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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the third edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Sudan and the United Arab Emirates.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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 editors, Will Pearce and John Bick of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

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Getting The Deal Through

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Singapore

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 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 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 (Chapter 50 of Singapore) (the Companies Act)), a scheme of arrangement under section 210 of the Companies Act or the statutory amalgamation procedures under section 215A of the Companies Act.

The transaction process depends on the complexity of the issues, the type of business, 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, heads of agreement, 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 not usually legally binding except for certain key provisions relating to confidentiality, costs or expenses, exclusivity and governing law. Break-up fees are uncommon in private acquisition transactions. After the preliminary arrangement is signed up, due diligence (typically, legal, financial and tax due diligence) will often take place, and will be followed by drafting, negotiation and execution of the definitive transaction documents (eg, sale and purchase agreement, disclosure letter and, where applicable, shareholders' agreement).

A formal auction sale process would, at the initial transaction phase, typically involve the preparation of the information memorandum on the company, or the business or assets, legal and financial due diligence reports, and draft transaction documents (eg, sale and purchase agreement, disclosure letter and, where applicable, shareholders' agreement). The information memorandum will be distributed by the vendor's financial advisers to potential buyers, with the view to 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 would be provided to the selected bidders. At the end of the due diligence phase, selected bidders would submit their binding offers, together with mark-ups of the transaction documents. 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 were not provided in the earlier due diligence phase).

The time required to complete the acquisition depends on, among others, 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-jurisdictions regulatory approvals (such as antitrust clearance) are required. A bilateral acquisition transaction may take longer to complete due to the lack of a controlled and competitive process (unlike the formal auction sale process for disposals).

Legal regulation

2 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 would need to take into account the Companies Act that is applicable for all companies incorporated, registered or carrying on business in Singapore. Other statutes and regulations, which 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 buyer or the seller is a company listed on the Singapore Exchange Limited (SGX), the SGX's listing rules would also be applicable in relation to the acquisitions and disposals.

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, liabilities, business or assets that are subject to Singapore law will have to be complied with.

Legal title

3 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 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 such shares only when the EROM of the company is updated.

In the case of a business or assets acquisition, while some title to assets (such as 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, registered with the Singapore Land Authority (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 with a different party having 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.

Under the Companies Act, persons holding beneficial title to shares in a company may in certain circumstances be registrable as a 'controller' in the register of controllers maintained by the company.

Multiple sellers

4 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?

Buyers would typically prefer that all the sellers agree to sign and be bound by the same 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 with the exiting 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 acceptance by shareholders of 90 per cent of the total number of shares to which the offer relates, the buyer will be entitled to give notice to the remaining shareholders to compulsorily acquire their shares. However, section 215 does confer on a dissenting shareholder the right to apply to court to object to such a squeeze out.

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).

Exclusion of assets or liabilities

5 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, and 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 (Chapter 91 of Singapore) (the Employment Act) engaged in the business that will automatically transfer on completion of the sale of the business (see question 33).

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

Consents

6 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 selling 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 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 would be subject to foreign ownership restrictions, for example, newspaper and broadcasting companies; and
- the transfer of shares in companies that operate in certain regulated sectors would be subject to regulatory approval or notification requirements, for example, licensed banks and insurers incorporated in Singapore, capital markets services licence holders, trust companies and certain designated telecommunications and electricity licensees.

In addition, mergers (which include an acquisition of control via a share acquisition) that substantially lessen competition in any market in Singapore are prohibited under Singapore's Competition Act (Chapter 50B of Singapore). While there is no mandatory requirement for mergers to be notified to the Competition and Consumer Commission of Singapore (the 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 would risk the CCCS subsequently investigating the transaction on its own initiative. Should the CCCS find that the merger will likely or has led to a substantial lessening of competition in Singapore, the parties could face financial penalties and/or other directions imposed by the CCCS, including divestiture orders.

Third-party consents

7 | Are any other third-party consents commonly required?

Existing contractual arrangements of a company (such as 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 management 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 assets 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.

Regulatory filings

8 | 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?

A Singapore company must update ACRA (via the lodgement of a notice of transfer of shares) when there is a transfer of its shares (see question 3). ACRA will update the EROM of the Singapore company to register the new holder of shares only if the relevant stamp duty is paid.

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 included.

In the case of sale and purchase of an immovable property in Singapore, a deed or other written instruments such as the transfer instrument is required to be executed for the transfer of interest in the immovable property. Such document will need to be lodged with the Singapore Land Authority (SLA). There are lodgement fees (which are generally nominal amounts) payable to the SLA for registration of such 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.

