Singapore

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

Private M&A transactions in Singapore are largely unregulated by statutory law, and parties are generally free to negotiate the terms and conditions of the sale and purchase. As we shall see, the contractual provisions for the acquisition of a Singapore company are often dictated by commercial considerations, but they nevertheless share the same basic components and features of acquisition agreements in other jurisdictions.

This article seeks to examine and discuss some of the more common legal practices and requirements in relation to private M&A transactions in Singapore.

2. GENERAL LEGAL FRAMEWORK IN SINGAPORE

Notwithstanding that private M&A transactions are largely unregulated, the following statutory provisions may be applicable or relevant in certain acquisitions and should be taken note of.

2.1 Companies Act

Chapter 50 of the Singapore Companies Act (Companies Act) contains general corporate legislation including provisions relating to the incorporation, management, administration and winding up of companies. Issues relevant to acquisitions such as the fiduciary duties of directors, as well as the procedural requirements for the transfer of shares in a Singapore company and for the disposal of a company's business which may arise as part of an acquisition, are covered under the Companies Act.

For instance, where a business sale involves the disposal by the vendor of the whole or substantially the whole of its undertaking or property, the prior approval of the vendor's shareholders in a general meeting must be obtained 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 the general meeting.

Since 1 July 2015, the prohibition against the provision of financial assistance for the acquisition of shares in a private company has also been removed. In practice, the target Singapore private company may provide such financial assistance, for instance, by offering its assets as security for any loan taken up by the purchaser of shares in question. However, in deciding whether to give financial assistance to a purchaser who is acquiring the company's shares, the directors of the target company are subject to their duties and obligations under the Companies Act and the common law to act in the best interests of the company.

However, the provision of such financial assistance (whether direct or indirect) is still prohibited under Section 76 of the Companies Act in the case of a public company or a subsidiary of a public company. If a public company or a subsidiary of a public company wishes to provide financial assistance in connection with the acquisition of its shares, it may do so under the 'whitewash' procedures as specified under the Companies Act. Since 1 July 2015, whitewashing procedures have been simplified so that solvency statements by directors and/or the placing on newspaper advertisements are no longer required. A board resolution of the company confirming that the company should give the financial assistance; and that the terms and conditions under which the assistance is proposed to be given are fair and reasonable to the company will suffice to 'whitewash' the proposed financial assistance.

Effective since 3 January 2016, the electronic register of members of private companies maintained by the Accounting and Corporate Regulatory Authority (ACRA) has replaced the physical register of members previously maintained by the company as the main and authoritative register of members in a private company. Such companies are required to file information concerning share ownership and changes in share ownership for registration with the ACRA. Therefore, a purchaser of shares in a Singapore company will only be registered as the legal owner of such shares when the electronic register of members of the Singapore company is updated of the same.

The following two amendments to the Companies Act aimed at improving the transparency of ownership and control of companies, which took effect on 31 March 2017, should also be taken into consideration in the context of private M&A transactions. Firstly, nominee directors of companies are required to disclose their nominee status and nominators to their companies. Companies are required to keep a register of nominee directors and produce the register of nominee directors and any related document to the Registrar, an officer of ACRA or a public agency upon request. Nominee directors must inform their respective companies of the fact that they are nominees and provide the prescribed particulars of their nominators to their companies within the applicable timelines.

Secondly, unless exempted, all Singapore companies, foreign companies and limited liability partnerships (LLPs) are required to maintain and keep up to date a register of controllers, which will have to be made available to the Registrar of Companies, the Registrar of Limited Liability Partnerships (as the case may be) or law enforcement authorities upon request, but not to the public. For reference, a 'controller' of a company/foreign company/LLP refers to an individual or legal entity who or which has a 'significant interest' in, or 'significant control' over, the company/foreign company/LLP.

2.2 Competition Act

The Competition Act, Chapter 50B of Singapore (Competition Act), prohibits mergers, acquisitions of control and certain joint ventures that have resulted, or may be expected to result, in a substantial lessening of competition within any market (or market segment) for goods or services in Singapore. This prohibition applies even where the merger takes place outside of Singapore, or where any merger party is located outside Singapore.

