

Private mergers and acquisitions in Malaysia: overview

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CORPORATE ENTITIES AND ACQUISITION METHODS

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

Acquisition vehicles in Malaysia primarily consist of private and public companies limited by shares.

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

Restrictions on share transfer

Generally there is no restriction on the transfer of shares in a private company under corporate law.

Foreign ownership restrictions

Generally there is no restriction on the acquisition of shares in a private company by foreign buyers, except that there may be a limitation on foreign ownership in certain industries such as telecommunications, financial services and the oil and gas industry.

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

The most common way to acquire private companies in Malaysia is by way of a share purchase.

Share purchases: advantages/asset purchases: disadvantages

The main advantages of a share purchase are:

- No transfer of ownership is required for assets in a share purchase transaction. In an asset purchase transaction, title to certain assets such as land or buildings needs to be transferred to the buyer, which may require prior approval of the relevant authority and more costs and time.
- Transfer of real estate attracts higher stamp duty compared to the transfer of shares.
- The buyer acquires the company together with its existing customers, suppliers and employees, and the business can continue with no or very little disruption.
- The buyer acquires the company together with its existing contracts, permits and licences, which are essential for the business to operate. In an asset purchase, certain contracts,

permits and licences may not be assignable without the consent of other parties to them.

Share purchases: disadvantages/asset purchases: advantages

The main disadvantages of a share purchase are:

- A share purchase can be complicated if there are too many shareholders or if the minority shareholders refuse to sell. There is only one seller in an asset purchase.
- The buyer acquires the company with not only its assets but also all its liabilities (whether disclosed or undisclosed liabilities).
- The buyer can select the assets and liabilities that it wishes to acquire in an asset purchase.
- The buyer has discretion to pick the employees whom it wishes to employ in an asset purchase, without any liability to the rest of the employees.

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

The sale of companies is usually negotiated privately. However, it is not uncommon for companies to be sold by private tenders. Prospective buyers are usually given the opportunity to inspect the books and conduct due diligence before they bid for the company. On acceptance, the successful offeror will enter into a share purchase agreement with the seller. The terms of the sale will be governed by the agreement and the same procedure applies as for any sale of companies.

Where shares of a company are charged to a lender, the lender may in the event of a default of payment apply for a charging order from a court, upon which the shares will be put up for sale by public auction.

PRELIMINARY AGREEMENTS

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

Letters of intent

A letter of intent or term sheet is usually entered into prior to the signing of any formal share purchase contract. It is common for a letter of intent or term sheet to be described as not legally binding. The letter of intent or term sheet typically sets out the:

- Understanding of the parties.
- Principal terms of the transaction.
- Other provisions, to allow the buyer to carry out due diligence and investigation of the assets and liabilities of the company,



and to set out the relevant time frame for completion and signing of the formal contract.

Exclusivity agreements

Under an exclusivity agreement, the seller undertakes with the buyer not to negotiate with a third party to sell or deal with the subject matter of the sale, for a prescribed period of time. Remedies may be limited to damages only for breach of the agreement. An exclusivity agreement can be part of a letter of intent or term sheet.

Non-disclosure agreements

Under a non-disclosure agreement, a party agrees not to disclose any information received from the other party to an unauthorised third party. It is typically entered into to protect the prospective seller from unauthorised use of information made available to the prospective buyer during the transaction. It may however be necessary for the prospective seller or buyer to make disclosures/announcements to certain authorities. For instance, disclosures may be required under securities law or listing requirements. The remedy is usually injunctive relief for a breach of the non-disclosure requirements.

ASSET SALES

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

Statutorily imposed obligations such as payment of taxes continue to apply to certain assets. For instance, quit rent and assessment payable on the property, taxes and contribution payable by an employer for an employee. The contract normally provides for the apportionment of liabilities as at completion of the asset sale.

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

Generally, there is no requirement to notify the creditors of the company in an asset sale (assuming that the company is solvent). However, where an asset is subject to any mortgage, charge, pledge, lien or encumbrance, or where the company has provided a negative covenant to a creditor undertaking not to transfer or dispose of any of its assets, the consent of that creditor must be obtained.

SHARE SALES

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

Common conditions precedent typically include:

- Completion of due diligence (financial, legal, tax and/or technical) and the results of the due diligence being satisfactory to the buyer.
- Approvals of shareholders in respect of the purchase/transfer of the shares, where required by law.
- Governmental approvals where required by law, or where an equity condition is imposed in any of the licences or permits.
- Approvals of banks and financiers whose consent may be required for any change in control of the company, as set out in the loan and security documents with the company.
- Approvals of any other third parties, where such approvals are required as a result of the change of ownership.

