
Malaysia

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

This guide provides an overview of the law and practice dealing with private M&A transactions in Malaysia. This guide does not constitute legal advice. Anyone involved in private M&A transactions should seek specialist advice.

1.1 Recent trends

M&A activity in Malaysia remained robust throughout 2020 and 2021, despite the challenges brought about by the Covid-19 pandemic. Notable M&A deals have taken place in Malaysia, including the headline acquisition by Thai conglomerate Charoen Pokphand Group Co. Ltd. of the entire shareholding in Tesco Stores (Thailand) Ltd. and Tesco Stores (Malaysia) Sdn. Bhd. and the contemplated acquisition by the Malaysian oil and gas exploration and production company, Hibiscus Petroleum Bhd., of the upstream oil and gas assets of Repsol Exploración S.A. in Malaysia and Vietnam. The outlook and growth of M&A activity in Malaysia remains positive as Malaysia exits lockdown and begins to re-open its borders and enters its ‘recovery’ phase.

In terms of sectors, there is a growing trend of M&A activity in the technology, logistics, healthcare and hypermarket/supermarket sectors. M&A activity in some new sectors have also been driven by the Covid-19 pandemic. For instance, M&A activity in the semiconductor sector has been very active due to the global semiconductor shortage, such as the acquisition by Beijing Integrated Circuit Advanced Manufacturing and High-End Equipment Equity Investment Fund Centre (CGP Fund) and its strategic partner, Malaysian-based company Dagang Nexchange (DNeX), of the entire equity interest of SilTerra Malaysia Sdn. Bhd. (a semiconductor company) from the sovereign wealth fund Khazanah Nasional Berhad. Moving forward, M&A of distressed assets are also expected to come on stream.

In recent years, M&A by way of an auction process has become increasingly common. In such auction situations, the existence of competition from other bidders means that potential buyers are more willing to negotiate more seller-friendly sale and purchase agreements (SPAs). In other situations, whether the SPA turns out to be buyer or seller-friendly would depend on a variety of factors, such as the attractiveness of the target company, the industry in which the target company operates and the premium paid.

1.2 Foreign investment

Malaysia does not have overarching legislation that regulates foreign investment. Restrictions on foreign investment, if any, are introduced and administered by the relevant sector regulator, for example, by requiring a minimum percentage of local Malaysian equity or Bumiputera¹ equity. These restrictions are typically imposed via specific legislation, guidelines and/or directives regulating the relevant target sector or in the terms and conditions attached to the licences issued to the target. As such, potential foreign investors will need to make proper investigations and ascertain the foreign investment restrictions applicable to the sector or their proposed activities in Malaysia.

¹ In Malaysia, while there is no official definition, a ‘person’ is typically classified as a ‘Bumiputera’ if they are of Malay ethnicity and practices Islam, or if they are an indigenous person of the land. A ‘Bumiputera’ company is one that is controlled (either via shareholding or management or both) by Bumiputera person(s).

1.3 Highly regulated sectors

Apart from foreign equity restrictions, there are also sector-specific requirements which potential investors will need to be aware of. For example, financial institutions are very closely regulated under the Financial Services Act 2013. The Financial Services Act 2013 stipulates the maximum permissible shareholding by an individual of a licensed financial institution, and also provides that the prior written approval of the Minister of Finance, on the recommendation of the Central Bank of Malaysia, is required for a person to acquire control of a licensed financial institution.

Approval from the Central Bank of Malaysia is also required for an acquisition which will result in acquirer holding an aggregate interest of 5 per cent or more of the shares in a licensed financial institution, and any subsequent acquisitions which would result in the acquirer holding an aggregate interest of any multiple of 5 per cent. In this regard, the approval is a two-stage process: firstly, approval is required prior to commencement of negotiations and secondly, approval is also required prior to the execution of the sale and purchase agreement. This is just one example of a sector-specific requirement: potential investors should be cognisant of such requirements in their target sector from an early stage. Foreign investment policies and conditions may also change from time to time, and it would be prudent for any foreign investor to ascertain the applicable restrictions and/or conditions at the relevant time.

1.4 Key legislation

The key legislation a foreign investor should note are:

- the Companies Act 2016, administered by the Companies Commission of Malaysia (all companies in Malaysia are incorporated or deemed incorporated under the Companies Act 2016); and
- the Capital Markets and Services Act 2007, the Malaysian Code on Take-Overs and Mergers 2016 and the Rules on Take-Overs, Mergers and Compulsory Acquisitions, administered by the Securities Commission of Malaysia (which is more relevant for public M&A).

