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PRIVATE COMPANY ACQUISITIONS

Private mergers and acquisitions in Singapore: overview

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CORPORATE ENTITIES AND ACQUISITION METHODS

1. What are the main corporate entities commonly involved in private acquisitions?

The most common forms of corporate entities in Singapore include:

- Sole proprietorships.
- Private and public companies limited by shares.
- Private companies limited by guarantee.
- General and limited partnerships.

In private acquisitions, the most common form of company used is a private company limited by shares. This is mainly due to the lack of restrictions on foreign ownership, ease of establishment, low tax rates and minimal compliance requirements.

Although a private limited company is defined as any company with fewer than 50 members, it is also possible to incorporate a "small" private limited company, which is exempt from the statutory audit requirements and need not file accounts or financial statements with the Accounting and Corporate Regulatory Authority (ACRA). The requirements for a "small" company are that it is a private company, and for the previous two financial years it met two of the following three criteria:

- Total revenue of no more than S$10 million.
- Total assets of no more than S$10 million.
- No more than 50 employees.

For larger transactions, public limited companies are often used. A public company may have more than 50 shareholders and will generally offer its shares to the public on a listed market (such as the Singapore Stock Exchange). It is not uncommon for a public company to use one of its private company subsidiaries as the acquisition vehicle in a transaction, with the public company providing financial support.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

Restrictions on the transfer of shares can be imposed through existing contractual arrangements (commonly shareholder agreements) and the company's constitution (previously known as the memorandum and articles of association). The constitution will contain certain restrictions on the transfer of shares, although the form of these restrictions is not specified in the legislation (*Chapter 50, Companies Act*). In addition, the constitution will give the directors discretion to refuse to register a transfer of shares and can also grant pre-emption rights. A transfer of shares will generally require board approval.

Foreign ownership restrictions

There are no limits on the movement of investment capital into or out of Singapore and no foreign ownership restrictions. Subject to additional authority approvals in specified industries (such as defence, banking, broadcasting and newspaper publishing), foreign persons can own up to 100% of the shares in a Singapore company.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

Share purchases: advantages/asset purchases: disadvantages

In a share purchase, the target company is bought in its entirety through the acquisition of its shares, complete with all assets and liabilities. In an asset sale, the buyer can generally pick and choose which assets (or liabilities) are acquired. The commercial objectives, tax implications and bargaining power of the parties will determine which method is chosen.

The key advantages of a share sale over an asset sale are as follows:

- **Method of transfer.** The execution of a simple, one-page share transfer form is sufficient to pass ownership of the company. Conversely, in an asset sale, each asset must be identified and separately transferred. While some assets can be transferred by simple delivery, others (such as intellectual property and land) must be formally transferred and usually require third party consent. As all assets and liabilities are acquired in a share purchase, the due diligence process is often more onerous and appropriate contractual protection through warranties and indemnities will generally be negotiated.
- **Contracts.** Most contracts (such as customer and supplier contracts) are with the company and so remain binding after the sale, allowing the company to continue its business with little interruption to trade. This means that the buyer must understand the nature and key terms of the company's contracts, as discovered through due diligence. While "change of control" clauses may give a counterparty a contractual right to terminate if the company changes hands (and must therefore be identified), in practice third parties are unlikely to exercise this right unless there are serious concerns about the identity of the buyer.
- **Employees.** There is little disruption to employees in a share sale as the employer remains the same so far as the employees are concerned. The terms of employment should be examined by the buyer, particularly for key employees. The buyer might also wish to lock in key employees through contractual provisions. There is no legal requirement to inform or consult either employees or trade unions on a share sale (subject to any overriding provisions of collective or trade union agreements). However, if the business undertaking (or part of it) is being

transferred in an asset sale, consultations must take place between the seller, the affected employees and/or the relevant trade unions before the transfer can take effect (*Chapter 91, Employment Act*). See *Question 31* for more details.

- **Directors.** In a share sale, the company's directors are likely to resign, allowing for a clean break from the company and freeing the buyer to appoint its own directors. However, it is important for the buyer to ensure that severance payments are not triggered under service contracts (or alternatively that the directors agree to waive any such entitlements).

- **Tax.** In a share sale, the target company's unabsorbed losses might be available to be carried forward for set-off against future income, subject to the shareholders' continuity test. Broadly, this test requires that there must be no substantial change in the company's shareholders and their shareholdings at relevant comparison dates. The shareholders are substantially the same where not less than 50% of the total number of issued shares of the company are held by or on behalf of the same persons. Additionally, the company must also carry on the same trade or business in order to utilise the carry-forward losses. Where a substantial change in shareholding takes place, the target may still be able to enjoy unabsorbed losses if a waiver of the shareholders' continuity test is obtained from the Minister for Finance or any person he may appoint. In an asset sale, goods and services tax (GST) at 7% can be chargeable on the sale of assets (although not on the sale of a business as a going concern). Share sales are exempt from GST. See *Question 29* for further details.

- **Post-completion.** Following the share transfer, the seller will have severed all ties with the target company, subject to any contractual protections included in the share purchase agreement (SPA). In contrast, in an asset sale the sellers will still own the shell company which will then need to be liquidated. This can be an expensive and time-consuming procedure in Singapore.

Share purchases: disadvantages/asset purchases: advantages

The main disadvantages of a share purchase compared to an asset purchase are as follows:

- **Method of transfer.** In an asset purchase, the seller is the company itself, selling off assets that together comprise the business. Because the assets and liabilities are not automatically transferred, the buyer can be more selective as to which assets it wishes to acquire, avoiding the liabilities associated with the target company (for example, tax liabilities for which the seller will remain liable post-completion). There is also no need to locate or secure the consent of absent minority shareholders.

