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CORPORATE ACQUISITIONS AND MERGERS IN SINGAPORE

Wolters Kluwer

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This book was originally published as a chapter in Corporate Acquisitions and Mergers.

General Editor: Peter Begg

* The authors would like to acknowledge the assistance of Mah Hong Seng, Elisabeth Ong, Quek Kay Hian & Wai Kar Wye towards the preparation of this chapter.

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper

ISBN 978-90-411-6715-6

This title is available on www.kluwerlawonline.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Corporate Acquisitions and Mergers in Singapore

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THE LEGAL ENVIRONMENT

[01] The Singapore legal system is a common law system, where case precedents and statutory provisions exist side by side. Singapore became an independent nation in 1965 and the Companies Act was passed in 1967. The Companies Act of 1967 was based on the Malaysian model, which in turn was based on the Australian model at that time, which was itself derived from the then Companies Act of the United Kingdom. Over the years, the Companies Act has evolved uniquely from its predecessors. The takeover and corporate fund-raising provisions of the Companies Act were transposed to the Securities and Futures Act (the 'SFA'), which came into effect in 2002.

[02] The Companies Act continues to contain general corporate legislation including provisions relating to the incorporation, management, administration and winding-up of companies. Two basic types of companies are provided for in the Companies Act, namely, the private company and the public company. A company is a private company where its memorandum or articles of association contains a restriction on the right to transfer shares and a limitation on the number of members to not more than fifty. A public company is a company that is not a private company. Public companies include companies limited by guarantee and companies limited by shares which are incorporated as public companies and which may or may not be listed on a stock exchange. Many public companies incorporated in Singapore are listed on the Singapore Exchange Securities Trading Limited (the 'SGX'), and all Singapore-incorporated companies listed on the SGX are necessarily public companies. The SGX is currently the only securities exchange in Singapore.

[03] The law in this chapter is stated as at 1 July 2015 and incorporates the changes to the Companies Act that came into force on 1 July 2015.

BUSINESS VEHICLES

[04] This section provides a brief summary of the legal nature of the following business vehicles available in Singapore. Private companies are probably the most common form of business vehicle in Singapore while other forms of business vehicles are used where they better serve the commercial objectives of the parties depending on the objectives, the nature of the business activity, the funding for the business and other factors relevant to the stakeholders of the business.

[05] The various forms of business vehicles used for establishing a business presence in Singapore and the relevant statutes are:

(i) companies (private as well as public companies);
(ii) branches of foreign corporations;
(iii) representative offices;
(iv) sole proprietorships;
(v) partnerships;

(vi) limited partnerships (the 'LPs');
(vii) limited liability partnerships (the 'LLPs'); and
(viii) business trusts (the 'BTs').

Vehicle	*Governing Statute on Incorporation/Registration*
Companies	Companies Act
Branches of foreign corporations	Companies Act
Representative offices	Guidelines issued by International Enterprise Singapore
Sole proprietorships	Business Registration Act[1]
Partnerships	Business Registration Act
LPs	Limited Partnerships Act
LLPs	Limited Liability Partnerships Act
BTs	Business Trusts Act

[06] The principal regulator of corporate entities and businesses in Singapore is the Accounting and Corporate Regulatory Authority (the 'ACRA'). Under the ACRA, the Registrar of Companies administers the Companies Act, the Registrar of Businesses administers the Business Registration Act (the 'BR Act'), the Registrar of LLPs administers the 'LLP Act' and the Registrar of Limited Partnerships administers the Limited Partnerships Act (the 'LP Act').

Sole Proprietorship and Partnership

[07] The term 'sole proprietorship' is used to describe a person who engages in business on his own without being associated with others. A 'partnership' consists of two or more persons carrying on business in common with a view to profit.

[08] Both sole proprietorships and partnerships are not separate legal entities. The owner of a sole proprietorship is personally liable to creditors of the sole proprietorship for all debts and liabilities incurred in the name of the business without limit. Similarly, each partner of a partnership is jointly liable with the other

[1] The Business Registration Act will be repealed and re-enacted as the Business Names Registration Act 2014, which is expected to come into force in the first quarter of 2016. The Business Names Registration Act 2014 will be administered by the Registrar of Business Names.

partners in respect of all debts and liabilities of the partnership incurred during his participation in the partnership.

