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Alan M Klein

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GETTING THE DEAL THROUGH

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Preface

Public M&A 2018

First edition

Getting the Deal Through is delighted to publish the first edition of *Public M&A,* which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
May 2018

Singapore

Mark Choy and Chan Sing Yee
WongPartnership LLP

1 Types of transaction

How may publicly listed businesses combine?

Public mergers and acquisitions in Singapore are commonly effected by the following ways:

- a purchase of shares with voting rights in the target company or an acquisition of the business or assets of the target company;
- a joint venture (which usually involves the incorporation of a new company) formed by two or more parties to pursue a common commercial goal;
- a takeover of the target company through an offer for the shares of the target company;
- a scheme of arrangement under section 210 of the Companies Act (Chapter 50 of Singapore) (the Companies Act);
- a scheme of amalgamation under sections 215A–K of the Companies Act; and
- a trust scheme constituting an acquisition of units in a business trust by way of an amendment of the trust deed constituting the trust following approval by unit-holders.

A scheme of arrangement is a legislative procedure allowing a company to be restructured under the Companies Act. The company may propose the scheme to its shareholders which, if approved by a statutory majority, is binding on all shareholders once sanctioned by the High Court of Singapore.

A scheme of amalgamation is another method of business combination introduced under the Companies Act which allows two or more Singapore incorporated companies to amalgamate and continue as one company through a voluntary amalgamation process without the need for a court order. The amalgamated company, which can be either of the amalgamating companies or a new company, will succeed to all the properties, rights and privileges as well as assume the liabilities and obligations of each of the amalgamating companies.

2 Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

For all companies incorporated, registered or carrying on business in Singapore, the relevant statutes are primarily the Companies Act and the Securities and Futures Act (Chapter 289 of Singapore) (the Securities and Futures Act) and their respective subsidiary legislation. Takeovers (including reverse takeovers and partial offers), and schemes of arrangement structured as takeovers, of listed public companies, listed registered business Trusts (BTs) and real estate investment trusts (REITs) are subject to the Singapore Code on Takeovers and Mergers (the Code) issued by the Monetary Authority of Singapore (MAS) pursuant to the Securities and Futures Act.

All schemes of arrangements, trust schemes and schemes of amalgamation are also subject to the provisions of the Code (although those that satisfy certain conditions are exempted from these mandatory offer provisions, as well as some other Code provisions).

Other relevant legislation to REITs are the Securities and Futures Act and the Code on Collective Investment Schemes issued by the MAS. Companies whose shares are listed on the Singapore Exchange Securities Trading Limited (SGX-ST) must also comply with rules laid down by the SGX-ST, known as the Listing Manual. Under the Listing Manual, listed companies are required to disclose, obtain shareholders' approval, or both, for transactions such as acquisitions and disposals that meet certain thresholds.

Singapore also possesses a codified system of competition law under the Competition Act (Chapter 50B of Singapore) (the Competition Act). The Competition Act prohibits, among other things:

- agreements that have as their object or effect the prevention, restriction or distortion of competition within Singapore;
- conduct that amounts to the abuse of a dominant position in any market in Singapore; and
- mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.

The Competition Act further established the Competition and Consumer Commission of Singapore, which is empowered to enforce the provisions of the Competition Act and is further empowered to conduct its own investigations as to infringements under the Competition Act. Takeover offers falling within the ambit of the Code as well as the Competition Act should comply with both the Code and the Competition Act.

Certain other companies regulated in the telecommunications and utilities industries are subject to quasi-statutory controls on behaviour that is anticompetitive and abuses market power. Certain regulated industries are also subject to statutory foreign shareholding limits.

3 Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Acquisition via bilateral arrangements

The acquisition of shares or the business and assets of the target company via a bilateral arrangement is usually effected by a sale and purchase agreement. Prior to entering into the acquisition documentation, the parties may sign heads of agreement, a memorandum of understanding or a letter of intent which are often stated as 'subject to contract'. However, to mitigate the risks of a party pulling out of the negotiations without any good reason prior to signing the sale and purchase agreement, the parties may include lock-out or exclusivity clauses or break fees in the heads of agreement, which are legally binding on the parties. Acquisitions may also be structured as put-and-call arrangements. The contracting parties are free to decide on the governing law of these transaction agreements, but the law of the jurisdiction in which the target company is established or where the assets for sale are located is typically selected as the governing law of the agreements.

Public takeovers

For public takeovers, the offer announcement and the offer document have to comply with the terms set out in the Code and there is usually an express statement in the offer document stating that the offer document is governed by the laws of Singapore.

Scheme of arrangement and scheme of amalgamation

Since the scheme of arrangement and the scheme of amalgamation are both statutory creations under the Companies Act, the documents prepared for the purposes of the schemes have to be in compliance with the Companies Act and the laws of Singapore in general (including the Code, if applicable).