At present, Malaysia does not have a merger control regime – only specific sectors are subject to merger control, namely the telecommunications sector and the aviation services sector. However, merger control is expected to come into force in Malaysia sometime in 2022, and parties proposing to undertake M&A or a joint venture transaction must then consider the potential competition implications arising from the transaction and notify the regulatory authorities accordingly. Nonetheless, in Malaysia, there is currently in place the Competition Act 2010 which regulates the behavioural aspects of competition. As such, there are still competition law concerns that a potential buyer should be mindful of.

2. TYPE OF TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS

For private M&A transactions, a buyer will typically consider an acquisition of shares or an acquisition of business and assets. The share acquisition route is the more popular route chosen by buyers, as it is generally easier to execute and the transaction is cleaner since the buyer acquires all the assets and liabilities of the target. However, there are cases where an asset acquisition route is clear from the outset – for example, when only a segment of the target's business is to be acquired, where the target company has exposure to liabilities and the buyer does not wish to assume such liabilities or where a buyer wishes to acquire the entire assets of

a company, but is unable to secure 100 per cent of the shareholders to sell the shares in the company.

There are also cases where the choice between a share or asset acquisition is not clear, and the final decision on the transaction structure is only made after due diligence has been conducted on the target. For example, a due diligence exercise may lead to the discovery of potential liabilities in the target which the buyer may not wish to assume, and thus the buyer will elect for an asset acquisition. The advantages and disadvantages of each transaction structure as well as further details are discussed below.

2.1 Share acquisition

2.1.1 Advantages

The greatest advantage of a share acquisition is that it is generally easy to execute. The primary downside of an asset sale (ie the need to identify and individually transfer each asset) is avoided since the buyer essentially steps into the shoes of the seller/target company. For example, all contracts and financing arrangements are entered into by the target company, and in a share acquisition, there is no need to novate or to assign these contracts to the buyer. Only if the contracts contain any restrictions on change in shareholder or directors or an event of default in the event of any change in shareholding or directors, then consents or waivers from the counterparties to these contracts will have to be sought. Similarly, employees of the company will also go across with the purchase of shares in the target company, without the need for the buyer or the target to re-offer employment to the employees.

2.1.2 Disadvantages

The main disadvantage of a share acquisition is that the buyer will also inherit the liabilities of the target company. Liabilities may include litigation, tax liability and any other corporate liability (for example, for corruption). In addition, if the buyer does not intend to acquire all the assets of the target, then arrangements will have to be put in place for the transfer of the carved-out assets and the subsequent distribution of the consideration received by the target company for the carved-out assets to the seller. There are costs associated with the carve-out transaction, including, legal fees, stamp duty and possibly, real property gains tax and the parties will have to agree on which party to bear these costs.

Another disadvantage of a share purchase is that there is limited room for the buyer to use the assets of the target as security for acquisition financing. Under the Malaysian Companies Act 2016, there is a general prohibition on companies providing financial assistance for the purpose of, or in connection with, a purchase or subscription of shares in the company or in its holding company; or for the purpose of reducing or discharging any liability that has been incurred by a person in such purchase or subscription of shares. The Companies Act 2016 does however provide a 'whitewash' exception for private companies to provide financial assistance, subject to, among others, the shareholders and the directors both passing separate resolutions authorising the financial assistance, the directors making a solvency declaration and the company receiving fair value in connection with the giving of the assistance. However, the aggregate amount of the financial assistance given must not exceed 10 per cent of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company. As such, the amount of financial assistance that may be given is limited.

2.1.3 Tax

Stamp duty payable in a share acquisition is less than in the case of an asset acquisition. Stamp duty payable on a share transfer is 0.3 per cent of the consideration or the net assets of the target based on the latest audited financial statements, whichever is higher. Real property gains tax may also be payable on the disposal of shares, but only if the shares being transferred are shares in a 'real property company' (as defined in the Real Property Gains Tax Act 1976).

2.1.4 Typical documentation

The typical documentation used for a share acquisition is a share sale and purchase agreement. To effect the share transfer, the transferor and the transferee must execute a form of transfer of securities (which must be stamped before the transfer may be registered in the register of members of the company). In addition, the requisite resolutions must also be passed to authorise the transfer of shares.