- **Contracts.** In an asset sale, the buyer can choose which contracts to acquire. As such, onerous or unprofitable contracts can technically be left behind with the selling company. In practice, however, it is often commercially unrealistic to fail to honour contracts. In addition, contracts being transferred must be assigned, novated or a new contract entered into between the counterparty and the buyer. Each of these methods can raise issues of confidentiality, timing, potential for renegotiation and notification/consent requirements. Only a formal novation can transfer both the assets and liabilities of a contract. In practice, the consent (or at least notification) of the counterparties to all key contracts is likely to be required.

- **Security.** On an asset purchase, the buyer can generally grant security to lenders over the assets to be acquired. Before the introduction of the first phase of the amendments under the Companies Amendment Act on 1 July 2015, the Companies Act prohibited security being taken over the target's assets in a share sale as unlawful financial assistance. Such restrictions have now been abolished for private companies in Singapore (unless the private company is a subsidiary of a public company) and the so-called "whitewash procedure" is no longer relevant. However, certain procedures must still be followed and additional restrictions apply to public companies. See *Question 19* for further details.

- **Tax.** Stamp duty at a rate of 0.2% is payable on the higher of the consideration paid or the value of shares in a private company in relation to a share sale. In an asset sale, buyer's stamp duty based on a rate of up to 3% is payable in relation to immovable property. Seller's stamp duty may be due on certain disposals of residential and industrial immovable property. Additional buyer's stamp duty may also be due on the purchase of residential immovable property. See *Questions 25* and *26* for further details.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Sale by auction is fairly common in Singapore, particularly for desirable target companies in which there is a high degree of buyer interest.

The auction process is generally run by an investment bank or financial advisor, responsible for drafting the auction process documents (including the process letter and information memorandum), finding buyers in the market and often running the due diligence process.

An auction is often effective for placing the seller in a strong negotiating position, both in terms of purchase price and sale terms. Each bidder will know that there are multiple bidders, which encourages each bidder to offer a higher purchase price and a lighter mark-up of the transaction documents drafted by the seller. The seller can also set parameters for the transaction at an early stage and make clear the factors that will incentivise (and conversely, aggravate) the seller when receiving bids. For example, the process letter may dictate that there should be no conditions precedent, or that a purchase price below a certain amount will not be considered.

The auction documents should make clear that the seller has the right to amend the terms of the auction process or cancel it entirely, and that the seller is not obliged to accept any bid, whether the highest bid or otherwise. Generally, the purchase price is not the only factor to consider and a seller can accept a lower bid if other factors (such as conditions precedent, source of funding and intentions for employees going forward) are more desirable.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

Letters of intent, or heads of terms, are commonly entered into for the parties to confirm the key points of a transaction before incurring increased costs and time drafting and negotiating the transaction documents. Generally, a letter of intent will be clearly expressed to be non-legally binding, apart from certain provisions such as confidentiality and costs. A letter of intent will cover issues such as:

- Parties to the agreement.
- Price (either the amount or how it will be calculated).
- Nature of the acquisition (share or asset sale).
- Any exclusivity period.
- Financing required.

- Timeline for completion.
- Any conditions to the transaction.
- Extent of representations and warranties.
- Confidentiality provisions.
- Costs and expenses.
- Governing law and dispute resolution.

Exclusivity agreements

Exclusivity (or lock-out) agreements are often entered into at an early stage in the transaction to provide comfort to the buyer that the seller will not solicit or entertain other offers while the buyer incurs time and costs negotiating the transaction. The exclusivity agreement must have a definite timeframe and cannot be open-ended. An exclusivity agreement can only prevent the seller from discussing alternative offers with third parties; it cannot compel the seller to enter into or maintain discussions with the proposed buyer (it must be expressed as a negative obligation, rather than a positive obligation). The consideration given by the buyer must also be made clear.

In the event the agreement is breached, the proposed buyer could bring an action for breach of contract and claim damages for wasted costs and expenses incurred up to that point in time. A claim for potential loss of a bargain or specific performance to compel the seller to cease negotiations with the third party is unlikely to be successful.

Non-disclosure agreements

Non-disclosure (or confidentiality) agreements are routinely entered into to protect the confidential information and business secrets of either (or often both) parties to a transaction. Confidentiality agreements are usually entered into at an early stage of a transaction and are particularly important before the due diligence process begins, when the seller will release commercially sensitive information on the target to the potential buyer.

The letter will define what the confidential information comprises, any authorised purposes for which it can be used, any parties to whom the buyer can disclose the information (such as legal advisors), various carve-outs and whether the information should be returned or destroyed in the event the transaction is aborted. The buyer may also be prohibited from soliciting customers, suppliers and employees of the seller for a period of time.

In order to be enforceable, consideration must be provided. This will generally be the information provided to the buyer in return for the buyer giving confidentiality undertakings. The restrictions must also be reasonable in scope and duration and not fall foul of the prohibition against anti-competitive agreements (*Chapter 50B, Competition Act*).

While a number of remedies are possible in the event of breach, the enforcement of confidentiality agreements is notoriously difficult. Damages can be claimed, although proving loss can be complex depending on how the loss is assessed (on an expectation, reliance or restitutionary basis). Where confidential information has already been released in breach of an agreement, damages might not be adequate and an injunction can be sought to prevent any further use or unauthorised disclosure of the information.