For schemes of arrangement, an implementation agreement is typically entered into between the acquirer and the target company, under which the target company agrees to propose the scheme of arrangement to its shareholders. The target company would have to prepare a scheme document (if acquisition is effected by a scheme of arrangement) or, together with the acquirer, an amalgamation proposal (if acquisition is effected by a scheme of amalgamation).

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

A Singapore company must lodge a return with the Accounting & Corporate Regulatory Authority of Singapore (ACRA) when the company makes any allotment of its shares.

A scheme of arrangement has to be approved by an order of court and the court order has no effect until it is lodged with ACRA. Upon such lodgement, the order will take effect from the date of lodgement or such earlier date as may be specified in the court order.

For the purpose of effecting a scheme of amalgamation, the amalgamation proposal that has been approved and other relevant documents will have to be filed with ACRA, together with payment of a prescribed fee. ACRA will then issue a notice of amalgamation as well as a notice of incorporation (in the case where the amalgamated company is a new company). The notice of amalgamation will state the effective date of the amalgamation. The amalgamated company can also apply to ACRA for a certificate of confirmation of amalgamation.

Certain fees are payable to the Securities Industry Council (the SIC), which administers the Code, upon the lodgement of offer documents and other whitewash circulars with the SIC.

See question 5 in relation to various disclosure requirements in public business combinations.

There is no capital gains tax in Singapore. For stamp duties and goods and services tax, see question 18.

5 Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The type of information to be disclosed to the public will generally depend on the business combination used and the structure of the transaction.

For public takeovers, an offer announcement should contain, among other things:

- the terms of the offer;
- the identities of the offeror and its ultimate holding company (if any);
- details of existing holdings in the target company held by the offeror and its concert parties;
- all conditions to which the offer will be subject;
- details of arrangements in relation to shares of both the offeror and the target company that may be material to the offer (if any); and
- where the offer is for cash or involves an element of cash, an unconditional confirmation that the offeror has sufficient financial resources to implement the offer in full.

An offer document, which is dispatched after the issue of the offer announcement, must set out in detail the terms of the offer, the intentions of the offeror relating to the target company and its employees, the shareholdings of the offeror and its concert parties in the target company, certain financial information relating to the offeror itself, the conditions attached to the offer and the acceptance procedure as well as the offeror's arguments in support of the offer.

The target company's independent directors must advise the shareholders of the target company of their recommendations as to the acceptance or rejection of the offer, in the form of an offeree board circular, having obtained competent independent advice. All the documents mentioned above have to satisfy the highest standard of accuracy and present the information contained therein adequately and fairly and contain the minimum information prescribed under the Code. Prior to the close of an offer, the offeror or the offeree (as the case may be) must also promptly announce any material new information or any material changes in information disclosed in an offer document or offeree board circular. Where material new information or material change in information is published, the target company's independent directors and their independent financial advisers have to take into consideration such information and, where appropriate, revise their recommendations.

The type of information required to be disclosed in a scheme of arrangement involving public listed companies is substantially similar to that set out in the offer document and the offeree board circular, except that a composite scheme document containing the requisite information is usually jointly issued by the offeror and the target company.

For a scheme of amalgamation in which an amalgamation proposal is required, the amalgamation proposal will contain, among other things:

- the terms of the amalgamation;
- the name and share structure of the amalgamated company;
- certain details of every director of the amalgamated company;
- the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company; and
- details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company.

Any major acquisition or disposal or very substantial acquisition by or reverse takeover (as defined in the Listing Manual) of an SGX-ST-listed company for the purposes of the Listing Manual will require the listed company to prepare a shareholders' circular for the purposes of seeking its shareholders' approval for the acquisition or disposal. Such shareholders' circular will contain information prescribed for such corporate actions as set out in the Listing Manual.

In addition to the above, an SGX-ST-listed company must also maintain a list of names of persons privy to the transaction, and the SGX-ST may request the privy list as and when necessary.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Under the Securities and Futures Act, substantial shareholders, directors and chief executive officers of a company listed on the SGX-ST must notify the company of their interests or changes in their interests in the company and the company must announce such information to the SGX-ST. A substantial shareholder is one who holds an interest in not less than 5 per cent of the voting shares of the company. The notification must be made within two business days of becoming aware of the relevant facts. For the purposes of notifying changes in a substantial shareholder's interest, only changes that exceed a discrete 1 per cent threshold above the minimum 5 per cent threshold (for example, when the shareholding crosses 6 per cent, 7 per cent, etc) are required to be reported. The disclosure regime also applies to foreign-incorporated corporations with a primary listing on the SGX-ST, as well as to managers and unitholders of collective investment schemes (CIS) REITs, and trustee-managers and unitholders of registered BTs listed on the SGX-ST.