Where after completion of the share acquisition there is more than one shareholder in the target company, the parties may also enter into a shareholders' agreement to govern the relationship between the shareholders.

2.2 Asset acquisition

2.2.1 Advantages

In an asset acquisition, the greatest advantage is that a buyer does not assume any liability unless it agrees to do so. Additionally, the buyer may choose to charge the assets acquired as security for the financing of the acquisition.

In situations where a buyer wishes to acquire all the shares in a target company but is unable to do so as there are minority shareholders who are unwilling to sell, an asset acquisition may be considered instead. Unless otherwise provided in the constitution, any other agreement binding upon the shareholders or required under any requirements binding upon the seller (for example, the listing requirements applicable where the seller is a listed entity and the relevant thresholds are met), a buyer may be able to acquire all the assets of the target even if there are minority shareholders who vote against the resolution for the disposal at a general meeting.

2.2.2 Disadvantages

An asset acquisition can be a tedious and time-consuming exercise. All movable and immovable properties that the buyer wishes to have transferred pursuant to the acquisition have to be identified. There are also specific nuances that may apply to each type of asset to be transferred under an asset acquisition. Some examples include:

Real property

In Malaysia, the document of title for real properties may contain express conditions and restrictions in interest of title, which apply to the real property. These have to be reviewed to see if the approval of any regulatory authority is required for the transfer of the real property. In addition, if the transferee is a non-citizen or a foreign company, approval of the relevant state authority may be required for the transfer of the real property. Aside from the approval of the state authority, approval from the Economic Planning Unit within the Prime Minister's Department may be required for direct or indirect acquisitions of certain prescribed classes of

real property which are held by Bumiputera interests and/or government agencies.

Employees

There is no automatic transfer of employees to the new owner of the business in a business/asset sale. Accordingly, the seller must terminate the employment of its employees and the buyer must enter into new employment agreements to re-employ the seller's former employees in a business/asset sale. Employees who do not wish to continue employment with the buyer may be entitled to claim severance payment upon termination of their employment. For employees falling within the purview of the Employment Act 1955 of Malaysia, if a buyer offers to continue to employ the employees on terms and conditions no less favourable than those under which the employees were employed prior to the change in ownership, Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 provides that there will be no termination of employment of the employees and severance payments are not payable.

Contracts

Each contract relevant to the business that the buyer wants to be transferred has to be reviewed to see if there are restrictions on assignment; if yes, consent has to be sought for the assignment. For contracts which by nature cannot be assigned, the buyer and seller will need to engage with the counterparty to seek the counterparty's agreement to novate the contract to the buyer.

Licences

Licences are generally not transferrable and will have to be re-applied for in the name of the buyer. The process may take time, especially given the steps in place to curb the spread of Covid-19 such as work-from-home arrangements and reduced workforce working physically in governmental offices.

Personal data

Where the business involves the processing of personal data of data subjects, the transfer of these personal data to the buyer will require the consent of the data subjects pursuant to the Personal Data Protection Act 2010. There is presently no exception to this consent requirement for business transfers.

2.2.3 Tax

Notably, there are higher stamp duty implications on an asset transfer – ranging from 1–4 per cent on the consideration sum or the market value of the property, whichever is the greater. Real property gains tax will also be payable if real property is transferred as part of the asset acquisition and there is a gain on the disposal by the seller.

2.2.4 Typical documentation

Like a share acquisition, the main documentation used for an asset acquisition will be an overarching business and asset purchase agreement. However, as each asset is transferred individually in an asset transfer, specific documents will be needed to perfect the transfer of assets depending on the assets involved. For example, a statutory transfer form is needed for a transfer of real property; a deed of assignment is needed for the transfer of trademarks; and

assignment and/or novation agreements will be needed for the assignment and/or novation of contracts.

3. PRE-AGREEMENT DOCUMENTATION

Pre-agreement documentation may come in several forms. Common pre-agreement documentation used in Malaysia is set out below. In a transaction, a mixture of these may be used, depending on the agreement between the parties and the intention of the parties.

3.1 Non-disclosure agreement

A binding non-disclosure agreement is signed in most transactions, whether prior to commencement of discussions or prior to commencement of due diligence. A non-disclosure agreement serves to protect confidential information exchanged between parties.