[09] A partnership may not be made up of more than twenty persons. This restriction on the size of a partnership however does not apply to one that is formed for the purpose of carrying on any professional services like a partnership formed to practice law, medicine, accounting, etc.

Limited Partnership

[10] LPs are commonly used in businesses focusing on single or limited term projects, as well as for situations where one or more financial backers or investors do not wish to take up an active role in the management of the business, preferring to entrust its management to one or more persons who are willing to assume liability for the debts and liabilities of the business.

[11] LPs are regulated by the LP Act, the Partnership Act, (where not inconsistent with the provisions of the LP Act) and the rules of equity and common law applicable to partnerships (where not inconsistent with the express provisions of the Partnership Act). The LP framework is administered by the ACRA.

[12] An LP is not a legal entity and does not have a separate legal personality. As such, it can neither own property under its own name nor can it sue or be sued in its own name. Like a partnership, an LP is a relationship which subsists between persons carrying on business in common with a view to profit.

[13] An LP must consist of at least one limited partner and at least one general partner. Limited partners and general partners may be either individuals or corporations (which need not be incorporated in Singapore). A general partner is liable for all debts and obligations of the LP incurred while it is a general partner of the LP. A limited partner, however, will not be liable for the debts and obligations of the LP beyond the amount of its agreed contribution subject to the provisions of the LP Act. In particular, to enjoy limited liability, limited partners may not take part in the management of the LP.

Limited Liability Partnership

[14] An LLP may be used by any two or more persons associated for carrying on a lawful business with a view to profit. An LLP is essentially a partnership with limited liability. However, unlike a partnership, an LLP is a body corporate with a legal personality separate from that of its partners. An LLP's obligation is solely that of the LLP.

[15] A partner of an LLP is not personally liable for the wrongful act or omission of any other partner of the LLP but is personally liable in tort for his own wrongful act or omission. Where one of the partners of the LLP is liable to any person as a result

of his own wrongful act or omission that was committed in the course of the business of the LLP or with the LLP's authority, the LLP is liable to the same extent as the partner. The liabilities of the LLP are met out of the property of the LLP.

[16] An LLP must be made up of at least two partners and must have at least one manager who is a natural person of full age and capacity and who is ordinarily resident in Singapore. Every LLP must have a registered office within Singapore to which all communications and notices may be addressed.

Business Trust

[17] BTs are business enterprises set up as trust structures and are created by the execution of a trust deed like any other trust. BTs are governed by the rules of common law and equally under the Trustees Act. However, the Trustees Act does not apply to a registered BT which is subject to the Business Trusts Act. The Business Trusts Act regulates the corporate governance of registered BTs.

[18] A BT differs from a company in that it is not a legal entity. It is created by a trust deed under which an entity named the trustee-manager has legal ownership of the assets of the business enterprise and manages the business for the benefit of the beneficiaries of the trust. Subject to the trust deed of a business trust, a trustee-manager may, however, appoint agents to carry out and perform its functions. BTs also differ from other traditional trusts, such as a private family trust or a unit trust, as they actively undertake business operations.

[19] Investors of a BT take a stake in the underlying business by purchasing units in the BT. Unitholders in the BTs, being beneficiaries of the trust, hold beneficial interest in assets of the BT. A unitholder of a registered BT is not liable to contribute to the registered BT or in respect of any debts, liabilities or obligations incurred by the trustee-manager in its capacity as trustee-manager for the registered BT. The liability of a unitholder of a registered BT is limited to the amount of money that he has expressly agreed to contribute to the registered BT.

Companies

[20] A company is legally a person separate and distinct from its members. Flowing from this independent legal personality of a company, the members of the company are not liable to creditors of the company for debts and liabilities incurred by the company. A company is responsible for its own debts and liabilities. The members of a company cannot be sued for the debts of the company.

[21] Subject to the memorandum and articles of association of a company, management of the company is vested in the Board of Directors whereas the day-to-day running of the company will usually fall to the managing director or the chief executive officer.