Generally in a takeover, dealings by directors, related companies, associates and concert parties of the offeror and the target company in the target company's securities must be publicly disclosed. Substantial shareholders of the offeror and the target company are "associates" under the Code. Where shares of the offeror are offered as consideration for the target company's shares, dealings by the target company in the offeror's shares must be publicly disclosed.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

There is a statutory obligation imposed on company directors (alongside the usual directors' fiduciary duties under common law) to act in the best interests of the company, which can be equated with the collective interests of the shareholders of the company. This obligation is not limited to companies in a merger or takeover situation but is a general fiduciary duty to which all company directors must adhere. Company directors and managers must also not improperly use their positions, or any information acquired by them by virtue of their positions, to gain advantage for themselves or for any other person or to cause detriment to the company.

Under the Code, there is a duty to give shareholders of the target company sufficient information, advice and time to enable them to reach an informed decision on an offer. Moreover, during the course of an offer or even before the date of the offer (if the board of the target company has reason to believe that a bona fide offer is imminent), the board must not, except pursuant to a contract entered into earlier, take any action without the approval of shareholders at a general meeting on the affairs of the target company that could frustrate the offer or deny shareholders an opportunity to decide on its merits. Soliciting a competing offer or running a sale process will not generally be treated as actions that could frustrate the offer or deny shareholders an opportunity to decide on its merits.

Although the board of the target company may delegate the day-to-day conduct of an offer to individual directors or a committee of directors, the board as a whole must ensure that proper arrangements are in place to enable it to monitor that conduct so that each director may fulfil his or her responsibilities under the Code.

There is also judicial recognition that the directors owe a duty to take into account the interests of the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited to the prejudice of the creditors, especially when the company is insolvent.

In a scheme of amalgamation, besides the duty to ensure that the amalgamation is in the best interests of the amalgamating company, the board of directors of each amalgamating company is also required to make solvency statements to confirm that the amalgamating company and the amalgamated company there is no ground on which they can be found to be unable to pay their debts (in respect of the amalgamated company, that as at the date of the effective date of the amalgamation, it will be able to pay its debts as they fall due), and that the value of their assets is not (or will not be in the case of the amalgamated company) less than the value of their liabilities (including contingent liabilities). Every director who voted in favour of the resolution and the making of the solvency statements will have to sign a declaration to confirm his opinion and to set out the ground for the opinion.

The controlling shareholders do not have any similar duties but a minority shareholder has statutory recourse in the event of minority oppression. The safeguard against minority oppression is a general principle which applies to both private and public-listed companies and is not dependent on the company being in a merger or takeover situation. Similar remedies for minority oppression are also available to unitholders of registered BTs under the Business Trusts Act (Chapter 31A of Singapore) (BTA) and holders of units in a CIS REIT under the Securities and Futures Act (Chapter 289).

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Under the Companies Act, any proposals for the issuance of new shares or for the disposal of the whole or substantially the whole of the company's undertaking or property must first be approved by an ordinary resolution of the shareholders in a general meeting. When approval is sought, shareholders may exercise their votes in any manner they wish, as shareholders owe no fiduciary duties either to the company or to fellow shareholders in this respect.

For a public takeover, every takeover offer must be conditional upon a minimal level of acceptance. For both mandatory offers and voluntary offers, the level of acceptance is that which would result in the offeror (and persons acting in concert with it) holding more than 50 per cent of the voting rights. Voluntary offers that are conditional on a level of acceptance that is higher than the requisite 50 per cent are subject to approval of the SIC. The offeror has to satisfy the SIC that it is acting in good faith in imposing a high level of acceptance. Separate approval thresholds are prescribed for partial offers.

Under a scheme of arrangement, the company proposes the scheme to its shareholders, which, if approved by a majority in number representing at least three-quarters in value of the shareholders or class of shareholders present and voting either in person or by proxy, is binding on all shareholders or class of shareholders once sanctioned by the High Court of Singapore.

For a scheme of amalgamation, the amalgamation proposal has to be approved by the shareholders of each amalgamating company by special resolution or by any other person, if any provision in the amalgamation proposal requires the approval of that person. Before an amalgamation becomes effective, a member of an amalgamating company may apply to the Singapore courts on the ground that giving effect to the amalgamation proposal would unfairly prejudice the member. If the courts are satisfied with the application, it may make any order it deems fit, including an order not to give effect to the amalgamation proposal or modify the amalgamation proposal or direct the amalgamating company to reconsider the amalgamation proposal.

As mentioned in question 5, any major acquisition or disposal or very substantial acquisition by or reverse takeover (as defined in the Listing Manual) of an SGX-ST-listed company will require approval of the listed company's shareholders.

9 Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

In a hostile offer, the announcement of a firm intention to make an offer is usually made by the offeror (whether immediately after approaching the target company's board or not) to restrict the time for the target company's board to marshal its defences.