- Waiver of pre-emption rights where there is more than one shareholder in the company, and where such rights have been granted by one shareholder to the other.

SELLER'S TITLE AND LIABILITY

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

Section 14 of the Sale of Goods Act provides that in a share sale, unless the circumstances of the contract are such as to show a different intention, there is:

- An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the shares and that, in an agreement to sell, he will have a right to sell the shares at the time when the shares are to pass.
- An implied warranty that the buyer will have and enjoy quiet possession of the shares.
- An implied warranty that the shares are free from any charge or encumbrance in favour of any third party not declared or known to the buyer, before or at the time when the contract is made.

The buyer would normally provide in the contract a long list of conditions and warranties, including those above.

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

Seller

A seller can be liable for pre-contractual misrepresentation, misleading statements or similar matters.

Advisers

Advisers may be liable under tort, though actions of this nature are rare, as an action is usually brought against the seller and not its advisers.

MAIN DOCUMENTS

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

Either the seller's or buyer's lawyers may prepare the first draft.

Share sale

Main documents include the:

- Share sale agreement.
- Tax indemnity
- Disclosure letter qualifying warranties (typically prepared by the seller).

Asset sale

Main documents include the:

- Asset sale agreement.
- Relevant deed/agreement for the transfer of the identified contracts.
- Disclosure letter qualifying warranties (typically prepared by the seller).

- Notices/letters in relation to employment of employees.

A share sale typically includes all assets and liabilities of the company while an asset sale only includes the identified assets and liabilities. Generally, no changes will need to be made to existing contracts in a share sale, while the identified contracts will need to be transferred to the buyer by way of novation or assignment in an asset sale.

ACQUISITION AGREEMENTS

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

The main substantive clauses in an acquisition agreement usually include:

- Purchase of shares/assets free from all encumbrances and with all rights attached to them.
- Payment of purchase consideration on completion, subject to any price adjustment.
- A price adjustment mechanism for a share acquisition usually involves preparation of completion accounts. A price adjustment for an asset acquisition may require verification of stock or fixed assets on completion, where the value of lost or damaged stock or assets will be taken into account for adjustment purposes.
- Conditions precedent to be fulfilled prior to completion. Conditions include satisfactory due diligence results and procurement of all necessary approvals and consents.
- Covenants by the seller not to encumber, transfer or dispose of the shares/assets. Others include covenants by the seller not to:
 - vary contracts (including terms of employment);
 - depart from the ordinary course of business;
 - borrow money;
 - incur capital expenditure exceeding a certain threshold;
 - issue or grant any option in respect of shares.

Some of these applicable to a share acquisition may not apply to an asset acquisition.

- Indemnity by the seller to the buyer for undisclosed tax liabilities of the company, arising from any acts or omission occurring prior to completion of the share acquisition. For an asset sale, there is generally no transfer of tax liability to the buyer.
- Undertaking by the seller not to compete with the business of the company after completion, for a certain period of time. Such undertaking may be void or not enforceable under section 28 of the Contracts Act, which provides that an agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void. However, an agreement not to carry on business of which goodwill is sold is an exception under this section.
- Retention of part of the consideration for an agreed period of time, which may be used to set off against any amount claimed arising from any breach of the warranties, indemnities or undertakings.
- Completion of a share acquisition typically involves:
 - delivery of share certificates and transfer;
 - appointment of the buyer's nominees as directors;
 - resignation of existing directors; and

- delivery of statutory records.

- Completion of an asset acquisition typically involves:

- assignment of contracts and intellectual property rights;
- delivery of assets together with all title certificates (if any); and
- offer of employment to employees, on terms no less favourable than those previously granted by the company.

- If the assets include real estate, the transfer will need to be stamped and presented at the relevant land office or registry.
- Warranties are generally more extensive in a share sale, to reflect the risk taken by the buyer in relation to the company. The warranties in an asset sale are generally specific to the assets being acquired.
- Generally, remedies will be provided for either party to compel performance or to terminate and claim damages.
- Governing law of the contract.

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

It is possible, although usually the law of Malaysia will be the governing law since the subject matter is in Malaysia.

A Malaysian court may apply foreign laws and rules, which may affect the enforceability of the share purchase agreement. In this case, the foreign law will have to be proved as a matter of fact by appropriate expert witnesses, and Malaysian law will govern certain procedural matters and the measure of damages for breach of contract. If a question of public policy arises, Malaysian law will prevail.