Liability of Members of Company

[22] The liability of the members of a company to contribute to the assets of the company upon its liquidation may be limited or unlimited. In an unlimited company, the liability of the members is without limitation. In a limited company, the liability of the members depends on whether the company is limited by shares or by guarantee.

[23] A member of a company limited by shares may be called upon to pay any amount remaining unpaid on his shares to the company in discharge of his liability not only upon the liquidation of the company but also at any time during the existence of the company. The liability of the members of a company limited by shares is limited to the amount remaining unpaid on their shares. There are no minimum capitalization requirements under Singapore law except that at least one share must be issued upon incorporation.

[24] A member of a company limited by guarantee may be called upon to discharge his liability to contribute to the assets of the company only in the event of the liquidation of the company. The liability of the members of a company limited by guarantee is limited to the amount which they have agreed to contribute.

Private Company versus Public Company

[25] A company having a share capital is a private company:

(i) where the right to transfer shares is restricted; and
(ii) where the number of shareholders is restricted by its memorandum or articles of association to fifty (counting joint holders of shares as one, and excluding current employees of the company or its subsidiaries and former employees of the company or its subsidiaries who became members when they were employed by the company).

[26] A public company has been defined as one other than a private company. Essentially, it is a company where the number of shareholders can be more than fifty. Generally, a public company is subject to more regulation than a private company.

[27] Previously, only public companies could raise capital by offering shares and debentures to the public. With effect from 1 April 2004, private companies are no longer prohibited from offering shares and debentures to the public, thereby removing what had been a fundamental difference between private and public companies. Where shares in or debentures of a company are offered to the public, a prospectus which complies with the relevant provisions of the Securities and Futures Act must be issued.

Exempt Private Company

[28] Private companies may further be classified into exempt private companies and non-exempt private companies.

[29] An exempt private company must be a private company:

(i) in which no beneficial interest in the shares of the company is held directly or indirectly by a corporation; and
(ii) which has no more than twenty members.

[30] Exempt private companies are exempt from the prohibition in section 162 of the Companies Act against a company extending loans to its directors or directors of its related corporations and the prohibition in section 163 of the Companies Act against a company extending loans to another company in which a director of the first-mentioned company has an interest of 20% or more.

Branch of Foreign Corporation

[31] This form of business organization is only available to foreign corporations. The obligation to register is imposed on all foreign corporations which have a place of business or which carry on business in Singapore.

[32] Under the Companies Act, every registered branch of a foreign corporation in Singapore must:

(i) appoint two natural persons ordinarily resident in Singapore who are authorized to accept on its behalf service of process and any notices required to be served on the corporation. The Companies Act will be amended in the first quarter of 2016 to reduce the number of appointed representatives to one natural person;
(ii) have a registered office in Singapore; and
(iii) lodge both the head office accounts and branch accounts with the Registrar of Companies within two months of its Annual General Meeting (AGM) (subject to certain conditions under the Companies Act).

Representative Office

[33] Another method by which a foreign corporation may establish a presence in Singapore is to set up a representative office. However, the activities that may be engaged by a representative office must be confined to conducting market research and feasibility studies. A representative office is merely an administrative creature and has no legal status.

[34] A representative office of a foreign commercial entity may operate in Singapore for a maximum of three years from its commencement date, provided

that the representative office status is evaluated and renewed. Representative offices which decide to continue their presence in Singapore thereafter should register their operations with the ACRA.

COMPLIANCE REQUIREMENTS OF A COMPANY

[35] The following are some of the key compliance and reporting requirements in respect of a company which is the common form of business vehicle in Singapore:

(i) Every company incorporated in Singapore must have at least one director who is ordinarily resident in Singapore and at least one company secretary whose principal or only place of residence is Singapore. The director must be at least 18 years old and of full legal capacity. The company secretary should be appointed within six months of incorporation.

(ii) Each company incorporated in Singapore must have a registered office from the date of incorporation at which service of processes and notices can be effected. The office must be open and accessible to the public daily, for at least three hours during normal business hours on weekdays.

(iii) Auditors have to be appointed within three months from the date of incorporation of the company. Except for dormant companies and 'small companies' (as defined in the Thirteenth Schedule to the Companies Act), a company's accounts must be audited once a year.