From 1 July 2007, a party who is unsure whether a proposed acquisition is prohibited by the Competition Act may apply to the Competition and Consumer Commission of Singapore (the CCCS) for a decision regarding whether the acquisition, if carried into effect, will infringe the provisions of the Competition Act.

While merger notification to CCCS is voluntary, CCCS requires all parties to mergers to conduct a self-assessment, in accordance with the methodologies in the guidelines published by CCCS and read with its decided cases, on whether a merger filing is necessary. The self-assessment should be documented in customary form which CCCS would accept as documentary evidence that the self-assessment has been conducted contemporaneously with the transaction.

In the event of an investigation, the self-assessment may be provided to CCCS as a first line of defence on why the transaction does not give rise to a substantial lessening of competition, that the self-assessment requirement was met, and that the infringement (if any) was not entered into intentionally or negligently. If CCCS finds that an infringement was entered into intentionally or negligently, CCCS may impose financial penalties on the parties to the agreement, in addition to considering other directions and remedies.

In the absence of a filing, parties bear the antitrust risk as there is no limitation period on the timeframe after which CCCS may cease to have the power to investigate a transaction. There is accordingly an evergreen risk of an investigation and subsequent divestments or other remedies to the transaction, even where the transaction has been implemented for some time. CCCS has stated that it will generally not consider the costs of divestment which the parties would have to incur, as it would have been open to the parties to notify CCCS of the merger for a decision. The only way to avoid the antitrust risk with certainty is to undertake a merger notification and obtain a clearance decision from the CCCS.

The CCCS has increasingly looked at commitments in its recent merger actions with an emphasis on Singapore-specific effects. The clearance of the acquisition by SEEK Asia Investments of 100 per cent of the online recruitment business assets of JobStreet Corporation Berhad, including JobStreet.com (SEEK Asia/JobStreet.com) is notable for the first-ever market testing of proposed commitments offered by merger parties, and the first conditional clearance subject to local commitments offered in Singapore.

In 2021, CCCS granted conditional approval of London Stock Exchange Group (LSEG)'s acquisition of certain subsidiaries and assets of Refinitiv Holdings Limited, accepting commitments submitted by LSEG. From January 2019 to December 2021, the CCCS has accepted commitments in 12.5 per cent of mergers reviewed. To date, the CCCS has also provisionally blocked three mergers, including one foreign-to-foreign merger. The CCCS also initiated a post-completion investigation against one transaction and issued an infringement decision, which was upheld on appeal. The CCCS disagreed with the parties' definition of the relevant market, market share calculations and competitive analysis; it found the failure to notify and the implementation of the transaction, among other things, to be an intentional and negligent infringement of Singapore competition laws, and imposed financial penalties of around S$13m (approx. €8.6m), in addition to other directions.

CCCS's decision to block the proposed acquisition by Parkway Holdings of RadLink-Asia from Fortis Healthcare Singapore Pte. (RadLink/Parkway) in 2015 followed less than five months after the conditional clearance of the transaction. It is notable that no commitments were proposed to CCCS for consideration during the review process according to media reports on the CCCS provisional decision on RadLink/Parkway.

In 2016, CCCS published revised guidelines which indicate how CCCS will interpret and give effect to the Competition Act. For instance, CCCS clarified that minority shareholdings may give rise to an acquisition of control based on factors such as historical attendance at shareholders' meetings and voting patterns, and the wide dispersion of shares. In respect of venture capitalists and private equity investors, CCCS has further clarified that competition concerns may arise if mergers involving such entities result in the coordination of conduct among portfolio firms in the same market in which the parties have stakes and are able to influence commercial behaviour. More recently in 2020, CCCS proposed further changes to its guidelines, which include *inter alia*:

a) changes to the review and transaction timetable;
b) changes to the information required in the notification form;
c) changes to commitment timelines; and
d) certain clarifications (eg, market definition for multi-sided platforms, encouragement of notification prior to completion of the transaction and the CCCS's approach to data protection aspects and countervailing buyer power in merger control).