WARRANTIES AND INDEMNITIES

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

Seller's warranties/indemnities in a share acquisition are typically included in an acquisition agreement. They cover areas such as:

- Ownership and rights to the shares being the subject matter of the sale.
- Legal status of the target company.
- Accuracy of accounts and financial statements.
- Ownership of assets and status of liabilities.
- Business operation.
- Licences and permits.
- Customers and suppliers.
- Material contracts.
- Insurance.
- Taxation.
- Litigation.
- Employees.
- Records.
- Intellectual property.
- Accuracy of information.

Seller's warranties/indemnities in an asset acquisition are generally tailored more specifically to the assets being acquired.

15. What are the main limitations on warranties?

The main limitations on warranties include:

- Limiting any claims on breach of warranties, unless the amount of each claim and the aggregate cumulative amount of all claims exceed a certain minimum threshold.
- Restricting the maximum liability of the seller.
- Imposing a time limit beyond which no claims can be made. A typical time limit is two years after completion of the acquisition.
- Excluding liability from particular warranties by disclosure in writing, at the time of signing the acquisition agreement.

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

Remedies

The acquisition agreement typically provides a time frame for the defaulting party to remedy the breach, failing which the non-defaulting party can claim damages for breach of warranty.

Time limits for claims under warranties

Under the Limitation Act 1953, the statutory limitation for any claim is six years from the date of breach. However, the seller normally imposes a shorter time frame (typically two years after completion) for any claim to be made.

CONSIDERATION AND ACQUISITION FINANCING

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

The main forms of consideration commonly offered in a share sale are cash, the issue of shares, or a combination of both. Shares are commonly used as consideration in a merger or restructuring.

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

Structure

The issue of shares is typically structured as a rights issue to shareholders.

Consents and approvals

No regulatory approvals are required for a rights issue by a listed issuer in Malaysia.

The approval of shareholders in a general meeting is generally required for a rights issue, unless the shares are to be issued as consideration or part consideration for the acquisition of shares or assets by the company and members of the company have been notified of the intention to issue the shares at least 14 days before the date the shares are issued.

Requirements for a prospectus

An information memorandum issued by a listed issuer or its agent, purporting to describe the business and affairs of the listed issuer

in respect of a rights issue, is deemed to be a prospectus, and a copy of the same must be deposited with the Securities Commission within seven days after it is first issued.

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

Restrictions

A company is not allowed to give financial assistance to a potential buyer of its shares. It is deemed a dealing by the company in its own shares, which is prohibited under section 67 of the Companies Act 1965.

Exemptions

Exemptions to section 67 of the Companies Act 1965 are set out below:

- Lending money is part of the ordinary business of the company.
- The provision by a company, under a scheme, of money for the purchase of or subscription for fully-paid shares in the company or its holding company. This is a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company or a subsidiary of the company, including a director holding salaried employment or an office in the company, or a subsidiary of the company.
- Financial assistance in good faith by a company to persons, other than directors, employed by the company or a subsidiary of the company, to enable those persons to purchase fully-paid shares in the company or its holding company, to be held by them through beneficial ownership.

SIGNING AND CLOSING

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

Signing

Documents commonly produced and executed at signing include:

- Share sale agreement.
- Disclosure letter qualifying warranties (typically prepared by the seller).

Closing

Documents commonly produced and executed at closing include, for a share purchase:

- Resolution of the board of directors of the company approving the share transfer.
- Original share certificates.
- Instrument of share transfer.
- Duly signed letters of resignation of the existing directors of the company.
- Duly signed letters of resignation of the company secretary of the company.
- Resolution of the board of directors of the company appointing the buyer's nominee(s) to the board of directors.
- Resolution of the board of directors of the company approving the change of bank signatories.
- Tax indemnity (if this is not already provided in the share sale agreement).

Documents commonly produced and executed at closing include, for an asset purchase:

- Assignment of contracts.
- Assignment of intellectual property rights.
- Instruments of transfer for the assets (if relevant).
- Title documents to the assets (if any).
- Records of the company.
- The originals of the identified contracts.
- Notices/letters in relation to employment of employees.

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

Documents or instruments governed by statutes have different legal formalities according to the requirements of the relevant statutes. For instance, a power of attorney to be exercised in Malaysia has to be executed, duly authenticated and registered with the High Court of Malaysia in accordance with the Powers of Attorney Act 1949. An instrument for the transfer of land in Malaysia will have to be executed, duly attested by the relevant witness and presented at the relevant land office or registry for the registration to take place.

Unless otherwise required by the relevant statutes, regulations or guidelines in Malaysia, a document or instrument can be executed by a company by way of affixation of common seal or by an authorised attorney or representative of the company, in accordance with the constitutional documents of the company. The company will pass the relevant board and/or shareholders' resolutions for the authorisation to be given for the execution of documents.