ASSET SALES

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

On an asset sale, the buyer can generally choose what to acquire and what to leave behind. As such, certain liabilities (such as tax liabilities) are typically not transferred to the buyer.

Employees have certain rights similar to the Transfer of Undertakings (Protection of Employment) Regulations in the UK under the Employment Act (*Chapter 50, Employment Act*). Transfer of the whole or part of the business undertaking will not terminate the employment contracts of the employees in that undertaking. Instead, their employment contracts are transferred to the buyer and deemed to have been made as if originally made between the employee and the buyer. Any act or omission by the seller before the transfer in respect of the employment contract is deemed to have been performed by the buyer.

Similarly, certain environmental legislation (such as the Environmental Protection and Management Act (Chapter 94A)) can impose strict liability for present environmental consequences of past activities on land. As such, the buyer of land can, depending on the facts, be held liable for certain actions of the seller before the transfer. See *Question 31* and *32* for further details.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

There is no statutory requirement to notify or obtain consent from creditors to an asset transfer. However, creditors will generally obtain contractual protection (for example, through the terms of a loan agreement) requiring their consent to be obtained in respect of the sale of certain assets or on a sale of the company. The liability for a breach of these contractual provisions remains with the seller unless novated to the buyer.

SHARE SALES

8. What common conditions precedent are typically included in a share sale agreement?

Generally the seller will want to ensure that conditions to completion are kept to a minimum or removed altogether in the share purchase agreement, allowing simultaneous signing and completion. This will depend upon the bargaining position of the parties and certain conditions cannot be avoided or waived, such as merger control filings and other regulatory approvals. Common conditions precedent include:

- Anti-trust and competition clearances.
- Regulatory clearances from relevant authorities.
- Third party consents, such as key customer and supplier change of control approvals.
- Shareholder approvals.
- No material adverse change in the target business.
- Financing consents.
- Clearance from tax authorities.

If the conditions are not satisfied within a certain timeframe, the share purchase agreement will generally provide that it terminates, potentially with a break fee being paid by the party that failed to satisfy a condition within its control, unless waived by either or both parties. It is common for parties to agree a "reasonable endeavours" requirement to satisfy certain conditions. Any condition should be as clear and specific as possible to ensure its satisfaction (or non-satisfaction) is readily apparent at a certain point in time.

SELLER'S TITLE AND LIABILITY

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

In a share sale, the principle of *caveat emptor* (buyer beware) applies. As such, no terms are implied by law about the seller's title to the shares. Instead, the buyer will usually require the seller to provide fundamental warranties about the seller's title to the shares and confirmation that the shares are not encumbered in any way. A buyer will also seek comfort on the seller's title to the shares through its own due diligence. Typical warranties in the share purchase agreement include:

- That the seller is entitled to transfer full legal and beneficial entitlement to the shares.
- That the shares are sold with all rights, benefits and entitlements, free from any encumbrances (often widely defined) and that no third party has any rights or entitlement to the shares, and nor will any such rights be created.
- That no such claims have been made in the past by any person.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

Seller

The seller will generally include express wording in the share purchase agreement confirming that no statement or representation has induced the buyer to purchase the shares, other than those statements expressly included in the agreement (generally through an entire agreement clause).

The share purchase agreement can also expressly exclude any claim for misrepresentation and misstatement. However, it is not possible for the seller to exclude liability for fraud or fraudulent misrepresentation in the tort of deceit.

In the absence of any express exclusions, a seller may be liable for negligent or innocent misrepresentation (*Chapter 390, Misrepresentation Act*) or under the common law of misrepresentation if the statement induces the buyer to enter into the contract.

Advisers

Advisors can be liable in the same way as sellers for innocent, negligent or fraudulent misrepresentation. However, the share purchase agreement can include an express clause prohibiting the parties from bringing an action against each other's advisers.

MAIN DOCUMENTS

11. What are the main documents in an acquisition and who generally prepares the first draft?

The main documents in a share sale are:

- Share purchase agreement: prepared by the buyer or sometimes the seller (particularly in an auction sale).
- Disclosure letter: prepared by the seller.
- Share transfer form: a simple, one-page document (technically all that is required to transfer title to shares in Singapore).

Various ancillary documents will also be entered into, such as board or shareholder resolutions, stamp duty documents and any side agreements (for example, an escrow agreement).

In an auction, the seller will usually draft the first drafts of the key transaction documents, rather than the buyer. Proposed bidders then mark up the agreements as part of their bid (the lighter the mark-up, the more attractive the bid to the seller).

In an asset sale, the main document will be an asset purchase agreement and novation or assignment agreements (as required). Although each asset must be transferred separately, the asset agreement will govern the overarching terms and any contractual protections. While some assets can be transferred by delivery, others require formal agreements (such as intellectual property and land). Shareholder approval is always required for the disposal of all or substantially all of the assets of a Singapore company.

ACQUISITION AGREEMENTS

12. What are the main substantive clauses in an acquisition agreement?

The main clauses in an acquisition agreement are as follows:

- Parties to the agreement (seller, buyer, any guarantor or additional party).
- Operative provision for the sale and purchase of the shares/assets.
- Purchase price and any adjustment mechanism (for example, through completion accounts or a "locked box" mechanism).
- Conditions precedent.
- Pre-completion undertakings governing how the business will be run between signing and completion.
- Signing and completion mechanics and obligations.
- Warranties and representations.
- Any indemnities or tax covenants.
- Any limitations on the seller's liability.
- Post-completion obligations (including non-compete/non-solicitation).
- Parent company guarantee, if applicable.
- Confidentiality/announcement provisions.
- "Boilerplate" clauses (for example, notices, assignment, costs, waivers, entire agreement and third party rights).
- Governing law and jurisdiction.

