by the cancellation and issue of new shares to the transferee will be treated as a transfer of shares. In this regard, stamp duty is payable on any document that effects, directly or indirectly and wholly or partially, any arrangement for the disposal of shares. Stamp duty is also payable on the conveyance or transfer of Singapore immovable properties.

The rate of stamp duty for the transfer of shares in a company incorporated in Singapore is currently 0.2 per cent. The amount of stamp duty payable is calculated based on the higher out of the consideration paid or the net asset value of the shares (determined by reference to the latest available audited financial statements or management accounts of the company). Stamp duty payable on the transfer of shares in a company is generally borne by the buyer, though parties are free to agree otherwise.

The rate of buyer's stamp duty for the transfer of immovable properties is progressive and capped at either 5 per cent or 6 per cent of the consideration or market value of the property (whichever is higher), depending on the type of property. In addition, additional buyer's stamp duty at a rate of up to 65 per cent will also apply to the purchase of residential property by companies.

Additional conveyance duties of up to 71 per cent will apply to the transfer of shares in certain property holding entities. These duties are generally borne by the buyer.

Certain disposals of immovable properties and shares in property-holding entities also attract seller's stamp duty and additional conveyance duties respectively. Such duties on disposals are generally borne by the seller.

Stamp duty must be paid if title needs to be proved or the agreements or documents are to be produced in evidence before a court in, or registered in, Singapore.

*Law stated - 18 July 2023*

### Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

The transfer of assets may be subject to goods and services tax (GST), which is currently at the rate of 8 per cent and is generally borne by the buyer. The rate of GST will be increased to 9 per cent with effect from 1 January 2024.

The transfer of a business as a going concern is treated as an excluded transaction outside the scope of the Goods and Services Tax Act 1993 and is not subject to GST if it satisfies certain conditions. Transfers of shares are not subject to GST.

There is no capital gains tax in Singapore; however, transfers of trading assets of a business will be subject to Singapore income tax at the corporate tax rate of 17 per cent.

In the draft Income Tax (Amendment) Bill 2023 circulated for public consultation on 6 June 2023 by the Ministry of Finance, a new Section 10L was introduced that taxes gains (including capital gains) from the sale of foreign assets that are received in Singapore by entities that are part of a multinational group without economic substance in Singapore. Section 10L will apply to entities whose financial statements are consolidated with and prepared by the parent entity of the group, and where the group has at least one member that has a place of business outside Singapore, subject to safe harbour provisions for certain specified entities (eg, financial institutions and entities enjoying specified tax incentives). If legislated without any amendments, the new Section 10L will apply to gains received in Singapore from a sale or disposal of a foreign asset that occurs on or after 1 January 2024.

*Law stated - 18 July 2023*

## EMPLOYEES, PENSIONS AND BENEFITS

### Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Employees of a Singapore target company are automatically transferred when a buyer acquires the shares in the target company given that there is no change of employer.

Where a buyer acquires a business from the target company (in its capacity as seller of the business), employees employed by the Singapore target company in the business and who are covered under the Employment Act 1968 will be treated as follows:

- the automatic transfer of employment contracts of the employees employed in the business transferred on their existing terms to the buyer, together with all rights and duties attached;
- continuity in the employees' period of employment; and
- consultation rights with trade unions or other employee representatives prior to the transfer.

'Employees' covered under the Employment Act 1968 includes all employees (including part-time employees), except seafarers, domestic workers and public servants (EA employees). For non-EA employees, the impact of the business transfer on their employment will be governed by the terms of their employment contracts.

Transfers of EA employees under the Employment Act 1968 take place automatically on the completion of the transfer

of the business, and the employment terms of EA employees will be the same as those enjoyed by them immediately prior to the transfer.

With respect to non-EA employees whose employment will not automatically transfer by operation of law, the 'transfer' of their employment to the buyer will be effected by way of termination of their existing employment contracts with the target company and the entering into of new employment contracts with the buyer. This is largely subject to commercial negotiation between the relevant parties. Any termination of the non-EA employee's employment will be subject to the terms of their existing contract of service.

Parties should also consider the terms of any collective agreement between the seller or transferor of the business and the trade union of affected EA employees (if any).

*Law stated - 18 July 2023*

## Notification and consultation of employees

### Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

There are no specific requirements under Singapore law to inform or consult employees or employee representatives or to obtain employee consent on a share acquisition.