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

Unless otherwise required by the relevant statutes, regulations or guidelines in Malaysia, the foreign company can execute the documents in accordance with the formalities laid down by the articles of association/constitution of the foreign company. Certain statutes typically require the execution of documents by the foreign company or its authorised representatives to be attested or authenticated by certain designated persons, such as a notary public.

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

A digital signature created in accordance with the Digital Signature Act 1997 is deemed to be a legally binding signature. A document signed with a digital signature in accordance with the Digital Signature Act 1997 is as legally binding as a document signed with a handwritten signature, an affixed thumb-print or any other mark.

Where a rule of law requires a signature or provides for certain consequences in the absence of a signature, that rule is satisfied by a digital signature where all the following will apply:

- The digital signature is verified by reference to the public key listed in a valid certificate issued by a licensed certification authority.
- The digital signature is affixed by the signatory with the intention of signing the message.

- The recipient has no knowledge or notice that the signatory either:
 - has breached a duty as a subscriber; or
 - does not rightfully hold the private key used to affix the digital signature.

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

Typically, the consent of the board of directors is required for a transfer of shares. The share transfer instrument has to be executed by the transferor and transferee. On execution, the share transfer form needs to be submitted to the Inland Revenue Board of Malaysia, along with the latest audited financial statements of the company, for assessment of stamp duty. Once stamp duty is paid, the share transfer instrument and the original share certificates need to be forwarded to the company secretary of the company, to register the change in ownership and to issue new share certificates to the buyer.

TAX

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

Share sale

Stamp duty is payable on a share transfer instrument, and is calculated on the price or value on the date of transfer, whichever is greater. For every MYR1,000 or fractional part of it, MYR3 is payable.

If the sale of shares requires the approval of the Securities Commission, the price/value per share as approved by the Securities Commission may be accepted for the purpose of valuing the shares, though other valuation methods as provided in the *Guidelines on the Stamping of Share Transfers not Quoted on the Stock Exchange* published by the Internal Revenue Board of Malaysia may apply.

Asset sale

Ad valorem stamp duty applies to the sale of goodwill, the assignment of account receivables, and the transfer of real estate in an asset sale. Stamp duty is calculated as follows:

- On the first MYR100,000: MYR1 per MYR100, or part of it.
- On any amount exceeding MYR100,000 up to MYR500,000: MYR2 per MYR100, or part of it.
- On any amount exceeding MYR500,000: MYR3 per MYR100, or part of it.

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

There is a tax exemption for the transfer of shares or assets between associated companies if all the following apply:

- A company with limited liability transfers its property (shares or assets) to another company with limited liability.
- The companies are associated (that is, one is the beneficial owner of at least 90% of the issued share capital of the other, or a third company with limited liability is the beneficial owner of at least 90% of the issued share capital of both the transferor and the transferee).
- Certain other conditions are complied with.

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

Share sale

Generally, no corporate income tax is payable by the seller on the disposal of shares, unless the seller is in the business of trading shares.

Asset sale

Generally, the sale of assets does not attract corporate income tax unless it involves the sale of depreciable capital assets of which capital allowances have been granted and the disposal value exceeds the tax written-down value of the assets.

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

Share sale

See *Question 27*.

Asset sale

See *Question 27*.

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

Other potential taxes include real property gains tax (RPGT). RPGT is payable on gains when a seller disposes of real property or shares in a real property company. A real property company is a company that holds real property or shares in another real property company, with a value of at least 75% of its total tangible assets.

The RPGT rate varies, depending on the year of disposal of the real property or shares, as follows:

- Disposal within three years: 30%.
- In the fourth year: 20%.
- In the fifth year: 15%.
- In the sixth and subsequent years: 5%.

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

A company can surrender no more than 70% of its adjusted loss in the basis period of a year of assessment to one or more related companies, provided that:

- The surrendering company and the claimant company have a paid up capital in respect of ordinary shares of more than MYR2.5 million at the beginning of the basis period for that year of assessment.
- The surrendering and claimant company have a 12 month basis period ending on the same day.
- One company must be beneficially entitled to at least 70% of any residual profits of the other company, and any residual assets of the other company, in the event of a winding-up.
- The 70% shareholding requirement must be throughout the basis period for that year of assessment and the 12 month period immediately preceding that basis period.

- The claimant company has a defined aggregate income for that year of assessment.

EMPLOYEES

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

Asset sale

There are no obligations to inform or consult employees or their representatives or obtain employee consent to an asset sale.