2.3 Take-over Code

The Singapore Code on Take-overs and Mergers (the Take-over Code) applies to the acquisition of voting control of public companies. The Take-over Code was drafted with listed public companies, listed registered business trusts and real estate investment trusts in mind. However, unlisted public companies and unlisted registered business trusts with more than 50 shareholders or unitholders with net tangible assets of S$5m or more must also observe, wherever possible and appropriate, the letter and spirit of the Take-over Code as set out in its General Principles and Rules. When evaluating an acquisition of any such unlisted public company or unlisted registered business trust, consideration should be given to approaching the Securities Industry Council (SIC), being the regulator that oversees the Take-over Code and is part of the Monetary Authority of Singapore, and requesting a ruling that the applicable provisions of the Take-over Code will not apply.

In considering such an application, the SIC will take into account the following factors:

a) the number of Singapore shareholders or unitholders and the extent of trading in Singapore; and
b) the existence of protection available to Singapore shareholders or unitholders provided under any statute or code regulating takeovers and mergers outside Singapore.

Where a takeover offer is made, all mandatory and voluntary offers are required to be subject to the condition that the offer will lapse if CCCS:

a) makes a decision to proceed to a Phase 2 review; or
b) issues a direction that prohibits the offeror from acquiring voting rights in the offeree company.

2.4 Statutory restrictions in specific industries and for real property

Singapore is generally an open economy with minimal foreign ownership or investment restrictions. There are, however, statutes relating to particular industries which govern takeover activity in Singapore, insofar as they limit or require prior regulatory approval for share ownership in companies engaged in those industries. Those industries are generally industries perceived to be critical to national interests, such as banking, finance, insurance and media. Examples of such statutes include Chapter 19 of the Singapore Banking Act; Chapter 108 of the Singapore Finance Companies Act; Chapter 142 of the Singapore Insurance Act; Chapter 206 of the Singapore Newspaper and Printing Presses Act; and Chapter 323 of the Singapore Telecommunications Act.

In addition to share ownership restrictions, it should also be noted that a foreigner, including a foreign-owned company, cannot own residential property without the approval of the Controller of Residential Property.

2.5 Employment Act

Under Singapore law, the transfer of employees employed in a business, all or part of which is to be sold, is dealt with under Section 18A of the Employment Act, Chapter 91 of Singapore (Employment Act).

Under Section 18A of the Employment Act, where a business or part thereof is transferred from the transferor to the transferee, Section 18A automatically operates to novate the contracts of employment of all employees who are covered under the Employment Act (covered employees) and employed in the business to the transferee. The Employment Act covers all employees (including part-time employees) except seafarers, domestic workers and employees of statutory boards.

Section 18A applies where there is a sale of a business on a going concern basis, not where there is a sale of assets. The distinction between the two is sometimes one of degree, but in most cases, it will be clear as a matter of law whether a business sale, rather than an asset sale, is involved. Section 18A specifically provides that there will be an automatic transfer, with no break in the continuity of employment, and the terms and conditions of service of the transferred covered employees will be the same as those enjoyed by them immediately prior to the transfer. Section 18A of the Employment Act further provides that on completion of the transfer of the business, all the transferor's rights, powers, duties and liabilities under, or in connection with, the employment contracts of its covered employees, are transferred to the purchaser, and any act or omission done before the transfer by the transferor in respect of such contracts shall be deemed to have been done by the purchaser. So, for example, if the transferor had failed to pay a covered employee's wages before the transfer of the undertaking, as between the purchaser and such employee, the purchaser will be statutorily liable to such employee.

In the case of employees falling outside the scope of the Employment Act (non-covered employees), the automatic statutory novation and consultation procedures under Section 18A do not apply. If the non-covered employees are to be transferred to the purchaser as part of the transfer of the business, the company will have to terminate their employment in accordance with the termination provisions in their employment contracts and the purchaser will have to offer new employment to the non-covered employees on such terms as the purchaser and such employees may agree. Note that the non-covered employees cannot be compelled to accept any such offer. The transfer of non-covered employees is therefore entirely a matter of contract under Singapore law.

3. TRANSACTION STRUCTURES IN SINGAPORE

The purchaser of the business of a Singapore company may generally acquire the business by one of two possible methods: the purchaser acquires the issued shares of the Singapore company that carries on the business (share sale), or the purchaser acquires the business (assets and liabilities) of the Singapore company (business sale).

In the case of a share sale, the purchaser need not be a Singapore company or have a legal presence in Singapore. In the case of a business sale, the purchaser must be a Singapore company, or a branch of a foreign company registered in Singapore, as it is an offence to carry on business in Singapore without the having legal presence of a Singapore-incorporated company or a Singapore branch.