While many of the provisions in a share purchase agreement will be similar to those in an asset purchase agreement, an asset purchase agreement will also include the following:

- The purchase price ascribed to each asset or class of asset (for tax and accounting purposes).
- Apportionment of liabilities for the pre-completion period and the post-completion period for matters such as employee wages, creditors, debtors and contract payments.
- Details of whether a class of asset is being assigned, novated or transferred by delivery.
- Details of those assets not being transferred.
- A mechanism to ensure each party accounts to the other for amounts incorrectly paid or received by that party.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

Any governing law can be specified in a Singapore purchase agreement. Also, any dispute resolution procedure can be specified. For example, a share purchase agreement for the sale of a Singapore company can provide that the governing law is French law with all disputes to be resolved by the English courts.

However, certain Singapore laws do continue to apply, for example in respect of competition, employment and company law governing the transfer of the shares or assets.

WARRANTIES AND INDEMNITIES

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Warranties are commonly included in acquisition agreements. Specific indemnities can be included for certain known liabilities and general indemnities for other potential breaches leading to loss, depending on the bargaining position of the parties. Tax indemnities, or a separate tax covenant, may also be given to cover tax liabilities.

Generally both the seller and the buyer will give fundamental warranties confirming their capacity to enter into the transaction, their due incorporation, validity and solvency. The seller will also give fundamental warranties in relation to its title and ownership of the shares or assets.

Common warranties given by the seller include:

- Up-to-date nature of the constitutional documents provided to the buyer.
- Due incorporation of any subsidiary companies.
- No resolutions or other action for insolvency proceedings for any group company.
- Accuracy of the accounts and management accounts.
- Any actions taken since the accounts date and consistent operation of the business.
- Valid ownership of the assets free from encumbrances.
- Valid ownership and no infringement of intellectual property.
- The binding nature of material contracts and no breach or threatened termination.
- Adequacy of information technology.
- Adequacy of insurance.
- Valid ownership of all freehold and leasehold property.
- Compliance with environmental laws.
- No employment disputes and no resignations or terminations of key employees.
- Compliance with existing financial facilities.
- No litigation and compliance with applicable laws.

In an asset sale, the warranties will focus to a greater extent on the assets themselves, rather than the target company. In an asset sale the buyer typically acquires the assets themselves (including goodwill) without assuming the historic liabilities relating to them. In contrast, broader contractual protection is required in a share sale where historic liabilities are transferred.

15. What are the main limitations on warranties?

Limitations on warranties

A seller will typically seek to limit its liability under the warranties through various exclusions. Common exclusions include:

- Confirmation that the warranties and representations in the agreement are the only warranties and representations, and that all others implied by law or otherwise are excluded.
- The maximum aggregate liability, usually expressed as a percentage of the purchase price.
- Any "de minimis" threshold, setting the minimum amount of any individual claim.
- Any "basket" threshold, setting the minimum amount of all claims.
- The time limits for claims, usually dependant on the type of claim (for example, two years for general warranties and six years for tax warranties).
- That there is no double recovery under insurance or otherwise.
- Compulsion to seek recovery from possible third parties prior to making a claim.
- The seller's ability to take over the conduct of a claim against a third party (subrogation rights).
- Whether there are any contingent claims to crystallise.
- The time period within which a breach can be remedied (usually around 30 days).
- Any obligation to mitigate loss.
- No claim for loss due to the buyer's action or due to a change in law.
- No claim where provision for the matter has been made in the accounts.
- No claim for loss of profit, business, contract or indirect/consequential loss.

Qualifying warranties by disclosure

Generally the purchase agreement will provide that the warranties are subject to disclosure, so that no warranty claim can be brought where the matter giving rise to the claim was known to the buyer or disclosed in the data room, the agreement itself or a separate disclosure letter prepared by the seller. The disclosure letter is provided at signing (although it will be negotiated prior to signing) and can be updated at closing, depending on the negotiating position of the parties.

The disclosure letter will include "general disclosures" (under which general matters are disclosed) as well as "specific disclosures" related to specific breaches of the warranties. Common general disclosures include:

- Any document disclosed in the data room.
- All information given to the buyer by the seller or its advisors (for example, through management presentations).
- The constitutional documents, statutory registers and minute books of the target company.
- Information revealed by public searches, such as company, intellectual property, litigation and property searches or surveys.

It is common for a standard of "fair disclosure" to be included, meaning that the matter must have been disclosed in sufficient detail and in a manner not misleading so as to enable a reasonable buyer to understand the nature of the matter disclosed and assess its impact.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The usual remedy for a claim for breach of warranty is damages for the loss suffered under contract. This could be the diminution of the value of the asset or shares acquired, or the monetary value of the loss (for example, a tax liability of S$100,000 would lead to a claim for damages for S$100,000). However, the buyer would need to show that the loss is not too remote, that it has mitigated its loss and that the specific exclusions of liability contained in the share purchase agreement do not invalidate the claim (for example, because the claim is too low in value).

Time limits for claims under warranties

The time limit or long-stop date by which claims must be made is negotiated between the buyer and seller. Statutory limitation periods apply in Singapore (six years for an action founded in contract from the date on which the cause of action accrued).