Usually, after an offer has been received in a hostile takeover, the defence includes seeking a 'white knight' or stating in the target company's documentation that the target company's independent directors do not believe that acceptance of the offer is in the best interests of the target company or its shareholders, or disclosing favourable factual information about the trading position or prospects of the target company to induce the shareholders to reject the offer. Under the Code, the target company's board is prohibited from taking any action to frustrate an offer or deny shareholders an opportunity to decide the offer on its merits, such as, but not limited to, issuing authorised but unissued shares, disposing or acquiring of assets of material amounts or entering into contracts other than in the ordinary course of business. Soliciting a competing offer or running a sale process will not generally be treated as actions that could frustrate the offer or deny shareholders an opportunity to decide on its merits. However, frustrating actions are allowed if they are carried out pursuant to a contract entered into before the offer or if the target company's shareholders at a general meeting approve the act. If the board of the target company considers that an obligation to take such acts or other special circumstance exists, although a formal contract has not been entered into, it should consult the SIC and obtain its consent to proceed without a shareholders' meeting.

Apart from the duty not to frustrate an offer, the target company's board must generally act in the best interests of the target company's shareholders as a whole.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Break-up fees (imposed on a target company) and reverse break-up fees (imposed on an offeror) are generally allowed. However, if the payment of a break-up fee is triggered, the amount may not be enforceable if it has been assessed as a penalty rather than a genuine pre-estimate of loss. Furthermore, to protect shareholders of the target company, the Code also sets out certain rules governing break-up fees, including arrangements which do not actually involve any cash payment but have a similar or comparable economic effect. Most significantly, a break-up fee must not be more than 1 per cent of the value of the target company calculated by reference to the offer price, and guidelines as to how this 1 per cent limit should be calculated are set out in the Code. The board of the target company and the independent financial adviser must also provide certain written confirmations to the SIC, including confirmations that the break-up fee arrangements were agreed as a result of normal commercial negotiations and that the break-up fee is in the best interests of the shareholders of the target company. Additionally, the break-up fee arrangement must be fully disclosed in the offer document and the offer announcement. The SIC should be consulted at the earliest opportunity where a break-up fee or similar arrangements are proposed.

Another mechanism that may potentially frustrate additional bidders is a lock-out or exclusivity clause. A lock-out or exclusivity clause prevents the seller from actively seeking or negotiating with other prospective buyers for a specified period, thereby giving the buyer a period of exclusivity in which to negotiate the sale and purchase agreement. It should be noted, however, that the negotiation of break-up fees and lock-out clauses must be considered in light of the general duty of the board of the target company not to frustrate the offer as described in question 7.

11 Government influence

Other than through relevant competition (antitrust) regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

The Singapore government has overriding discretion to avoid transactions against the national security or public policies of Singapore. Otherwise, government agencies do not generally have such overreaching influential or restrictive powers. However, if the target company is listed on the SGX-ST, the shareholders' circular (for any major acquisition or disposal or very substantial acquisition or reverse takeover (as defined in the Listing Manual)), the scheme document (for a scheme of arrangement) and the amalgamation proposal (for a scheme of amalgamation) will require the approval of the SGX-ST, while the shareholders' circular (for a takeover) may require the review of the SGX-ST in certain circumstances. The SIC which administers and enforces the Code has powers under the law to investigate any dealings in securities that are connected with a takeover or merger transaction. If the SIC finds that there has been a breach of the Code, it may have recourse to private reprimand or public censure or, in a flagrant case, to further action designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market.

12 Conditional offers

What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

See question 8.

Subject to the consent of the SIC, a mandatory offer must not be subject to any condition other than the condition that the offeror receiving acceptances which would have the effect of the offeror and his concert parties holding more than 50 per cent of the voting rights. An offeror in a voluntary offer can subject the voluntary offer to a number of conditions; however, none of these conditions should be based on the offeror's subjective judgement. In addition, the offeror should not invoke any condition (except as to a minimum level of acceptance) causing the offer to lapse unless the circumstances giving rise to the offer lapsing are of material significance to the offeror in the context of the offer, and information about the condition is not available from public records or is not known to the offeror before the offer is announced. In most cases, the SIC's consent or consultation is required. An offeror may also announce a preconditional voluntary offer, where the announcement of a firm intention to make an offer is subject to the fulfilment of certain preconditions; similarly, the preconditions should be objective and reasonable. Additionally, the offeror must specify a reasonable period for the fulfilment of the preconditions, failing which the offer will lapse. The offeror should also not rely on a precondition to cause the offer to lapse unless the offeror has demonstrated reasonable efforts to fulfil the preconditions within the time period specified, and that the circumstances that give rise to the offer lapsing are material in the context of the proposed transaction.