A share sale tends to be a more straightforward transaction as it only involves a transfer of ownership of the shares in the Singapore company. On the other hand, a business sale requires the passing of title to assets from the Singapore company to the purchaser. The Singapore company's assets may include land and premises, stock and work in progress, book debts, intellectual property rights, goodwill, insurance, leasing, hire purchase and other contracts, and plant and machinery. It will therefore be necessary to transfer each asset, or category of asset, from the Singapore company to the purchaser by way of different conveyances, assignments and transfers.

Since January 2006, a third alternative has existed in the form of the statutory amalgamation procedures under Section 215A of the Companies Act, whereby the purchaser (provided it is a Singapore company) may merge with a target Singapore company to become an enlarged amalgamated company. In practice however, this is rarely adopted since the directors of the purchaser will have to issue solvency statements in relation to the amalgamated company, and most directors will, not surprisingly, be unwilling to do so given their lack of knowledge of the financial position of the Singapore target. Amalgamations are typically used to facilitate mergers between related companies instead.

3.1 Tax considerations

Leaving aside commercial factors dictating the acquisition structure to be adopted, tax considerations are often critical. In the Singapore context, these include the following.

3.1.1 Existing tax assets and liabilities of the Singapore company

Generally, and except as specified below, all existing tax rights, obligations, assets and liabilities remain with the Singapore company.

Unused deductibles (capital allowances, losses and donations)

Any unused deductibles will remain in the Singapore company. The purchaser in a business sale will not be able to utilise the unused deductibles of the Singapore company because unused deductibles may not be carried forward to be deducted against future profits, if the shareholders of the Singapore company on the last day of the year in which the deductibles arose or were incurred and the shareholders of the Singapore company on the first day of the year of assessment in which the deductibles are to be used, are not substantially the same – ie, less than 50 per cent of the issued shares in the Singapore company are held by or on behalf of the same persons (shareholding test).

In all the above instances, the shareholding test may be waived off if the Comptroller of Income Tax determines that the change in shareholding was for commercial reasons, and not for the purpose of deriving any tax benefit or obtaining any tax advantage.

Tax incentives

In a share sale, any tax incentives which the Singapore company enjoys should generally continue to be applicable after the sale, unless the incentive is subject to a 'no change of control' condition.

On the other hand, in a business sale, tax incentives will not automatically be transferred to the purchaser. The purchaser will need to reapply for the incentives afresh.

3.1.2 Tax issues on transfer of assets

In a share sale

In a share sale, the vendor will transfer shares in the Singapore company to the purchaser.

There is no capital gains tax in Singapore. Accordingly, in a share sale, the vendor should not be subject to income tax on the gain arising from the sale of shares, unless the shares are regarded as trading stock in its hands.

In a business sale

In a business sale, the vendor will transfer business assets and trading stock relating to the business in Singapore to the purchaser.

Any gain realised on the sale of any capital asset by the vendor will not be subject to tax. However, if capital allowances had previously been claimed in respect of the asset (for example, plant or machinery), a balancing charge or allowance may be applicable. A balancing charge is applicable (up to the amount of capital allowances previously claimed) insofar as the consideration for the sale of the asset exceeds the tax written-down value of the asset (the original cost of the asset less the amount of capital allowances already claimed). Conversely, if the consideration for the sale of the asset is less than the tax written down value of the asset, a balancing allowance for the difference may be claimed by the vendor.

Agreement regarding the amount of consideration paid in respect of each capital asset is important as the purchaser will claim capital allowance for each such capital asset based on the cost paid for the asset. Under Chapter 134 of the Singapore Income Tax Act, any transfer of plant or machinery at less than market value will be treated as if the sale is at market value.

Any gain realised on the sale of trading stock by the vendor will be subject to tax. Where the purchaser will not claim the cost of the trading stock as an expense (because it would not be trading stock in the purchaser's business), the sale of trading stock by the vendor is deemed to be made at market value.

3.1.3 Financing costs of acquisition

Generally, interest and other financing costs are deductible for tax purposes if they are incurred on capital employed to produce taxable income.

In a share sale, any interest and other financing costs incurred by the purchaser to acquire shares in the Singapore company will not be tax deductible, as the shares acquired would only produce dividends which are exempt from tax.