The time limit for general warranties is typically around 12 to 24 months, with longer periods for fundamental warranties and specific matters that are of concern to the buyer (for example, environmental breaches). For tax indemnity claims, the time period is usually stated to be around six years from the end of the target company's current accounting period.

CONSIDERATION AND ACQUISITION FINANCING

17. What forms of consideration are commonly offered in a share sale?

Forms of consideration

The main forms of consideration offered are:

- Cash (most common).
- Shares in the buyer.
- Debt (loans or promissory notes).
- A combination of the above.

Factors in choice of consideration

The likely factors to be taken into account when selecting the method of consideration include:

- The availability of financing to the buyer (whether through debt or equity fundraising, group company loans or cash reserves).
- The tax implications of different methods of payment.
- The level of debt in the target company, which may, for example, lead the buyer away from issuing loan notes in the target company or allowing it to give financial assistance to the buyer.
- The liquidity of any shares to be issued to the seller as consideration (for example, whether the shares are listed on a recognised investment exchange and the anticipated volatility of share prices in that particular industry).

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

In most cases, a small issue of shares will be structured as a private placement. A larger issue will be structured as a rights issue made to existing shareholders.

Consents and approvals

The consents and approvals required depend on the provisions in the issuing company's constitution, the structure of the issue and the applicable parts of the Singapore Exchange Securities Trading Limited (SGX-ST) listing manual (the Listing Manual).

As a general rule, majority shareholder consent is required by ordinary resolution of the shareholders to grant directors the authority to issue shares in the company. Such consent cannot be for the issue of new shares exceeding 20% of the total number of shares then in issue (excluding treasury shares). However, if the new shares are to be issued to existing shareholders on a pro-rata basis, shareholder consent can be sought to issue new shares comprising up to 50% of the existing shares.

There is no statutory pre-emption right for existing shareholders under Singapore law. However, for listed companies, the Listing Manual requires that the constitution should provide pre-emption rights to existing shareholders subject to any contrary direction by the shareholders in general meeting or elsewhere in the Listing Manual.

Requirements for a prospectus

For a rights issue, a company must publish a short-form prospectus known as an "offer information statement", and must comply with certain disclosure requirements contained in the Listing Manual (*Chapter 289, Securities and Futures Act*). Various exemptions are available under the Securities and Futures Act, the key exemption being in respect of a private placement to no more than 50 individuals within a 12-month period, provided certain other conditions are satisfied.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Prior to the introduction of the first phase of the amendments under the Companies Amendment Act on 1 July 2015, financial assistance by a company was generally restricted for the purpose of, or in connection with, the acquisition of shares in that company or its holding company. However, these restrictions no longer apply to private companies (unless the private company is a subsidiary of a public company). As such, private companies are free to provide financial assistance for the purchase of their own shares and shares in their private holding companies. This change to the Companies Act reflects the changes made to the UK Companies Act in 2006, providing greater flexibility and simplifying many corporate transactions. The so-called "whitewash procedure" is therefore no longer relevant.

However, before providing financial assistance, private companies must carry out a legal and financial analysis relating to the effect of the transaction and the directors must consider whether the transaction will promote the success of the company for the benefit of its members.

Since the introduction of the first phase of the amendments under the Companies Amendment Act on 1 July 2015, private companies are permitted to provide financial assistance for the acquisition of their own shares. Doing so must not materially prejudice the interests of the company, its shareholders or the company's ability to pay its creditors. The directors of the company must deem the terms of the assistance to be fair and reasonable.

SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

Documents typically produced and executed at a signing meeting for a private company share sale include:

- The share purchase agreement.
- A disclosure letter addressed to the buyer from the seller, containing disclosures against the warranties contained in the share purchase agreement or in a separate warranty deed.
- Board resolutions (and, where required, shareholder resolutions) of the buyer and the seller, approving the transaction and the entry into the transaction documents by the directors.
- Any ancillary documents, such as escrow agreements or side letters (either executed or to be confirmed in agreed form).

Closing

Documents typically produced and executed at a closing meeting for a private company share sale include:

- Share transfer form(s) in respect of the shares being sold in the target company.
- Existing share certificates in respect of the shares being sold.
- Any third party consents (for example, landlord's consent), regulatory consents or competition clearances.
- Board resolutions of the target company covering all closing actions.
- Waiver letters from existing shareholders in the target company, waiving any pre-emption rights to the shares being transferred.
- New employment agreements for any key management personnel of the target company who will continue to be employed.
- A banker's draft, MT103 or similar document evidencing the transfer of the completion monies from the buyer to the seller/escrow agent, as appropriate.
- Signed letters of resignation from the relevant directors and secretaries of the target company.
- Signed forms of appointment for the new directors/secretaries to be appointed (Form 45/Form 45B).
- The books and registers of the target company.
- Where applicable, evidence of the target company's loan repayments and the discharge of any security attaching to the target company shares or undertaking.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

There is an important distinction between the execution formalities for a simple agreement and those for a deed. It is also important to determine whether a document must be executed by an individual on their own account, or on behalf of a company.

To be enforceable under Singapore law, certain documents must be executed as a deed, while others can be executed either as a deed or an agreement. The following documents must be executed as a deed:

- Documents transferring or granting an interest in land (including mortgages).
- Powers of attorney granting the authority to execute a deed.
- Documents under which a promise is given for no consideration.