Where the offer is for cash or involves an element of cash, the offer document must include an unconditional confirmation by an appropriate third party (eg, the offeror's banker or financial adviser) that resources are available to the offeror to satisfy full acceptance of the offer.

A scheme of arrangement must be approved by a majority in number of the shareholders or creditors (as the case may be) of the company representing three-quarters in value of the shareholders or creditors present and voting at the relevant meeting. Even if such approval is obtained, the scheme will be conditional upon the Singapore High Court's approval.

In a scheme of amalgamation, the directors of each amalgamating company have to resolve that the amalgamation is in the best interests of the amalgamating company and to make a solvency statement in relation to the amalgamating company and the amalgamated company. In addition, every director who votes in favour of the resolution and the making of the solvency statement has to sign a declaration confirming that certain conditions are satisfied. The scheme is further subject to the approval of the shareholders of each amalgamating company by special resolution.

13 Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In an acquisition of shares or the business and assets of a target company via a bilateral arrangement, it is possible to have a financing condition imposed as part of the sale and purchase agreement to ensure that the obligations to complete the transaction is conditional upon the availability of financing. In practice, such condition would not be acceptable to most sellers.

A takeover, scheme of arrangement or scheme of amalgamation involving a public company would be subject to compliance with the provisions of the Code. Accordingly, the offer document or scheme document (as the case may be) must include an unconditional confirmation by an appropriate third party (eg, the offeror's banker or financial adviser) that resources are available to the offeror to satisfy full acceptance of the offer.

The seller usually has limited involvement in the procurement of financing by the buyer. In practice, the seller may assist in introducing the buyer to banks or financing institutions that are existing financiers to the target company in the event that the buyer intends to obtain financing for the proposed acquisition from the same banks or financing institutions or it wishes to get the assurance from them that the existing financing terms may continue as a result of the proposed acquisition. In some instances, the concept of stapled financing may be introduced by the financial adviser to the seller to facilitate a quicker decision on acquisition financing.

A public company, or a private company whose holding company or ultimate holding company is a public company, is prohibited from giving financial assistance (either directly or indirectly) for the purpose of the acquisition of shares in itself or its holding company. Financial assistance can be given in many forms including gifts, loans, guarantees, giving security, waiving debts or other obligations or where, as a result of the assistance, net assets of the company giving assistance are reduced to a material extent. For example, there can be financial assistance if financing is obtained by a buyer for an acquisition and the lender requires the assets of the target company to be used as security for such financing.

Singapore law provides exemptions in certain circumstances for companies which, provided the legislative procedure is followed, allows the shareholders of a company to approve the financial assistance. One of these exemptions is known as the financial assistance whitewash procedure. As the financial assistance whitewash procedure would typically be carried out post-acquisition, Singapore lenders have come to accept that they may not necessarily have the security in place at the point of completion of the acquisition. In many instances, parties agree to a time frame pursuant to which the financial assistance whitewash procedure must be undertaken and the security documentation executed thereafter. There are detailed technical formalities to be complied with in order to invoke this exemption, and specific legal advice should be sought.

14 Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Where a takeover offer is made for a Singapore company and acceptances are received in respect of 90 per cent of the shares to which the offer relates within four months of the making of the offer, the offeror may compulsorily acquire the shares of the non-accepting shareholders. For the purpose of computing the 90 per cent acceptance threshold, the following are excluded:

- shares held by the offeror;
- shares held by a nominee on behalf of the offeror;
- shares held by a related corporation of the offeror or by a nominee of that related corporation;
- shares held in the offeree company as treasury shares; and
- shares issued by the target after the date of the offer.

However, shares subject to an irrevocable undertaking or shares acquired during the offer other than pursuant to acceptances of the offer can usually be counted towards the 90 per cent acceptance threshold.

Notices must be served on the non-accepting shareholders within two months of reaching the 90 per cent threshold and the non-accepting shareholders have a right to apply to the court for an order that the bidder shall not be entitled to acquire the shares or to specify terms of acquisition different from those of the offer.

A similar regime applies to the compulsory acquisition of units in a CIS REIT or a registered BT under the BTA if an offeror making a general offer for units in such CIS REITs or registered BT obtained acceptances of 90 per cent or more of the units offered.

Separately, where a scheme of arrangement is approved by a majority in number representing three-quarters in value of the creditors or shareholders of the company (as the case may be) present or voting by proxy in a scheme meeting and is subsequently approved by the High Court of Singapore, the scheme will be binding on all the creditors or shareholders of the company. In the event that the scheme calls for the transfer of all the company's shares, the entire share capital of the company will be transferred to the acquirer (including the shares of any dissenting shareholder).