In a business sale, any interest and other financing costs incurred by the purchaser to acquire assets that will be used in the production of income in a business to be carried on by the purchaser will generally be tax deductible.

3.1.4 Stamp duty

In Singapore, stamp duty is payable on a transfer of shares in a Singapore company or a transfer of real property (which would include leasehold property) in Singapore. The transferee is liable to pay the stamp duty under Chapter 312 of the Singapore Stamp Duties Act.

In respect of a transfer of shares in a Singapore company pursuant to a share sale, stamp duty is payable on the instrument for the conveyance, assignment or transfer of the shares (ie, the share transfer form), at the rate of 0.2 per cent of

(a) the consideration paid for the transfer of the shares; or
(b) the net asset value of such shares, whichever is the higher, and may be liable to additional conveyance duties.

In respect of a transfer of real property pursuant to a business sale, stamp duty is payable on the execution of the sale and purchase agreement for the transfer of the real property, generally at the average rate of 3 per cent of the purchase price or the market value of the property, whichever is the higher.

The Singapore Government has enacted various tax measures to discourage speculation in the property market in Singapore. This may affect a business sale where the assets transferred include real property zoned or used for industrial or residential purposes. If the real property is property zoned or used for industrial purposes, seller's stamp duty of up to 15 per cent of the sale price or the market value of the property, whichever is the higher, may be applicable if the business sale occurs within three years of the acquisition of the property by the seller. Similarly, if the real property is property zoned or used for residential purposes, seller's stamp duty of up to 12 per cent of the sale price or the market value of the property, whichever is the higher, may be applicable if the business sale occurs within three years of the acquisition of the property by the seller. Additional buyer's stamp duty may also be applicable to the buyer if the real property is property zoned or used for residential purposes. If the buyer is an entity (not an individual person and not a housing developer), the rate of additional buyer's stamp duty is 35 per cent of the purchase price or the market value of the property, whichever is the higher.

Stamp duty relief may be available for certain transfers between associated companies and in relation to certain reconstructions or amalgamations.

Additional conveyance duties may also be chargeable on the buyer and/or seller in respect of certain significant acquisitions or disposals of shares in property-holding entities beneficially owning (directly or indirectly) residential properties in Singapore where the market value of such residential properties is at least 50 per cent of the total tangible assets of the target entity and its related entities.

3.1.5 Goods and services tax

Goods and services tax (GST) is not payable on a sale of shares. However, a purchaser in a share sale should ensure that the Singapore company was not previously a member of a GST group as the Singapore company may remain liable for the GST liabilities of other members of the GST group.

GST may be payable on the sale or transfer of assets in a business sale or under a statutory amalgamation.

If the business sale involves the transfer of all or part of a business as a going concern, the sale of the assets may be exempt from GST pursuant to the Goods and Services Tax (Excluded Transactions) Order.

The main criteria for exemption under this Order are summarised as follows:

(a) the assets being sold as part of the business will be used by the purchaser in carrying on the same kind of business as that carried on by the company; and
(b) the purchaser already is, or as a result of its acquisition of the business immediately becomes, a 'taxable person' in Singapore.

In any event, as GST is a consumption tax, unless the purchaser is the ultimate consumer of the assets acquired, GST is normally not an outright cost but rather a cash flow issue. Any GST payable on the acquisition of the assets generally can be offset as input tax against the GST which the purchaser must pay on the taxable supplies that it makes where the assets are acquired by the purchaser in order to make its taxable supplies.

4. MEMORANDUM OF UNDERSTANDING/LETTER OF INTENT

A memorandum of understanding (MOU) or letter of intent is common in Singapore, particularly for larger transactions. Typically, it is entered into where parties are keen to obtain some earlier assurance that the other party is fully committed to the transaction and to confirm that parties are working on the same understanding as to the outline terms of the transaction. MOUs are usually non-binding, save for certain key provisions such as confidentiality, costs or expenses, and 'no-shop' or exclusivity clauses.

Notwithstanding the non-binding nature of most MOUs, care should nevertheless be taken to ensure that the provisions accurately reflect the commercial intentions of the parties, as parties often have a moral commitment or obligation to adhere to those terms in the definitive agreements, and the leverage and bargaining position of the parties will be affected accordingly.