(iv) Each company incorporated in Singapore must prepare their annual financial accounts in accordance with the Financial Reporting Standards of Singapore.

(v) Each company incorporated in Singapore must hold an AGM once every calendar year, with the first AGM held within eighteen months of the company's incorporation. No more than fifteen months may elapse between subsequent AGMs. Private companies may however, dispense with AGMs, if at a general meeting of the company, a resolution to that effect is passed by all members entitled to vote at the meeting.

(vi) Each company incorporated in Singapore must file its Annual Return with the ACRA within one month after an AGM.

LAWS AFFECTING M&A

Competition Act

[36] In Singapore, the merger control regime is prescribed under the Competition Act. The Competition Act is the principal statute governing the competition law regime in Singapore. Merger control provisions under the Competition Act came into force on 1 July 2007. Merger controls are dealt with under 'Competition Aspects' below.

Securities and Futures Act

[37] Part VIII of the SFA contains legislative provisions relating to takeover offers made for public companies in three sections. Section 138 of the SFA provides for the establishment of the Securities Industry Council (the 'SIC'). The SIC is the principal regulator which oversees the Singapore Code on Take-overs and Mergers (the 'Take-over Code'). Section 139 provides that the Monetary Authority of Singapore (the 'MAS') has the power, on the advice of the SIC, to issue the Take-over Code, and to make amendments to the Take-over Code from time to time. Section 140 lists the offences relating to takeover offers. It is an offence for a person to give notice or publicly announce that he intends to make a takeover offer if he has no intention to make one. It is also an offence to make a takeover offer if a person has no reasonable or probable grounds for believing that he will be able to perform his obligations pursuant to the offer being accepted or approved.

Companies Act

[38] The Companies Act is also relevant to corporate acquisitions and mergers. Section 210 of the Companies Act provides for schemes of arrangement. Singapore-incorporated companies may also use the amalgamation process in sections 215A–215K of the Companies Act to facilitate the combination of such companies. Section 215 of the Companies Act governs the compulsory acquisition of the shares of minority shareholders once an offeror has acquired 90% of the target's shares through a takeover offer (excluding the shares held by the offeror). The Companies Act will be amended by the Companies (Amendment) Act 2014 that will come into effect in two phases. Some amendments took effect on 1 July 2015 while the remaining amendments are expected to come into effect in the first quarter of 2016. One amendment which will be made in the first quarter of 2016 is that 'shares' referred to in section 215 of the Companies Act will include units of shares (e.g., options and convertibles).[2] Shares held by the offeror include shares held by a nominee on behalf of the offeror, as well as shares held by a related corporation of the offeror or a nominee of that related corporation. Under the Companies Act, a related corporation is a subsidiary, holding company or a fellow subsidiary. Another amendment in the first quarter of 2016 will extend the operation of section 215 to cover individual offerors. Section 215 currently only applies to offerors who are companies.

[39] The Companies Act contains provisions relating to financial assistance in sections 76 and 76A. The financial assistance provisions restrict a public company incorporated in Singapore, or a company incorporated in Singapore whose holding company or ultimate holding company is a public company, from providing financial assistance, whether directly or indirectly, to any person in the acquisition

[2] See s. 138(k) of the Companies (Amendment) Act 2014 and para. 147 of the Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act (3 Oct. 2012).

or proposed acquisition of shares or units of shares in that company or the holding company or ultimate holding company of that company. The provisions relating to financial assistance are widely drafted. For instance, if a party seeking to acquire shares in a target company procures the target company to charge its assets to refinance a loan taken by the offeror to acquire the target company, this may constitute financial assistance by the target company. The prohibition against financial assistance for private companies has been removed with effect from 1 July 2015.