3.2 Term sheet/letter of intent:

Parties may exchange a term sheet or a letter of intent (sometimes called a memorandum of understanding) setting out the principal terms of the transaction which are typically expressed to be non-binding, save and except clauses with respect to exclusivity, confidentiality and costs. Parties may also provide for a 'fee' to be paid by a party if a party withdraws from the transaction after due diligence. There is no norm as to how detailed a term sheet or letter of intent should be: this varies from transaction to transaction. A head of agreements may also be signed – though labelled an agreement, it usually contains many conditions to signing of the definitive sale and purchase agreement.

3.3 Information memorandum/process letter/bid letter

In an auction sale, the seller will typically issue an information memorandum containing reasonably sufficient information about the target and a process letter setting out details of the auction process, such as timing, procedures and next steps. Bidders usually submit a non-binding indicative bid letter. If a bidder is invited to participate in the next round, the bidder may, after conducting due diligence on the target and participating in management presentations, submit a binding bid letter together with a mark-up of the sale and purchase agreement. These preliminary agreements generally establish a framework for the transaction and provide a platform for parties to identify deal-breakers at an early stage. On the other hand, a term sheet or letter of intent may result in parties having less room for manoeuvre when negotiating the definitive agreements and often increases the time and cost spent on finalising the transaction.

If exclusivity provisions are agreed upon in the pre-agreement documentation, parties are assured of the other party's commitment to the transaction. Conversely, for the seller, such exclusivity may be a double-edged sword as this will effectively mean that it will not be able to entertain offers from other prospective buyers.

When a party to the transaction is a company listed on the stock exchange of Bursa Malaysia Securities Berhad (the Malaysian stock exchange) and the transaction is required to be announced, parties should discuss the timing (whether upon the signing of the letter of intent or the sale and purchase agreement) and content of the announcement. Depending on its contents, the signing of the pre-agreement documentation by the listed company may trigger announcement requirements even though an announcement may, at such juncture, be premature.

4. DUE DILIGENCE STAGE

Due diligence in the context of an M&A transaction will typically cover legal, financial, commercial and tax due diligence. Depending on the industry, the buyer may also conduct environmental, IT integrity, human resource and/or social due diligence.

4.1 Key points

In Malaysia, the areas to be covered for a legal due diligence on a Malaysian target company are similar to those conducted in other jurisdictions. We have set out below some points and trends to be cognisant of when conducting legal due diligence on a Malaysian target company.

4.1.1 Litigation searches

There is not currently available in Malaysia, an official online nationwide centralised database from which lawsuits commenced at the Malaysian Courts are searchable online. Online court file searches can be performed through the e-Filing System (EFS), which is the Malaysian Court's electronic platform for the filing of court documents in legal proceedings (implemented in stages since 2011 and implemented in full from 2021), albeit with limitations only on lawsuits which were filed online through the EFS after 2011. Lawsuits which are: (1) filed prior to 2011; (2) filed manually after 2011; and (3) filed at the courts in the states of Sabah, Sarawak and the Federal Territory of Labuan are not searchable via the EFS. In either case, whether online search via EFS or manual search, a search can only be performed if one has the full suit number of the lawsuit (with prefix indicating the court at which the matter was filed).

4.1.2 Corporate liability regime

A corporate liability provision was introduced to the Malaysian Anti-Corruption Commission Act 2009 by way of a new section 17A which came into force on 1 June 2020. Section 17A(1) of the Malaysian Anti-Corruption Commission Act 2009 imposes liability on a commercial organisation where a person associated with that commercial organisation gives, agrees to give, promises or offers to any person any gratification with the intent to obtain or retain business, or to obtain or retain an advantage in the conduct of business. Section 17A of the Malaysian Anti-Corruption Commission Act 2009 does allow commercial organisations to assert a defence of demonstrating that adequate procedures are in place to prevent the associated persons from undertaking such conduct. As such, as part of the due diligence process, the buyer may wish to review the policies and procedures which the target company has put in place to prevent persons associated with the company from undertaking any corrupt conduct and check if these policies and procedures have been adhered to.

4.1.3 Environmental, social and governance (ESG) practices

During the Covid-19 pandemic, the gloves and electronics manufacturing industry came under heavy scrutiny for their labour practices. The US Customs and Border Protection Agency had seized and banned imports from certain Malaysian glove manufacturers over suspected forced labour practices. As a result, foreign investors are now placing increasing importance on investigations into environmental, social and governance (ESG) practices of target companies.