Subject to the specific provisions of a company's constitution, agreements can be entered into by corporations in any of the following ways:

- In writing and under the common seal of the corporation.
- In writing and signed by the corporation's duly authorised corporate representative.
- Orally on behalf of the corporation by its duly authorised corporate representative (although this method is neither common nor advisable, principally for lack of evidence of the existence of the agreement and its terms).

It is most common for a Singapore company to execute a deed by affixing its common seal. A Singapore company's constitution will typically provide that the seal can only be affixed with board approval and the signature of either two directors or one director and one secretary. Alternatively a company can authorise a person to act as its attorney under a power of attorney to execute a deed on its behalf.

22. What are the formalities for the execution of documents by foreign companies?

Foreign companies executing documents in Singapore must do so in any manner binding on the company according to the laws of its own jurisdiction. Singapore does not impose any additional procedure or formality.

23. Are digital signatures binding and enforceable as evidence of execution?

Yes, secure electronic signatures are admitted as evidence of execution (*Chapter 88, Electronic Transactions Act*).

24. What formalities are required to transfer title to shares in a private limited company?

Subject to any specific requirements in the target company's constitution, the formalities to transfer legal title to shares in a private limited company are as follows:

- Duly executed instrument of transfer (that is, a share transfer form) signed by the buyer and the seller and delivered to the target company's company secretary.
- Payment of any applicable stamp duty on the transfer of shares to the Inland Revenue Authority of Singapore.
- Delivery of the existing share certificates for the shares to be transferred to the target company's company secretary for cancellation.
- Board resolutions of the target company approving the share transfer from the seller to the buyer and the registration of the

buyer as shareholder in the target company's register of members.

Practically, the target company's company secretary should be involved throughout the transaction to ensure the smooth execution of the transaction.

TAX

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

In Singapore, stamp duty is chargeable on instruments relating to immovable property and stocks and shares. Generally, no stamp duty is payable on instruments relating to the transfer of assets (with the exception of immovable property and stocks and shares).

Share sale

Stamp duty is payable in relation to the transfer of shares in a private company, whether the transfer is for consideration or not. The current rate of stamp duty payable is 0.2% of the higher of the actual price paid and the value of the shares. The position is the same for ordinary and preference shares. No stamp duty is payable in respect of transfers of scripless shares (shares in public companies listed on the Singapore Exchange where the transfer is effected through the central depository book entry system).

Singapore's stamp duties legislation previously exempted any contract or agreement executed for the sale of shares from being stamped. The longstanding legal practice has therefore been to stamp share transfer forms rather than sale and purchase agreements (SPAs) relating to proposed transfers of shares.

However, new legislation in effect from 11 March 2017 now prescribes that all SPAs involving the transfer of shares must be stamped within 14 days from the date of execution of the SPA, provided the SPA is executed in Singapore. It appears that this is the case even where a SPA is subject to various conditions precedent that have not yet been satisfied. Accordingly, in the event of a split signing and completion, an executed SPA will require stamping before completion of the transaction has occurred if completion is scheduled to take place longer than the prescribed 14-day period from the SPA execution date.

Although the position is unclear, current guidance from the Inland Revenue Authority of Singapore (IRAS) suggests that, if completion of a transaction fails to occur, the intended buyer may have to submit an appeal to IRAS requesting a refund of the stamp duty to be issued. However, given the level of uncertainty in Singapore's M&A market, the Law Society of Singapore has raised further enquiries with IRAS, and it is hoped that practical guidance will be issued in due course to clarify the position.

Asset sale

For immovable property, stamp duty is calculated on the consideration paid and the value of the property, whichever is higher. The current buyer's stamp duty rates in relation to the transfer of immovable property are:

- 1% on the first S$180,000.
- 2% on the next S$180,000.
- 3% on the remainder.

Unless the parties contractually agree otherwise, the buyer is liable to pay the stamp duty.

Disposal of residential immovable property may attract additional stamp duty if the property is disposed of within four years of purchase. This is known as seller's stamp duty. The seller's stamp duty in relation to residential immovable property is based on a rate of up to 16%. The seller's stamp duty in relation to industrial immovable property is based on a rate of up to 15%.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

Generally, it is not possible to avoid attracting stamp duty in relation to a transfer of shares in a private company in Singapore. However, relief from stamp duty may be available where the transfer:

- Involves corporate restructuring or amalgamation.
- Is made between certain associated entities.
- Involves an acquisition of ordinary shares under a mergers and acquisitions deal, if certain conditions are satisfied.

For any relief to be granted, an application must be made to the Commissioner of Stamp Duties.

Exemptions from stamp duty are available in relation to dispositions of land situated outside of Singapore and transfers of shares in a foreign company where the shares are not registered in a register kept in Singapore.

Asset sale

Transfers are generally not subject to stamp duty, unless immovable property is being transferred. Structuring a transaction as an asset transfer may therefore significantly reduce the stamp duty payable provided no immovable property is transferred (*see Questions 3 and 25*).

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Share sale

There is no capital gains tax payable in Singapore. Gains that are revenue in nature are subject to corporate income tax. Singapore has a single-tier corporate income tax system with a flat corporate income tax rate of 17%. The effective tax rate may actually be lower than this, depending on whether one of a number of tax incentives is applicable. For example, a partial tax exemption is granted on the first S$300,000 of normal chargeable income, giving an effective tax rate of 8.36% in respect of that S$300,000.

Whether a gain or loss from the disposal of equity is revenue or capital in nature depends upon the particular facts and circumstances. Relevant factors arising under Singapore case law include:

- The seller's motive in making the disposal.
- The length of the period of ownership of the shares.
- The frequency of similar transactions carried out by the seller.
- The seller's reasons for the disposal.
- How the acquisition of the shares is financed.