Break fees, while common in public acquisitions, are still rarely used for private deals in Singapore, although a binding commitment by the party walking away from the deal to reimburse all or a portion of the other party's costs and expenses is increasingly being sought for and incorporated in MOUs.

5. CONFIDENTIALITY LETTER

If, as is the usual case, due diligence investigations (see section 6) are carried out by the purchaser on the Singapore target and its businesses, the purchaser typically is required to sign a confidentiality letter, often prepared by the vendor, in which the purchaser provides undertakings that protect the vendor from the risk of any misuse or unauthorised release of commercially sensitive information that the vendor may provide to the purchaser during the due diligence process. The letter defines what the confidential information is, the authorised purposes that the purchaser can use the information for, who the purchaser can disclose the information to, and what the purchaser should do with the information should negotiations fail. Typical issues relating to confidentiality letters include:

a) the scope of information covered;
b) the duration of the confidentiality undertaking;
c) the exclusions, if any, to the undertakings; and
d) the remedies for breach.

6. DUE DILIGENCE

Before an offer for an acquisition is made, the purchaser may require due diligence to be conducted on the Singapore company. The purpose of due diligence is to afford a purchaser or investor an opportunity to discover all that it reasonably can about the Singapore company's business being acquired or invested in prior to concluding the transaction, such as its critical success factors, strengths and weaknesses. Thorough due diligence should uncover potential risks and/or problems which may be addressed in the price negotiations or by incorporating appropriate clauses into the contract.

There are several aspects of due diligence, including legal due diligence, business due diligence and financial due diligence. Legal due diligence investigates and analyses the Singapore company's legal compliance with relevant statutory and regulatory authorities, as well as the ramifications and relevance of the provisions of material contracts on the proposed transaction. It is important to consider that legal due diligence does not operate in a vacuum, but rather complements business and financial due diligence. Taken together, all aspects of due diligence strive to reveal a true picture of the target's business, financial and legal position to the purchaser, uncovering and highlighting key issues that the parties will need to address during the due diligence and negotiations process.

One issue to note in the due diligence process is that CCCS has highlighted in its 2012 Guidelines on Merger Procedures that parties to an anticipated merger should exercise due caution when exchanging commercially sensitive information (such as prices and customer details) in the context of the merger negotiations, and the CCCS application and review process. The exchange of such information may infringe Section 34 of the Competition Act (against anti-competitive agreements) where it has the object or effect of restricting competition within Singapore.

There are two main forms of a due diligence report: a long-form report and an exceptions-only report. A long-form report is relatively rare and will describe the business in detail. An exceptions-only report is increasingly common in Singapore and covers only material issues.

Some of the matters which may be relevant when reviewing particular types of documents (subject to the required scope of the due diligence exercise) include the following.

6.1 Constitutional documents

Issues to check in relation to a share sale include whether there are any restrictions on transfer, any minority shareholders and any minority shareholder protection (such as any provisions restricting changes in control or making such changes expensive for any potential purchaser). Also, it should be determined whether there is any security over the shares to be acquired. If the purchaser needs to charge the shares, confirmation should be sought that there are no restrictions on granting security.

6.2 Board minutes

A review of board and board committee minutes can reveal material information about a company's business and identify critical documents, such as an acquisition or loan agreement, which may be relevant to the proposed transaction.

6.3 Material contracts (eg, supplier contracts, customer contracts)

On a share sale, change of control will be a material issue. On a business sale, it will be necessary to check whether it is necessary to seek the consent of third parties to the assignment of identified contracts to the purchaser. Other matters to consider include whether any material contracts are set to expire in the near future, and whether there are any indemnities for which the vendor or the target is liable.

6.4 Litigation

The amount of litigation claims, pending and in progress, should be noted. It is also worth considering whether the likelihood of success has been considered and whether any litigation claims are covered by insurance.

6.5 Accounts

It may be useful to review the target's accounts to find out if they flag anything that should be reviewed as part of the due diligence exercise. For example, consider how litigation is treated – there could be a provision, meaning a claim is considered likely, or there could be a contingent liability note, which suggests that there is a more remote chance of liability.