4.1.4 Vendor due diligence reports

Vendor due diligence reports are used more frequently for M&A transactions, particularly where the sale is by way of an auction process. In such instances, buyers will typically request to conduct top-up due diligence on areas which are out of scope in the vendor due diligence reports or on areas in which the buyer requires a more thorough investigation.

4.2 Overview of common issues and how they are addressed

Issues uncovered during a legal due diligence exercise will typically be addressed as adjustments to the purchase price, conditions (which may be conditions to signing or conditions to closing), post-closing covenants, representations and warranties, or indemnities. We have set out below the typical types of issues addressed by each mechanism.

4.2.1 Purchase price adjustments

An adjustment to the purchase price will typically be requested by the buyer for issues flagged during the legal due diligence process which are high priority and will affect the valuation of the target company. For instance, if the target company was not able to secure the renewal of an agreement with a customer that is a key contributor to the revenue of the target company, this will have an impact on the earnings of the target company moving forward and will affect the price that the buyer is willing to pay for the target company. Other examples include where the target company did not obtain a key licence required to operate the business of the target company, where the target company has been ordered by a regulatory authority to comply with certain laws and regulations, or where the target has been operating its business on a plot of land in breach of the category of land use or the conditions attached to the land. In such situations, the target company may have to incur significant capital commitment and costs in order to comply with the laws and regulations (eg, renovation works may be required in order for a manufacturing plant to comply with environmental laws).

4.2.2 Conditions

Buyers will request for certain conditions to be fulfilled by the seller, depending on what is uncovered during the legal due diligence process. Commonly, in Malaysia, these conditions will include:

Regulatory and third-party approvals

Approvals of regulatory authorities or third parties, whether pursuant to legislations, terms and conditions of the licences held by the target company, financing agreements or other agreements, will be included as conditions to closing. Where consideration shares will be issued by a company listed on the stock exchange of Bursa Malaysia Securities Berhad, approval of Bursa Malaysia Securities Berhad for the listing of and quotation of the securities will also be included as a condition to closing.

Pre-closing restructuring

Where the target company is a part of the seller's group of companies, an internal restructuring may be required to be included as a condition to closing. For example, if there are employees engaged in the target's business but are employed by another company within the seller's group, such employees will have to be offered fresh employment by the target. In

addition, if certain assets are intended to be carved-out from the transaction, the transfer of such assets to another entity within the seller's group of companies will be included as a condition to closing.

Contractual arrangements

The buyer may also require the renewal, extension or termination of certain contracts entered into by the target company as a condition to signing or closing. If there are material contracts which are expiring, the buyer may require these to be extended or renewed. Contracts to be terminated may include contracts with the seller or its affiliates (related party contracts).

Sellers will often try to limit the list of conditions to closing to those which are absolutely necessary, and will try to resolve as many issues prior to signing of the share purchase agreement or the asset purchase agreement as possible. If the conditions are not fulfilled within a pre-agreed period, the SPA will terminate.

4.2.3 Post-closing covenants

Post-closing covenants are often requested by buyers, but these are generally deemed not high priority or matters in respect of which sellers will require more time to fulfil. In such cases, these will be included in agreements as post-closing covenants. Post-closing conditions or conditions subsequent, which if unfulfilled results in an unwinding of the whole transaction, is usually not agreed upon by sellers.

4.2.4 Indemnities

Buyers want indemnities for risk areas uncovered during the due diligence exercise. The language of the SPA has to be sufficiently clear that these indemnities are not limited by the disclosures, whether general or specific, against the representations and warranties. In addition, buyers may also ask for general indemnities to cover other liabilities, such as taxation, litigation or environmental.

5. MAIN TRANSACTION AGREEMENT

5.1 Formal requirements

Generally, under Malaysian contract law, there is no general requirement for a contract to be in writing or to be signed in order for it to be valid and enforceable. As long as the elements of contract are fulfilled, there will be a valid and binding contract.

Nonetheless, the constitution of the parties should be checked to see if there are any specific formal requirements for the contract to be binding on the party, such as a requirement for specific directors to execute the agreement or the common seal to be affixed. Where a party to the M&A transaction is a company incorporated under the Companies Act 2016 of Malaysia, there are formalities to be complied with in respect of execution of documents by a company where such documents are required to be executed by any written law, resolution, agreement or constitution.