Asset sale

As noted above, no corporate income tax is payable for a capital gain as might be realised on the sale of a fixed asset or goodwill. However, corporate income tax is payable on revenue gains, and the disposal of plant and machinery or other capital assets may result in a balancing charge which may subject the transferor to corporate income tax.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Share sale

An exemption known as the "certainty of non-taxation rule" was announced by the government in the 2012 budget. Under this exemption, gains or profits derived by a divesting company from the disposal of a substantial equity stake of 20% or more held in the ordinary shares of an investee company, for a continuous period of at least 24 months immediately before the disposal, are exempt from income tax.

This exemption originally applied to disposals occurring from 1 June 2012 to 31 May 2017, but it was announced in the 2016 budget that it would be extended to disposals occurring until 31 May 2022. The exemption will apply whether the investee company is incorporated in Singapore or elsewhere, and listed or non-listed. This exemption is not applicable to a disposal of preference, redeemable or convertible shares.

There is no capital gains tax in Singapore.

Asset sale

For certain asset sales between related parties, the buyer and seller can elect to treat the tax written-down value of the asset sold as the deemed sale price, meaning the seller will not be subject to any balancing charge under Chapter 134 of the Income Tax Act.

For trading stock which is sold or transferred on the discontinuance of a trade or business, the ITA prescribes that the value of the trading stock sold or transferred will be taken to be the purchase price, where the transferee carries on or intends to carry on a trade or business in Singapore and the cost of the stock is deductible as an expense in computing the gains or profits of the transferee's trade or business. Otherwise, the value of the trading stock is deemed to be the open market value.

29. Are other taxes potentially payable on a share sale and an asset sale?

Goods and services tax (GST) can be payable on the sale of an asset by a taxable person in the course or furtherance of business carried on by that person. However, GST is not chargeable on the sale of a business or part of a business as a going concern, subject to the fulfilment of certain legislative and administrative conditions. Broadly, these conditions include the following:

- The transfer of assets is made in relation to the transfer of the whole or part of a business.
- The assets to be transferred are intended for use by the buyer in carrying on the same kind of business as that being transferred.
- If only part of a business is transferred, that part is capable of being operated independently.
- The business (or the relevant part) is a going concern at the time of the transfer and does not cease to be a going concern immediately after the transfer.
- The buyer is GST-registered or immediately becomes liable to register for GST as a result of the transfer.

The sale of shares is exempt from GST.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Subject to certain conditions, a member company of a group (the transferor) can transfer unabsorbed losses to another member company within the same group (the claimant) if the transferor and the claimant have the same accounting year-end. Both the transferor and the claimant must be Singapore-incorporated companies. Two Singapore companies are members of the same group if either:

- At least 75% of the total number of issued ordinary shares in one company are beneficially held, directly or indirectly, by the other.
- At least 75% of the total number of issued ordinary shares in each of the two companies are beneficially held, directly or indirectly, by a third Singapore company.

Interest expenses incurred by the bid vehicle on financing used to fund the acquisition are only deductible against the dividend income received from the target company, meaning they are not tax deductible against the profits of the target company before tax. There is in fact no tax benefit derived if the target company issues tax exempt dividends under Singapore's single-tier corporate income tax system.

EMPLOYEES

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Employees are ordinarily protected by the Employment Act (Chapter 91). An employee is a person who has entered into or works under a contract of service with an employer, although, briefly, certain categories of employees are not protected by the Employment Act. The key exclusion is any person in a professional, managerial or executive position earning more than S$4,500 per month (although some parental benefits, such as maternity and childcare leave, may still apply if the employee is a Singapore citizen).

Employees protected under the Employment Act are referred to as Employment Act Employees in the remainder of this section.

Asset sale

Where an undertaking or part of an undertaking is to be transferred, the transferor must make certain notifications as soon as it is reasonable, and in any event before the transfer is effective. Once employees have been notified of the transfer, consultations should take place between the seller and the affected Employment Act Employees and any trade union to which those employees belong.

The notifications must be made to the affected Employment Act Employees and trade unions and include:

- 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 transferor envisages it will need to take in relation to the Employment Act Employees (or, if the transferor envisages that no measures will be taken, the relevant Employment Act Employees should be made aware of this).
- The measures the transferee envisages it will need to take in relation to the Employment Act Employees (or, if the transferee

envisages that no measures will be taken, the relevant Employment Act Employees should be made aware of this).

The transferee must give the transferor the necessary information to enable the transferor to meet these obligations as soon as it is reasonable to do so. Employment will be deemed continuous where it is transferred.

Share sale

On a share sale, there is no change in the identity of the employer and as such there are no obligations to inform or consult employees or to obtain employee consent.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Employees do not have any special statutory protection against dismissal in the context of a share or asset sale. The general position on dismissal of employees is outlined below.

Asset sale

On completion of an asset transfer:

- All the transferor's rights, powers, duties and liabilities under or in connection with the contract of employment of each Employment Act Employee automatically transfer to the transferee.
- Any acts or omissions before the effective date of the transfer in relation to any Employment Act Employee will be deemed to have been done by the transferee.
- Any acts or omissions done before the transfer by an Employment Act Employee employed in the undertaking or part transferred in relation to the transferor will be deemed to have been done in relation to the transferee.

The transfer does not terminate the employment agreements of the employees of the business being transferred, but will have effect after the transfer as if the agreement was originally made between the employee and the transferee. The period of employment is deemed to be continuous, regardless of the transfer.