See question 31 for a discussion on stamp duties.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | 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 would typically provide strategic input on transaction structure, valuation advice, assist in negotiations and manage the transaction (in particular, in a formal auction process, where there are strict timelines). The accountants would typically assist on accounting and tax-related matters, undertaking financial and tax due diligence, and tax structuring (in particular, where the transaction involves multi-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, fee structure, confidentiality and conflicts of interests. The fees of such advisers will depend on the scope of work, the complexity of issues and the size of the deal.

Duty of good faith

10 | 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) and this includes the duty to act honestly, exercise his or her powers with reasonable care, skill and diligence for a proper purpose and in good faith, in the best interest of the company.

Documentation

11 | 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 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 such 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;
- 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);
- 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, deed of assignment or transfer instrument In respect of real property).

Formalities

12 | 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. Certain documents such as an instrument transferring interests in immovable property, mortgages, 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) and contracts not supported by consideration must 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 two directors, a director and a company secretary, or a director in the presence of a witness. 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 such corporations will be in accordance with the requirements of the relevant laws of the jurisdiction of its incorporation.

The Electronic Transactions Act (Chapter 88 of Singapore) (the ETA) provides a legislative framework for 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, then that requirement is satisfied in relation to an electronic record if: (i) the 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 (ii) the method used is as reliable as appropriate for the purpose for which the electronic record was generated or is proven in fact to have fulfilled the functions described in (i) of the foregoing.

The ETA essentially provides that a contract shall not be denied validity or enforceability solely on the ground that an 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'. It is important to note, however, that if other Singapore legislation requires a signature to be in non-digital form, then that other legislation will apply. The ETA also does not apply to certain categories of transactions and documents, such as the creation and execution of a will, negotiable instruments, the creation of indentures, trust documents (eg, declaration of trusts and powers of attorney) and transactions relating to land.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | 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 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 (such as title to shares, the constitution and share capital structure of the target);
- regulatory approvals;
- licences or permits held by the target or its subsidiaries which prohibit or restrict a change in control of the target and its subsidiaries or which 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 the assets;
- banking and financing (in particular, whether there are financial covenants and change of control provisions);
- employee matters (eg, 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 with respect to 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 such instances, buyers would typically not be able to rely on due diligence reports produced for the seller.

Liability for statements

14 | 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.

Publicly available information

15 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 ACRA. Publicly available information on Singapore-incorporated companies include:

- details on share capital, and any change in or transfer of share capital;
- particulars of directors and shareholders;
- business profiles;
- company information such as: (i) dates and descriptions of lodgements such as annual returns (which include certain financial statements); (ii) the company's constitution; (iii) details of changes to the company's directors; and (iv) name changes;
- the register of charges over the company's assets; and
- the 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 SLA's Integrated Land Information Service.

Details of registered intellectual property, namely patent, trade mark and registered design, 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, bankruptcy and winding-up searches are also typically conducted to determine if there are any ongoing or former claims that may have been made for or against the target company, or winding-up proceedings or petitions against the target company.

Impact of deemed or actual knowledge

16 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.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

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

Pricing mechanisms with post-completion cash, net debt 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 diligence the accounts before agreeing to the deal and provide greater certainty for the seller on an exit.

Form of consideration

18 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 Takeovers and Mergers (the Code) is applicable to the target company, the buyer would need to adhere to the general principle of the Code to treat all shareholders of the target company equally, which includes offering the same consideration to all shareholders.

Earn-outs, deposits and escrows

19 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. Escrows arrangements are used in respect of earn-outs structure, 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.

Financing

20 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 thereof. Buyers are increasingly borrowing from alternative finance providers, such as direct lending funds and institutional investors.

Parties are free to determine what assurance the seller requires that financing will be 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 condition would typically not be acceptable to most sellers in practice.

Limitations on financing structure

21 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, whether 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 sets out this prohibition against financial assistance and while 'financial assistance' is not expressly defined, it includes the making of a loan, giving of a guarantee, provision of a security or an indemnity, and waiver or release of an obligation or a 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.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 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 where there are no specific legal (ie, third-party consents) or regulatory obligations (ie, anti-trust) to satisfy before completion of the transaction. In such instances, closing conditions that are customarily acceptable to a seller to completion of the transaction would include the seller providing duly executed transfer instruments (eg. share transfer forms), title documents (eg, share certificates) and relevant corporate resolutions (eg, board resolutions approving the transfer of shares and the updating of the EROM of the company).