6.6 Relationship between due diligence and disclosure

One of the reasons why a vendor will conduct due diligence is to support the disclosure exercise against the warranties. To the extent that a matter is fairly disclosed, a purchaser will not be able to claim for breach of warranty. It is in the interests of the vendor to disclose as much information as possible and there will often be a general disclosure of the contents of the data room. The effectiveness of the disclosure will generally depend on whether the information has been fairly disclosed. A well-organised data room will, however, support any argument that a matter has been fairly disclosed.

From a purchaser's point of view, the strength of the contractual protection sought in the form of warranties can be influenced by the amount of due diligence it carries out. In secondary buyouts, private equity investors will rarely give warranties. Although management may give limited warranties, these are likely to be capped at a low level; it may not be desirable to sue management post-closing as they will be employed in the purchaser's group after the sale. Purchasers will therefore carry out extensive due diligence to make up for the lack of warranty protection.

A purchaser may be less willing to trade due diligence for warranty protection. Warranties, as we shall soon see, are typically subject to limitations and disclosure, and may be qualified by materiality and the knowledge of the vendor. However, where a largely solvent vendor is prepared to indemnify the purchaser for liability relating to the pre-acquisition period arising after the sale, the purchaser might, under those circumstances, be prepared to carry out a more limited due diligence.

7. SALE AND PURCHASE AGREEMENT

Assuming that the due diligence investigations are satisfactory to the purchaser, the next and final step in the acquisition cycle will be to finalise and execute a sale and purchase agreement. As is the usual case in other jurisdictions (and save in special circumstances such as auction sales), it is generally accepted practice in Singapore that the lawyers acting for the purchaser will prepare the acquisition agreement whether it is a share sale or business sale. This is because the most contentious part of an agreement is usually the scope and content of the warranties, and it is the purchaser who knows what protection it requires.

The principal contents of a sale and purchase agreement comprise:

a) parties;
b) definitions;
c) agreement to purchase and sell;
d) purchase price;
e) conditions precedent;
f) actions preceding completion;
g) completion;
h) warranties and representations (warranties are often contained in a schedule to the agreement);
i) limitations on claims under warranties (limitations are often contained in a schedule to the agreement);

j) restrictive covenants; and
k) boilerplate provisions

7.1 Purchase consideration

Particularly in high value transactions, the purchase consideration may have a variable component to it to adjust the amount payable by the purchaser. These typically take the form of a set of completion accounts being prepared, and a working capital, indebtedness or net asset adjustment being effected.

Retention sums or holdbacks to meet claims are sometimes used by the purchasers when there is doubt that the vendor can meet its obligations, although this is unsurprisingly resisted by vendors. Compromises are usually made by reducing the duration, as well as amount, of the retention.

It may also be decided that payment of a part of the consideration should be deferred. The amount deferred may be ascertainable or unascertainable, eg, calculated by reference to future profit, turnover or other financial data. Where deferred consideration is unascertainable, the purchaser should try to impose a maximum limit so that, in the case of consideration based on future profits, the purchaser is protected from having to pay excessive consideration.

7.2 Conditions precedent

Conditions as regards completion are transaction-specific and may occasionally be contentious since the vendor craves transaction certainty, whereas the purchaser would typically require certain walk-away rights for protection (such as satisfactory due diligence being carried out by the purchaser). Conditions outside the control of parties, such as regulatory or governmental approvals, are often uncontroversial. However, parties will often resist the insertion of events dictated by the other party, such as the approval of the board or shareholders of the other party, so that this is not abused as a walk-away right post signing the agreement.

7.3 Period between signing and completion

If, as is usually the case, there is a time gap between signing and completion, the purchaser will typically insist on restrictions being imposed on the vendor's conduct of the business during this period. Instead of listing the various specified actions which are prohibited, the vendor could negotiate for a general obligation to carry on the business as a going concern in the ordinary and usual course, especially where the representations and warranties given by the vendor to the purchaser on signing are repeated at completion, and the purchaser's interests are already protected to a large extent.

The purchaser's entitlement to terminate the agreement in the event of a material breach of the vendor's representations, warranties and/or undertakings prior to completion is fairly common. What is more contentious is the incorporation of material adverse change (MAC) provisions (not resulting in or constituting a breach of the vendor's representations and warranties) entitling the purchaser to terminate the agreement. While such termination is often stated to preclude the purchaser's claim for damages, this is little comfort to the vendor who would otherwise have been looking to complete the acquisition.