A scheme of amalgamation becomes effective after the shareholders of the amalgamating companies approve it by special resolution and the amalgamation proposal and other relevant documents are filed with ACRA.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

In a cross-border transaction involving investment in a Singapore entity or certain business in Singapore, one of the main considerations in the structuring of the transaction is tax issues as the investor would want to take advantage of the various double taxation agreements that Singapore has entered into with other countries.

Certain industries in Singapore have statutory limits imposed on the absolute shareholding of a company permissible by a single entity. For example, no person is allowed to hold more than 5 per cent, 12 per cent or 20 per cent of the shares of a Singapore-incorporated bank unless so authorised by the MAS. Likewise, legislation relating to the telecommunication industry puts a cap of 12 per cent or 30 per cent of the total voting shares in a telecommunications company, whereas for print media companies the limit is 5 per cent and 12 per cent. The limit for insurance companies and finance companies is 5 per cent and 20 per cent.

Further, it will not be permissible for a person to enter into an arrangement that would result in his obtaining effective control of a capital markets intermediary (for example, a manager of a CIS REIT) without the prior approval of the MAS.

Subject to the relevant legislation for specific industries, there is no general statutory restriction under Singapore law on the size of a shareholding interest that a foreign entity may hold in a Singapore-incorporated company.

Singapore-incorporated companies are required to have at least one director who is ordinarily resident in Singapore and the company secretary, who cannot be a sole director, must be resident in Singapore. A foreign issuer applying for primary listing on the SGX-ST must have at least two independent directors, both of whom must be resident in Singapore.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

The following is a simplified illustration of the key dates for a public offer in Singapore in accordance with the requirements of the Code (assuming there is no competing offer):

Key dates	Event
Day 0 to 21	Earliest possible date for offer announcement.
Day 0	Offer document dispatched (no earlier than 14 days but no later than 21 days after offer announcement).
Day 14	Last date for dispatch of response document by target company.
Day 28	Earliest date for first closing date.
First dealing day after first closing date (and all subsequent closing dates)	Announcement of acceptance levels and (if appropriate) extension of offer.
Day 46 (assuming first closing date is day 28)	Last day for revision of offer. An offer, if revised, must be kept open for 14 days. Since the offer period must end on day 60 unless it has previously become unconditional as acceptances (except for special circumstances), the last day for revision is day 46.
Day 60	Last date for fulfilment of acceptance conditions, otherwise last closing date.
Day 74	If an offer becomes unconditional on day 60, the closing date will fall 14 days thereafter.
Day 74 + 7 business days	Last day of settlement. Settlement will take place seven business days after an offer becomes unconditional or receipt of valid acceptances (whichever is the later).

The following is a simplified illustration of the key dates for a scheme of arrangement for a Singapore-incorporated company listed on the SGX-ST that will be delisted after the scheme becomes effective:

Key dates	Event
Day 0	Boards of acquirer and target company formally approve terms of the scheme. Scheme implementation agreement signed after close of trading day and joint announcement released.
Day 1 to 25	Preparation of scheme document.
Day 28	Submission of scheme document to the SGX-ST.
Day 28 to 49	Review by the SGX-ST of the scheme document.
Day 50	In-principle approval of the SGX-ST (assuming the SGX-ST reverts in three weeks).
Day 52	Application to Singapore High Court to convene scheme meeting of target company.
Day 59	Court hearing and obtaining of court order to convene scheme meeting (assuming early court hearing date is obtained in one week).

Update and trends

The introduction of an inward re-domiciliation regime in Singapore pursuant to the Companies (Amendment) Act 2017 came into effect on 11 October 2017. This means that foreign corporate entities can now transfer their registration to Singapore instead of setting up subsidiaries (eg, foreign corporate entities that may want to relocate their regional and worldwide headquarters to Singapore and still retain their corporate history and branding). An inbound foreign corporate entity that is redomiciled to Singapore will become a Singapore company and be required to comply with the Companies Act like any other Singapore company. Re-domiciliation will not affect the obligations, liabilities, properties or rights of the foreign corporate entities. This amendment is meant to provide a further boost to Singapore's competitiveness as a business hub. The Companies (Amendment) Act 2017 also introduced changes to Singapore's corporate rescue and restructuring processes to position Singapore as a choice venue to conduct international debt restructuring.

At the end of 2017, the Singapore Exchange Limited issued a consultation paper on enhancements to continuous disclosures under the SGX-ST Listing Rules (Mainboard) and the SGX-ST Listing Rules (Catalist) (collectively, the Listing Rules). Some of the key proposed amendments to the Listing Rules include, inter alia, the introduction of new rules to require issuers to disclose, in its announcements relating to discloseable and major transactions under Chapter 10 of the Listing Rules, whether an introducer was involved in the transaction and if so, the identity of the introducer and its relationship to the parties to the transaction, and any introducer fees or benefits earned in relation to the transaction (if any), and the requirement for the appointment of a competent and independent valuer to value assets to be disposed where such disposal is one where any of the relative figures as computed on the bases set out in Rule 1006 exceeds 75 per cent. These proposed amendments, if implemented, will raise the standards of disclosure in relation to public mergers and acquisitions. The consultation closed on 12 January 2018 and it remains to be seen what changes would be adopted.