These requirements, while they may not apply to the SPA/asset purchase agreement itself, may apply to documents executed pursuant to the SPA/asset purchase agreement. In a cross-border M&A, if a foreign party wishes to appoint an attorney in Malaysia to execute the transaction agreements on behalf of the foreign party, the power of attorney containing the authentication

in the prescribed form will need to be stamped and registered with the High Court of Malaya if the power of attorney is to be exercised within Peninsular Malaysia.

During the past two years, where wet-ink signing was in many instances not feasible, many businesses have resorted to using electronic signatures to sign documents and agreements. The Electronic Commerce Act 2006 confirms the validity of electronic communications in the formation of contracts and applies to any commercial transaction conducted through electronic means. Parties to an M&A transaction have thus signed sale and purchase agreements through electronic means. However, electronic signatures or electronic copies would not be acceptable for certain documents, which may be required to be delivered pursuant to the SPA/asset purchase agreement (for example powers of attorney, instruments of transfer or any other document which is required to be notarised, legalised, witnessed or attested by a notary public, commissioner for oaths or similar official).

5.2 An overview of the typical key clauses

Sale and purchase agreements or asset purchase agreements in relation to companies incorporated in Malaysia are generally consistent with the broad format adopted by commonwealth jurisdictions.

We have set out below a brief overview of the typical key clauses of SPAs or asset purchase agreements in Malaysia, being provisions relating to purchase price, covenants pending closing, representations and warranties, non-compete and limitation of liability.

5.2.1 Purchase price

This is a key clause with details on determination of the purchase price, satisfaction of the consideration (cash or in-kind) and timing of payment. The completion accounts mechanism and the locked box mechanism are commonly used in Malaysia.

Completion accounts mechanism

Where a completion accounts mechanism is adopted, the agreement will provide for the initial purchase price and subsequent adjustments based on the specifically prepared completion accounts. The agreement will also provide for specific timelines and processes for a party to draw up and deliver the completion accounts to the other party to review, and a procedure for parties to agree on the completion accounts, the working capital and cash or debt at completion. There will also be detailed definitions of what will be included in the computation of working capital, cash and debt.

Locked box mechanism

Where the locked box mechanism is adopted, the purchase price is calculated using a recent historical balance sheet of the target prior to the date of the agreement. The seller will undertake that there will be no 'leakage' from the date of the balance sheet, save and except for an agreed list of matters which are considered as 'permitted leakage'. The seller will provide a ringgit-for-ringgit indemnity to the buyer for any leakage.

The purchase price may be paid in several tranches (eg, deposit, completion payment, retention sum to be held in escrow for a period of time and earn-outs). Earn-out clauses would contain detailed provisions on when these additional payments are payable to the seller (eg, at certain milestones), restrictions on the buyer post-closing, and any adjustments to the financials arising from actions taken by the buyer (eg, an increase in remuneration levels, closure of business segments etc.)

Covenants pending closing

During the period between signing and closing of a transaction, the target company will still be in operation. However, buyers will want to ensure that the target company is not run in a manner that decreases the value of the company. As such, sellers will usually agree to running the business materially in the ordinary course of business during the gap period. These gap controls are usually subject to exceptions that allow sellers the flexibility to run the business in the ordinary course of business and consistent with past practices. Sellers have recently asked for upfront consent to allow the target company to comply with the directives, guidelines or any other requirement which may be introduced from time to time by the government to curb the spread of Covid-19.

5.2.2 Representations and warranties

The suite of representations and warranties typically requested by a buyer for an M&A transaction in Malaysia is similar to international M&A documentation. Focused warranties would be required based on the industry in which the target company is operating in.

Negotiations of warranties can be a tedious process. Sellers may be willing to accept that certain warranties are fundamental and accordingly, agree to a higher cap on liability. These are typically warranties on title to shares and assets.

Other areas where buyers have placed importance on are anti-bribery and corruption, anti-money-laundering, environmental, data protection, the availability of IT business continuity plans, adequate servers and proper IT systems, and compliance with employment laws in Malaysia (including compliance with accommodation standards for workers in Malaysia and immigration laws). For some of these areas, buyers may request for a higher liability cap and/or a longer period to bring claims.