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 on satisfaction of conditions precedent relating to such legal or regulatory obligations (in addition to the other closing conditions 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 a seller will often only accept extending conditionality to include the accuracy of fundamental warranties.

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.

Buyer and seller obligations

23 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 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. A 'best endeavours' standard may be agreed, which is more onerous than a 'reasonable endeavours' standard, but is not an absolute obligation. However, under Singapore law, there is no practicable difference between clauses that require parties to use 'all reasonable endeavours' and 'best endeavours', as both essentially require parties to take all those reasonable steps which 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 conditions involving the payment of purchase consideration and the delivery of title documents.

Pre-closing covenants

24 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 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:

- 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) (see question 28). 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.

Termination rights

25 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 (see question 28). 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.

Break-up fees and reverse break-up fees

26 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 Code applies, the Code sets out certain rules governing break-up fees. A break-up fee must be minimal, normally not be more than 1 per cent of the value of a 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 a target company and the independent 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 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 document and the offer announcement. The SIC should be consulted at the earliest opportunity where a break-up fee or similar arrangement is proposed.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 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 set of representations and warranties typically given by a seller pertain to:

- title, capacity and authority;
- corporate information (such as 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 and their scope vary widely from transaction to transaction, and will depend on the 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 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 (ie, shares) 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 (Chapter 390 of Singapore) (the Misrepresentation Act). Damages for tortious misrepresentations seek to put the buyer in the position he or she would have been in if the misrepresentation had 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 the buyer the amount of any loss arising in specified circumstances and to 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.

Limitations on liability

28 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 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 will normally 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 limitation period as to when the buyer must bring a claim after completion of the transaction;
- qualifying representations and warranties with disclosure contained in the disclosure letter and information in the data room;
- knowledge qualifications in representations and warranties, and materiality qualifications in warranties and covenants;
- limiting the seller's liabilities to contractual remedies and excluding tortious remedies; and
- barring double recovery and requiring 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.

Transaction insurance

29 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 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 anticompetitive agreements and practices; and
- issues that are specific to a transaction.

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.

Post-closing covenants

30 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-competition and non-solicitation clauses, whereby the seller covenants not to compete with the company or business that has been sold, or not to solicit for 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: (i) there is a legitimate interest to be protected; and (ii) the restrictive covenant is reasonable having 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 time 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, 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 say, public policy constraints, such provision could be ignored without affecting the other provisions.

TAX

Transfer taxes

31 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, 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 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 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, if available). Stamp duty payable on the transfer of shares in a company is generally borne by the buyer. 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 buyer's stamp duty for the transfer of immovable properties is progressive and capped at either 3 per cent or 4 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 the rate of up to 30 per cent will also apply to the purchase of residential property by companies. Additional conveyance duties of up to 34 per cent will also 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 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.

Corporate and other taxes

32 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 7 per cent and is generally borne by the buyer. 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. 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.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 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), employees employed by the Singapore target company who are covered under the Employment Act 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 is defined to include 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.

Transfer of EA Employees under the Employment Act takes 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 entering into of new employment contracts with the buyer. This is largely a free process subject to commercial negotiation between the relevant parties. Any termination of the non-EA Employee's employment will be subject to the terms of his or her existing contract of service.

Notification and consultation of employees

34 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?

If an undertaking (which includes any trade or business or a part of it) is to be transferred from the target company 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).

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

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.

Transfer of pensions and benefits

35 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 CPF Act (Chapter 36 of Singapore) provides that every employer of an employee shall pay to the CPF monthly contributions in respect of each employee who is a Singapore citizen or permanent resident.

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.

UPDATE AND TRENDS

Key developments

36 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?

The Singapore M&A scene has seen an increasing number of start-ups and venture capital funds transactions. To facilitate transactions of such a nature and to reduce transactional costs and time taken in deal negotiation, the Singapore Venture Capital & Private Equity Association and the Singapore Academy of Law have recently worked with WongPartnership LLP and other law firms and organisations to create a set of Venture Capital Investment Model Agreements (VIMAs). The VIMAs comprise standardised documentation for use in seed rounds and early-stage financings and currently includes, inter alia, a Series A term sheet and subscription agreement, a shareholders' agreement and a convertible agreement regarding equity. The VIMAs documents are drafted based on Singapore law and contain explanatory notes to help the user.

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