The Corporate Governance Council also released on 16 January 2018 a consultation paper on its recommendations to revise the Code of Corporate Governance. The proposed changes include, inter alia, the shift of certain guidelines in the current Code of Corporate Governance to the Listing Rules for mandatory compliance. This could increase compliance costs for publicly listed companies, but boost investor confidence in Singapore capital markets.

Key dates	Event
Day 75	Scheme meeting of shareholders of target company to approve scheme.
Day 82	Court hearing to sanction scheme (assuming early court hearing date obtained in one week).
Day 92	Lodgement of court order with ACRA and effective date of scheme.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in specific industries are subject to additional regulations and statutes. For instance, banks carrying on business in Singapore have to be licensed under the Banking Act (Chapter 19 of Singapore) or the Monetary Authority of Singapore Act (Chapter 186 of Singapore) and have to comply with the provisions of these Acts, their respective subsidiary legislation, as well as notices and directives from the MAS. Other legislation for specific industries include the Telecommunications Act (Chapter 323 of Singapore) for companies providing telecoms systems and services; various applicable legislation for companies in the mass media industry; and the Insurance Act (Chapter 142 of Singapore) for companies carrying on insurance business in Singapore. The above statutes or subsidiary legislation and codes promulgated under them contain restrictions as to change of shareholdings and control of companies.

18 Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Transfer taxes (or stamp duty) are 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, and stamp duty is payable on any document that effects, whether directly or indirectly and whether wholly or partially, any arrangement for the disposal of shares. Stamp duty is also payable on the conveyance or transfer of land.

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 of the consideration paid per share or the net asset value of each share (determined by reference to the latest available audited financial statements of the company). The transfer of shares for qualifying M&A deals will be eligible for stamp duty relief capped at S$80,000 per year. This relief is available for qualifying M&A deals executed between 1 April 2016 and 31 March 2020 (both dates inclusive).

The rate of stamp duty for the transfer of land is 1 per cent for the first S$180,000, 2 per cent for the next S$180,000 and 3 per cent thereafter and this is usually paid by the buyer. In certain circumstances, the rate of duty is increased for the buyer and stamp duty is levied on the seller as well. 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.

Every qualifying acquisition and disposal of an equity interest in residential property holding entities (as opposed to a direct transfer of residential property(ies)) will attract additional conveyancing duty (ACD), which is in addition to the existing stamp duty that is payable on the transfer of the shares. ACD is levied on both the buyer and the seller.

If an amalgamation of companies pursuant to the Companies Act involves a transfer or conveyance of shares in a Singapore-incorporated company or immovable property situated in Singapore, ad valorem stamp duty will be chargeable on the transfer or conveyance of shares or immovable property unless such amalgamation qualifies for relief from stamp duty under the Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules.

The corporate tax rate for companies for the year of assessment 2018 is 17 per cent, and companies will be granted a corporate income tax rebate of 40 per cent for the year of assessment 2018 (subject to a cap of S$15,000). Partners in a partnership will be subject to tax in their personal capacity and, depending on their income tax bracket, they will be subject to a progressive tax rate up to a maximum of 22 per cent in the year of assessment 2018.

The transfer of assets may be subject to goods and services tax (GST), which is currently at the rate of 7 per cent. However, 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 (Chapter 117A of Singapore) and not subject to GST if it satisfies certain conditions.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Singapore companies do not have employee work councils, although participation in trade unions is common in certain sectors, such as manufacturing. Under the Industrial Relations Act (Chapter 136 of Singapore), recognised trade unions can negotiate with employers for a collective agreement on certain industrial matters.

Employees in Singapore enjoy certain protections in business purchases (as opposed to share acquisitions) under the Employment Act (Chapter 91 of Singapore) (the Employment Act). Such protections include:

- 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.

It should be noted that currently, under the Employment Act, the term 'employee' is narrowly defined; for example, employees in managerial or executive positions earning more than S$4,500 are generally not covered under the Employment Act except in limited circumstances. For employees not falling within the definition under the Employment Act, the protection afforded to them will be governed by the terms of their employment contracts. The Singapore government has announced plans to amend the Employment Act to remove the S$4,500 salary cap to widen the scope of coverage of the Employment Act. It is expected that the Parliament's approval of the amendments be sought in the second half of 2018, for implementation by April 2019.

Transfer of employees under the Employment Act takes place automatically upon the transfer of the business. In all other cases, transfers must be effected prior to, or simultaneously with, the completion of the sale of the business, although this is subject to contract.