5.2.3 Non-compete

Most buyers will require a seller not to compete post-acquisition. However, a buyer will also need to be careful to ensure that a non-compete is not challenged under Malaysia's Contracts Act 1950 (as an illegal restraint of trade) or the Competition Act 2010 (as anti-competitive) if there is no transfer of goodwill and/or know-how as part of the sale of business (whether via a share sale or an asset sale). Even if there is a clear transfer of goodwill and/or know-how, a non-compete can still be illegal where it is unreasonable or excessive.

Like other jurisdictions, it is important to assess each transaction carefully as a non-compete that is legal in one transaction may be treated as excessive in another transaction. The courts of Malaysia and the competition regulator will consider the specific facts of each case such as the scope of the non-compete (whether it is directly related and necessary), the nature of market and the parties.

5.2.4 Limitation of liability

It is common to see extensive provisions limiting the seller's liability for claims for breaches of the SPA, breaches of representations and warranties and claims under indemnities. The main limitations are with respect to the seller's total liability under the SPA and the time period within which claims may be brought. In each of these claims, there may be different caps and time periods for claims arising from different breaches.

In addition, warranty and indemnity (W&I) insurance is increasing in relation to deals involving Malaysian assets. If W&I insurance is taken for a transaction, clauses on limitation

of liability will have to be tailored accordingly.

5.3 Considerations when drafting dispute resolution clauses

Internationally recognised and accepted considerations when drafting dispute resolution clauses such as choice of forum (arbitration or litigation), speed of the process of the selected forum, costs, quality of decision makers (judges, arbitrators), finality of judgment or award, jurisdiction clauses etc. equally apply to transactions involving a Malaysian party and/or Malaysian elements. If litigation is the preferred choice, parties should note that judgments of the courts of Malaysia have limited enforceability beyond its shores; likewise, court judgements from only a handful of countries are recognised and can be enforced in Malaysia without a need to commence a fresh action pursuant to the Malaysian Reciprocal Enforcement of Judgments Act 1958.

On the other hand, if arbitration is preferred, the drafter should be aware of whether a particular dispute is arbitrable in Malaysia. As an example, in the context of disputes arising from a foreclosure of lands held as security by a chargee for a chargor's default pursuant to the National Land Code 1965 of Malaysia, such disputes would fall under the exclusive jurisdiction of the courts of Malaysia and are non-arbitrable. In an asset sale involving a transfer of land in Malaysia, this would be relevant. In respect of Malaysian seated arbitrations, recent judgments by the courts of Malaysia have also underscored the importance of designating the specific city or state within Malaysia as its seat of arbitration (due to the Malaysian courts system). This avoids potential unnecessary litigation to determine the identity of the local court having the supervisory powers over an arbitration (and award(s) rendered therefrom).

6. TYPICAL CONDITIONS TO CLOSING/RELEVANT REGULATORY REGIME

6.1 Typical conditions to closing

In addition to the resolution of the matters identified during the due diligence exercise (please refer to paragraph 4.2.2), other conditions to closing that will typically be included in a transaction document are:

- a) receipt of all regulatory approvals required for the transaction (including approvals for the issuance of any consideration securities, and the listing and quotation for such securities – please refer to paragraph 4.2.2). Depending on the facts of each specific transaction, approval of the Central Bank of Malaysia may also be required for a resident to invest abroad;
- b) receipt of all corporate approvals, including approval of shareholders or bondholders of a party for the transaction, where it is not feasible for these to be obtained prior to signing (for example, in the case of a listed company); and
- c) the occurrence of an event which will constitute a material adverse change (MAC) is sometimes included, particularly where there is a long period between signing and closing. Sellers do not welcome MAC clauses and will be prepared to accept only a limited set of events or a clear objective test, such as a numerical reduction in earnings or any specific financial metric or performance, to constitute a MAC.

6.2 Relevant regulatory requirements and problems when dealing with foreign investment

Where the law or governmental policies do not permit a foreign buyer to hold all of the sale shares or purchase certain assets (eg, land), the foreign buyer may wish to seek approval from the relevant authority, or engage with the relevant authority for a grace period to comply with

the condition. Alternatively, the buyer may form a consortium or joint venture to acquire the shares or assets together with other local or Bumiputera shareholders.