If an undertaking (which includes any trade or business or a part of it) is to be transferred from the target company (in its capacity as seller of the business) to the buyer, the target company would be required to make certain notifications as soon as it is reasonable and before the transfer takes place. The notifications must be done to enable consultations to take place between the target company and the affected EA employees, and between the target company and a trade union of affected EA employees (if any). Such notifications would comprise:

- the fact that the transfer is to take place, the approximate date of the transfer and the reasons for it;
- the implications of the transfer and the measures the target company envisages it will take in relation to such EA employees (or if the target company envisages that no measures will be taken, the relevant EA employees should be made aware of that fact); and
- the measures the buyer envisages it will take in relation to such EA employees (or if the buyer envisages that no measures will be taken, the relevant EA employees should be made aware of that fact).

The buyer is obliged to provide the target company with the information necessary for the target company to perform the duties required as soon as it is reasonable.

*Law stated - 18 July 2023*

## Transfer of pensions and benefits

### Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

There are no compulsory contributions to any pension scheme in Singapore. In the case of employees who are Singapore citizens or permanent residents, contributions must, however, be made to the Central Provident Fund (CPF). The CPF scheme is not a pension scheme, but a compulsory social security savings scheme funded by contributions from employers and employees.

The Central Provident Fund Act 1953 provides that every employer of an employee shall pay to the CPF monthly contributions (which shall comprise both the employer's and employee's share of contributions) in respect of each employee who is a Singapore citizen or permanent resident, and the employer shall be entitled to recover from the wages of each employee such employee's share of the contributions at the time when such wages are payable to the employee.

Pensions and other employee benefits remain the responsibility of a target company following a share acquisition by the buyer. Further, the target company remains responsible for contributions under the CPF scheme in respect of employees who are Singapore citizens and permanent residents.

In respect of a business acquisition, the buyer will be responsible for contributions under the CPF scheme in respect of EA employees and non-EA employees (acquired as part of the business acquisition) who are Singapore citizens and permanent residents. The CPF Board should also be notified of the change in employer status so that the buyer can start paying CPF contributions for the newly transferred employees. If the buyer does not already have a CPF submission number, it would have to apply for one to be able to pay CPF contributions for employees.

*Law stated - 18 July 2023*

## UPDATE AND TRENDS

### Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

As reported by The Business Times , overall M&A activity in Singapore and the region has declined in 2022 and the first half of 2023 , due partly to differences in expectations between buyers and sellers and uncertainty in the overall economic environment. However, sustainability considerations remain a key driver for M&A transactions in the region in 2023. A notable example of this trend in Singapore includes the completion of Sembcorp Marine's approximately S $4.5 billion acquisition of Keppel Offshore & Marine in the first half of 2023. The combined entity is set to capitalise on opportunities arising from the global energy transition towards renewables.

Singapore has also shown signs of shifting away from the 'comply or explain' approach for environmental, social and governance (ESG) disclosure, towards more mandatory legal and regulatory requirements. For example, climate reporting will become mandatory for listed issuers in the finance, agriculture, food and forest products, and energy industries from 2023, and for listed issuers in the materials and building and transportation industries from 2024.

Additionally, while ESG disclosure requirements were previously primarily confined to listed companies, it was reported by The Business Times in July 2023 that Singapore could be the first country in Asia to implement mandatory International Sustainability Standards Board-aligned climate-related disclosures on large non-listed companies (with annual revenue of at least $1 billion and subsequently, with annual revenue of at least $100 million), with the same legal sanctions and responsibilities as financial reporting to be applied on climate reporting.

*Law stated - 18 July 2023*

# Jurisdictions

| | |
|---|---|
| **Austria** | Schindler Attorneys |
| **Brazil** | Campos Mello Advogados |
| **Denmark** | Gorrissen Federspiel |
| **Dominican Republic** | Guzmán Ariza |
| **Egypt** | Soliman, Hashish & Partners |
| **Finland** | Waselius & Wist |
| **Greece** | Karatzas & Partners Law Firm |
| **Hong Kong** | Davis Polk & Wardwell LLP |
| **Indonesia** | Makes & Partners |
| **Japan** | Mori Hamada & Matsumoto |
| **Latvia** | VILGERTS |
| **Malaysia** | Foong and Partners |
| **Myanmar** | Myanmar Legal MHM Limited |
| **Norway** | Aabø-Evensen & Co |
| **Philippines** | Zambrano Gruba Caganda & Advincula |
| **Romania** | MPR Partners |
| **Serbia** | Stankovic & Partners NSTLaw |
| **Singapore** | WongPartnership LLP |
| **South Korea** | Yulchon LLC |
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