It is also provided under the Employment Act that no employee who has been in continuous service with the same employer for fewer than two years is entitled to retrenchment benefits if retrenched from the company. The quantum of retrenchment benefits is not specified in the Employment Act and if not provided for in the contract of employment, it will be a matter for negotiation between the individual employee and employer.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A company may be wound up or liquidated in three ways: members' voluntary winding-up, creditors' winding-up and a court-ordered winding-up.

Once a company is in liquidation, the power to run the company is taken from the board of directors and transferred to the liquidator. The duties of the liquidator are to wind up the company's business, realise the assets, pay off the creditors and return whatever is left to the members. A takeover of a public company which is being wound up is unlikely to occur as there cannot be an offer to acquire the company's shares without the court's approval. The court may sanction the share transfer if the bidder is capable of meeting its liabilities as a contributory. However, a takeover of a company that is being wound up can be structured as a scheme of arrangement. A scheme of arrangement is a legislative procedure allowing a company to be restructured. The liquidator proposes the scheme to the creditors or members, and, if approved by a statutory majority or by the court if certain conditions are met, it is binding on all creditors or members once sanctioned by the High Court of Singapore. A scheme of arrangement is subject to the Code unless certain conditions are met and, in such cases, exemptions from complying with material obligations of the Code can be obtained from the SIC. For a company listed on the SGX-ST, the SGX-ST may suspend the trading of the listed securities of the company when there is an application filed with a court for the liquidation of the company and the amount of debt alleged is significant.

A company typically enters into receivership when a receiver is appointed by the debenture holder or trustee for the debenture holders, or by the court upon the application of the debenture holder or trustee for the debenture holders. The main function of the receiver is to gather in the assets subject to the charge, realise them and pay off the creditors, but it has no power to run the company's business. There are no similar prohibitions of share transfer for a company going through receivership.

A financially troubled company may also be placed under judicial management where a judicial manager is appointed by the court to take control of the company from the directors in order to try and achieve one of the following: salvage the company as a going concern; effect a more advantageous asset realisation situation than if the company was subject to a winding-up process; or aid the approval of a scheme of arrangement with the shareholders and creditors. No restrictions on the transfer of a company's shares are imposed when it is under judicial management.

The Code does not provide for situations in which the target company is undergoing liquidation or receivership or is under judicial management.

Where a substantial corporate shareholder injects funds into a subsidiary or an associated company as part of a rescue package, it may be that the consideration for such funds will be in the form of newly issued shares from the company. In the event that the issue of such shares puts the corporate shareholder in the position of having to make a mandatory offer under the Code, a waiver or whitewash of the obligation to make such an offer may be requested. The specific requirements that will have to be met in order for such a waiver to be granted are listed in the Code.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

The key legislation in Singapore that deals with corruption is the Prevention of Corruption Act (Chapter 241 of Singapore) (PCA). The Corrupt Practices Investigation Bureau is an independent body empowered under the PCA to investigate corrupt practices in the public and private sectors in Singapore and implement preventive measures against corruption.

It is an offence under the PCA for a person to corruptly solicit or receive or give, promise or offer any gratification as an inducement to or reward for doing or forbearing to do anything in respect of any matter or transaction. If an agent corruptly accepts or obtains, for himself or herself or others, any gratification as an inducement or reward for doing or forbearing to do any act in relation to his or her principals' affairs or business, or for showing or forbearing to show favour or disfavour to any person, both the agent and the giver will be guilty of an

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offence under the PCA. The agent will be guilty even if he or she did not have the power or intention to do or forbear to do such act or that the favour or disfavour was not in relation to his or her principals' affairs or business. Under the PCA, extra-territorial jurisdiction can be exercised against Singapore citizens who commit corruption offences outside of Singapore.

Any person found guilty under the PCA will be liable to a fine not exceeding S$100,000, or an imprisonment term not exceeding five years, or both. If the person is found guilty under the PCA in connection with a transaction involving a public body, the imprisonment term can be increased to seven years. In addition, the courts can order a person who is convicted of an offence under the PCA by the acceptance of any gratification to pay a penalty equivalent to the value of such gratification, or to order the confiscation of properties found to be benefits of corruption offences from convicted corrupt offenders under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A of Singapore). The principal of an agent who has received any gratification in contravention of the PCA may also recover as a civil debt the gratification in money value from the agent or the person who gave the gratification.

Corruption risk is a relevant consideration in a business combination, particularly in cross-border transactions that involve companies with subsidiaries or operations in regions where corruption is pervasive. An acquirer of a target company with corruption risks will assume the liabilities that extend to such risks, such as potential loss of valuable contracts obtained through questionable practices. Therefore, it is important to mitigate such risks through pre-deal due diligence investigations and the establishment of anti-corruption compliance measures in the target company post-deal.

Getting the Deal Through

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