7. CLOSING ACTIONS

7.1 Typical steps to be undertaken for consummation of the proposed transaction

7.1.1 Share acquisition

There are several steps to be taken in order to effect the transfer of shares from the seller to the buyer. At closing, the seller will deliver the instrument of transfer of the shares together with the original share certificates of the target to the buyer. The seller will also procure that the directors of the target company pass a board resolution (and if required, a shareholders' resolution) approving the transfer of the shares.

The buyer will also have to ensure that its nominees are appointed as directors of the target company, as well as the prompt resignation of the directors previously appointed by the seller to the board of the target company. Some buyers also request for a change in the company secretary and auditor of the target company as well as authorised bank signatories and resolutions will need to be passed to effect these. In addition, the seller will have to ensure the smooth transfer and delivery of books, records and operational material to the buyer. Typically, these will include delivery of the original title to the assets (including documents of title to real property) held by the target company and its subsidiaries, and a physical handover to the buyer of chequebooks of the target company. In some cases, the keys to any facilities or premises under the operation of the target company will also be handed over. Some buyers will also request for key operational items to be delivered (such as bills of material, certain agreements etc.)

7.1.2 Asset acquisition

In an asset acquisition, the proposed transaction will be consummated by the delivery of assets, complete with all title certificates and documents. Any intellectual property rights belonging to the target company should be assigned to the buyer. Contractual rights which are assignable should also be conveyed to the buyer. From a workforce asset perspective, the buyer will have to send out offers of employment to existing employees of the target company, on terms no less favourable than those previously granted by the seller company. This will have to be done in accordance with the Employment Act 1955 and the Employment (Termination and Lay-Off Benefits) Regulations 1980 as previously mentioned in paragraph 2.2 (ii)(b), if the said employees fall under the purview of the Employment Act 1955.

7.2 Additional inputs for cross-border M&A

In the case of a cross-border M&A, there may be additional considerations. Parties will have to plan ahead and factor in the additional time that will generally be required. Transfers of funds from offshore may have to be initiated earlier, in order for the funds to be received by the seller on closing. Similarly, parties may have to add buffer time for the delivery of signed documents into Malaysia for such documents to be effected on closing. For instance, it is pertinent to note that in the case of a share transfer, the instrument of transfer of shares cannot be signed in counterparts. In a situation where the authorised signatories of both parties are not in Malaysia, additional buffer time will need to be factored in for the delivery of the instrument.

There are also some formalities with respect to the execution of certain documents. For example, a person is required to make a statutory declaration prior to being appointed as a director. The statutory declaration has to be affirmed before a Commissioner for Oaths if executed within Malaysia. If the statutory declaration is executed outside of Malaysia, then it will have to be executed before the notary public of that country or in accordance with the law of that country.

Malaysia also has exchange control regulations in place. A foreign investor may remit funds for investment and repatriate proceeds of sale. However, depending on the sums involved, notifications may have to be made to the Controller of Foreign Exchange for inflow and outflow of funds into and from Malaysia.

8. POST-CLOSING

8.1 Share acquisition

In a share acquisition, the instrument conveying title to the shares is the instrument of transfer in the prescribed form. The instrument of transfer which is delivered to the buyer on closing against payment of the purchase price will have to be presented for adjudication of stamp duty within 30 days from the date of the instrument of transfer. The instrument of transfer must be duly stamped before the transfer may be registered in the register of members of the target company (ie, the buyer registered as the new shareholder of the target company).

The notification on change in shareholding, appointment of new directors by the buyer and resignation of directors appointed by the seller will have to be filed with the Companies Commission of Malaysia. These matters are usually handled by the company secretary of the target company. Notifications of change in shareholding and/or change in the directors of the target company are to be given to the regulators or third parties, where required under the terms of the licence, permit, approvals or consent given by the regulators and/or third parties to the target company. The buyer should also act quickly to ensure that new bank signatories nominated by the buyer are on-boarded and new mandates are given to the banks.

If the buyer had agreed to change the name of the target company, then this will have to be attended to at the post-closing stage. Any change of name to the company will require a shareholder resolution to be passed.

8.2 Asset acquisition

Post-closing, certain documents will also have to be stamped (for instance, novation agreements and assignment agreements). Where the employment of employees is terminated by the seller, notification must also be made to the Inland Revenue Board of Malaysia and the Social Security Organisation. In addition, for employees falling under the purview of the Employment Act 1955, the employer has a statutory duty to notify the relevant office of the Director of Labour within 90 days of the takeover of the business or the change of name or location of such business.