Employment Act Employees (or the trade union representing them) can, under the Employment Act, negotiate and agree different employment terms from those agreed in their existing employment agreements to take effect from the date of transfer. If no such negotiation and agreement takes place, then the terms of the existing employment agreements are preserved.

If an Employment Act Employee's employment agreement contains termination provisions that specify a notice period to be given by the employer (as is common in Singapore), there is nothing to stop the employer from terminating in accordance with those provisions before the date of the transfer. If no such provisions have been agreed, then the employer can terminate by giving the applicable statutory notice period as set out in the Employment Act.

Share sale

It is common for termination provisions to be included in individual employment agreements. If there are none, the employment termination provisions contained in the Employment Act will apply to Employment Act Employees (and will in fact supersede any less generous provisions in individual employment agreements of Employment Act Employees). As a guide, the statutory minimum notice periods for dismissing Employment Act Employees range from one day to four weeks, and payment in lieu of notice is possible.

PENSIONS

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

It is not common in Singapore for employees to participate in private pension schemes. Where employees are Singapore citizens or permanent residents, they are required by law, along with their employer, to contribute to Central Provident Fund savings (*Chapter 36, Central Provident Fund Act*). Expatriate employees who do not have permanent resident status will typically make their own private pension arrangements.

Pensions on a business transfer

An employer is required to contribute towards its employee's Central Provident Fund savings for as long as the employee remains in its employment. The obligation is assumed by the new employer on an asset transfer. The Central Provident Fund scheme is centrally administered by the Singapore Government, and as such, there is no complexity when an employee is transferred to a new employer.

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

Singapore competition law is modelled on UK legislation. In the context of mergers and acquisitions, section 54 of the Competition Act (Chapter 50B) prohibits mergers that have resulted, or may be expected to result in a substantial lessening of competition in Singapore (section 54 prohibition). The term "merger" is broadly defined and may even apply to joint ventures in certain cases, for example where a joint venture performs on a lasting basis all the functions of an autonomous economic entity. The section 54 prohibition also has extra-territorial effect, meaning it applies to companies outside Singapore if there is or may be a sufficient anti-competitive effect within Singapore.

A merger is likely to be anti-competitive if either:

- The merged entity has or will have a market share of 40% or more.
- The merged entity has or will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms in the relevant market is 70% or more.

Market share is only one factor to consider in assessing the merger. A merger exceeding the thresholds above may be permitted, while a merger that falls below the thresholds may be in breach. Essentially, the entity should be able to objectively justify its conduct and show it has behaved in a proportionate manner in defending its legitimate commercial interests.

A merger will be excluded from the section 54 prohibition if it has a net economic benefit, which may be deemed to occur if the agreement in question contributes to improving production or distribution or promotes technical or economic progress, and is done in the least restrictive way that does not eliminate competition in a substantial part of the market. Certain mergers are excluded from the Competition Act entirely (for example, mergers in the water and waste management services industries).

Notification and regulatory authorities

Notification of mergers to the Competition Commission of Singapore (CCS) is voluntary. Parties to a merger can apply to the CCS for a decision at any time before, during or after a merger.

Parties should decide early in the transaction timeline whether to notify the CCS. If a formal notification is made, the parties can either request general guidance on whether the prohibitions are likely to be breached, or request a formal decision. In either case, the CCS will adopt a two-stage review process:

- The first stage, a "Phase 1 review", will be completed within 30 working days and will clear proposed mergers that clearly do not raise any competition concerns. If the CCS is unable to conclude this based on the information provided, it may decide that a "Phase 2 review" involving a more detailed assessment is necessary.
- The indicative timeframe for a Phase 2 review is 120 working days, and commences only when the CCS notifies the applicant that the merger situation has proceeded to a Phase 2 review and receives a complete Form M2 that meets all the applicable filing requirements.

At any stage during this review process the parties can offer behavioural or structural commitments to the CCS to alleviate any concerns that the CCS may have.

For anticipated mergers, a favourable decision of the CCS may be subject to a validity period within which the anticipated merger must be carried into effect. Conversely, the CCS can issue an unfavourable decision and directions to remedy, mitigate or eliminate the adverse effects arising from the merger. For completed mergers, this may entail heavy financial penalties or a direction that the merger be unwound.

The CCS has strong enforcement powers and can commence its own investigations into mergers that have not been notified.

Substantive test

The substantive test is whether the merger has resulted or may be expected to result in a substantial lessening of competition within the relevant market in Singapore.

ENVIRONMENT

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

On an asset sale, historic liabilities typically remain with the seller, unless the parties agree that the buyer will assume those liabilities. Environmental legislation in Singapore does, in some circumstances, impose liability for present environmental consequences of past activities at a given property on the present owner, regardless of a change in ownership and where the previous owner was actually responsible for causing the present consequences.

In a share sale, the buyer will typically inherit the target company's environmental liabilities unless the parties agree that the seller will retain environmental liability, for example by indemnifying the buyer.

ONLINE RESOURCES

Singapore Attorney General's Chambers

W http://statutes.agc.gov.sg

Description. This website contains links to the legislation mentioned in this article. It is operated and maintained by the Attorney General's Chamber, which is the legal adviser to the Government of Singapore and also its public prosecutor.

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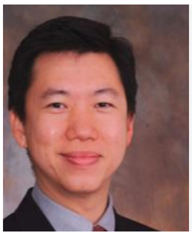

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