[40] Financial assistance is a restricted but not a prohibited activity under the Companies Act. It is possible to 'whitewash' financial assistance, where the company obtains its shareholders' approval by a special resolution and complies with the procedures set out in section 76(10)–76(14) of the Companies Act, which include the filing of certain prescribed forms with the Registrar of Companies (the 'Registrar'), publishing a notice of intention to give financial assistance in a daily newspaper and permitting objections to be made by shareholders, debentureholders, creditors and the Registrar. A special resolution requires the approval of a majority of not less than 75% of shareholders present and voting at a general meeting for which not less than twenty-one days' prior notice has been given. Where the company is a subsidiary, the ultimate holding company, if listed or incorporated in Singapore, is also required to obtain its shareholders' approval for giving the financial assistance. Financial assistance may also be given in other circumstances including where the amount of financial assistance is not more than 10% of the company's paid-up capital and reserves, where the resolution to provide the financial assistance receives the unanimous approval of the shareholders or where the giving of financial assistance does not materially prejudice interests of the company or its shareholders or the company's ability to pay its creditors (subject to the company satisfying certain prescribed conditions).

Take-over Code and the SIC

[41] The Take-over Code applies to the acquisition of voting control of public companies. It applies to corporations (including corporations not incorporated under Singapore law) with a primary listing of their equity securities, and registered BTs or Real Estate Investment Trusts (REITs) with a primary listing of its units, in Singapore. While the Take-over Code was drafted with listed public companies, listed registered BTs and REITs in mind, unlisted public companies and unlisted registered BTs or REITs with more than fifty shareholders or unit holders, as the case may be, and net tangible assets of SGD 5 m 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. The Take-over Code does not apply to takeovers or mergers of other unlisted public companies or unlisted BTs or REITs, or private companies. With respect to foreign-incorporated companies and foreign-registered BTs, the Take-over Code applies, prima facie, only to those with a primary listing in Singapore.

[42] The Take-over Code applies to all offerors, whether they are natural persons or not, be they resident in Singapore or not and whether citizens of Singapore or not, and whether they are corporations or bodies unincorporated, be they incorporated or carrying on business in Singapore or not. The Take-over Code also extends to acts done or omitted both in and outside Singapore.

[43] The Take-over Code is administered and enforced by the SIC. The SIC is provided with discretion to waive the application of the Take-over Code in relation to: (i) Singapore-incorporated companies or Singapore-registered BTs or Singapore-registered REITs with a primary listing overseas, and (ii) unlisted public companies or unlisted registered BTs or unlisted REITs with more than fifty shareholders or unit holders, as the case may be, and more than SGD 5 m of net tangible assets.

[44] The SIC is made up of representatives from the government, the MAS and the private sector. The day-to-day business of the SIC is conducted by a professionally staffed full-time Secretariat. The MAS is a statutory board formed under the MAS Act and is the de facto Central Bank of Singapore, as well as the integrated regulator of the banking, insurance, financial, securities and futures industries.

[45] The Take-over Code contains General Principles, Rules and Notes, and is supplemented by Practice Statements issued by the SIC from time to time. Nonetheless, the Take-over Code notes that it is impracticable to devise rules in sufficient detail to cover all circumstances that can arise in takeover and merger transactions. Therefore, both the letter and spirit of the Take-over Code must be observed, especially in circumstances not explicitly covered by any Rules. The SIC may, pursuant to section 139 of the SFA, also issue rulings on the interpretation of the General Principles and the Rules in the Take-over Code and lay down the practices to be followed by the parties in a takeover offer or a matter connected therewith. In the course of a takeover, it is not unusual to require rulings from the SIC. The SFA provides that such rulings or practices issued by the SIC are final and cannot be challenged in any court.

[46] The SIC is available for confidential consultation on points of interpretation of the Take-over Code. When there is any doubt as to whether a proposed course of conduct in a takeover offer accords with the General Principles or Rules of the Take-over Code, it is advisable for the parties or their advisers to consult the SIC in advance, as such confidential consultation minimizes the risk of breaches of the Take-over Code.

[47] The parties to a takeover are primarily responsible for ensuring observance of the provisions of the Take-over Code. If there appears to be a breach of the Take-over Code, the SIC may summon the alleged offenders to appear before the SIC for a hearing where every alleged offender will have the opportunity to answer allegations and also to call witnesses. The SFA provides the SIC with powers to investigate any acts of misconduct in relation to or connected with a transaction involving a takeover or merger transaction, where it has reason to believe that any party or any financial adviser is in breach of the Take-over Code. In this respect, the SIC is empowered to make enquiries, summon persons to give evidence on oath or