Material adverse changes in economic or similar conditions put the transaction at risk for events outside the vendor's control and are often strongly resisted by the vendor.

7.4 Restrictive or protective covenants

The restrictive covenant seeks to ensure that the benefit of any goodwill attaching to the Singapore target company or its business passes to the purchaser. Such covenants are notoriously difficult to enforce, since covenants in restraint of trade under Singapore law are generally enforceable only to the extent that they are reasonably necessary for the protection of a party's legitimate business interests. As a general guide, restrictive covenants of 12 to 18 months have been accepted. The covenant is usually limited to the geographical area where the target carries on business as on the transfer date.

Restrictive covenants are commonly drafted to be severable, so that a provision that affects say, public policy constraints, can be ignored without affecting the other provisions.

There have been recent investigations by CCCS on restrictive covenants for possible infringements of Section 34 of the Competition Act (against anticompetitive agreements) or Section 47 of the Competition Act (against abuse of a dominant position). Restrictive covenants may benefit from an exclusion from Section 34 or Section 47 of the Competition Act, if the restrictive covenant is an ancillary restriction directly related and necessary to the implementation of a merger. Where the exclusion does not apply, restrictive covenants should be reviewed to ensure that they do not give rise to an infringement.

7.5 Warranties, indemnities and disclosure

There is little protection under Singapore law for a purchaser of shares, therefore the purpose of warranties is to provide the purchaser with some express contractual protection. Warranties apportion the risks associated with a particular transaction: to the extent that warranties are given, the vendor accepts liability; to the extent that they are not given or if they are restricted in their scope, the purchaser accepts the risk.

Warranties also underpin the price, in that the purchaser will be less likely to pay a good price if it has no contractual protection to satisfy itself that it is getting what it bargained for.

The most contentious and heavily negotiated portions of the acquisition agreement invariably concern the representations and warranties provided by the vendor. Warranties should be tailored to each transaction, but common areas of protection cover the following:

a) title to shares;
b) accounts, financial matters and absence of undisclosed liabilities;
c) assets (including real property), intellectual property and contracts;
d) employees;
e) environmental matters;
f) compliance with laws;
g) litigation;
h) product liability;
i) tax; and
j) post-balance sheet events

Negotiations on the warranties typically centre on their scope and breadth, as well as various qualifiers by reference to say, materiality and the vendor's knowledge – which the vendor will seek to incorporate, and the purchaser will resist.

The vendor will also set out in a separate disclosure letter (not disclosure schedule, as is common in some European jurisdictions) exceptions to the warranties so that liability for breach of warranty is removed from the vendor to the extent of the matters disclosed. This letter is given at signing, and any update thereafter is typically resisted. Disclosures may be general (for instance, information which may be uncovered via the conduct of searches at public registries or information which is within the actual or constructive knowledge of the purchaser) or specific in nature, but in all cases, the matter in question must be 'fairly' disclosed to be effective at law. This will generally require the disclosure to be sufficient and precise, which in turn is likely to be subject to an objective, and not subjective, test.

The vendor will usually seek to treat all documents placed in a data room for the purchaser's due diligence as deemed disclosures, which the purchaser will almost certainly resist. A typical compromise will be to treat a pre-agreed and reduced list of data room documents as deemed disclosures.

Warranty indemnity insurance is increasingly being used in Singapore. That said, vendors still typically look to mitigate their risk exposure through contractual limitations of liability. In this respect, a broad range of limitations are usually inserted, notably those relating to time (ranging from having no time limits for title breaches, six years for tax warranty breaches, and 12–24 months for all other breaches), and amount (common ones include no cap for title warranties, 100 per cent for tax warranties and anything from 30 per cent to 60 per cent for other warranties). Purchasers are also increasingly resisting high *de minimis* and basket thresholds as well.

Finally, in the event that the vendor is liable for warranty breaches, the purchaser's remedies will usually be to pursue a claim for damages, which in turn are subject to the usual remoteness tests and mitigation duties in common law. Few vendors are prepared to provide indemnification for breaches of warranties, so these indemnities are seldom used, save perhaps for identified breaches prior to signing and breaches of tax warranties.