Share sale

There are no obligations to inform or consult employees or their representatives or obtain employee consent to a share sale.

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

Business sale

If the buyer in a business sale does not transfer the employees of the seller to the buyer, the employees remain in the employment of the seller. Those employees can be terminated for redundancy. The Employment (Termination and Lay-Off Benefits) Regulations 1980 provides for this scenario for employees in the definition of the Employment Act 1955, for example they are entitled to indemnities. There are guidelines for the selection of affected employees, for example the ability, experience, skill and occupational qualifications of employees, the age of the employees, and the last in, first out principle.

Employees not governed by the Employment Act are governed by their employment contracts, common law and/or collective agreements (except for those employed by statutory bodies and civil servants). Employers are also encouraged to adhere to the Code of Conduct for Industrial Harmony 1975 (Code) before embarking on a retrenchment exercise. Although adherence to the Code is voluntary, section 30(5A) of the Industrial Relations Act provides that the court may take into consideration any agreement or code relating to employment practices between organisations, representative of employers and workmen respectively, where such agreement or code has been approved by the Minister of Human Resources.

Generally, dismissal of employees in Malaysia must be for a just cause. Where there is a just cause for dismissal, proper inquiry procedures must be followed, failing which the employee can bring an action in the Industrial Court for reinstatement. Employers are also required to notify the Director General of Labour concerning the retrenchment of employees at least one month prior to the retrenchment.

Share sale

See above, *Business sale*.

Transfer on a business sale

For employees governed under the Employment Act, employees are not automatically transferred in a business sale. If the new owner of the business does not immediately offer to continue the employment of the employees, on terms and conditions no less favourable than previously enjoyed by them before the acquisition, the employees' service contracts are deemed terminated, and the employer immediately preceding the change of ownership is liable to pay termination benefits (*Employment (Termination and Lay-Off Benefits) Regulations*).

For employees not governed under the Employment Act, the employment contracts, common law and collective agreements (if applicable) of the affected employees apply.

PENSIONS

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

Private pension schemes

Private pension schemes for private companies are not common in Malaysia.

Pensions on a business transfer

For employees governed under the Employment Act, if the new owner of the business decides to retain employees of the business, he must continue to offer the affected employees employment on terms and conditions no less favourable than previously enjoyed by the affected employees before acquisition of the business. This includes any entitlement to pension, if provided in the employment contracts immediately preceding the acquisition.

For employees not governed under the Employment Act, their employment contracts, common law and collective agreements (if any) apply.

COMPETITION/ANTI-TRUST ISSUES

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

The Competition Act 2010 and Competition Commission Act 2010 came into force on 1 January 2012 and 1 January 2011 respectively. The Competition Act does not provide for merger control provisions.

However, there are two major prohibitions in the Competition Act (anti-competitive behaviour and abuse of dominant position).

An agreement is anti-competitive if it is a horizontal or vertical agreement between enterprises that has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

The Competition Act prohibits an enterprise from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

Triggering events/thresholds

The following horizontal agreements are deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services:

- Fixing purchase or selling price or any other trading conditions.
- Sharing markets or sources of supply.
- Limiting or controlling production, market outlets or market access, technical or technological development, or investment.
- Bid rigging.

In general, anti-competitive agreements are not considered significant if:

- Parties are competitors, and the combined market shares are less than 20%.
- Parties are not competitors, and individual market share is no more than 25%.

There are no specific thresholds for abuse of a dominant position (*see below, Substantive test*). However, the following are the types of abuses prohibited under the Competition Act:

- Predatory behaviour (for example, margin squeeze, and predatory pricing).
- Refusal to supply.
- Buying up scarce supply.
- Limiting output.

Notification and regulatory authorities

The Malaysian Competition Commission is an independent body established under the Competition Commission Act to enforce the Competition Act. The main role of the Competition Commission is to protect the competitive process for the benefit of businesses, consumers and the economy.

The Competition Commission can commence investigations under the Competition Act as a result of any of the following:

- At the direction of the Minister responsible for domestic trade and consumer affairs.
- Where the Competition Commission has reason to suspect an infringement.
- As a result of a complaint by any person.

Substantive test

The test for determining whether a horizontal or vertical agreement between enterprises has anti-competitive conduct is whether it has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

To determine whether there is an abuse of dominant position, an enterprise will first have to determine whether it is in a dominant position. Dominant position means a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

ENVIRONMENT

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

The Environmental Quality Act 1974 and its regulations govern the discharge of sewage, scheduled waste, industrial effluent, and so on. In the event of spillage, accidental discharge or leakage of sewage, industrial effluent, and so on, the owner/occupier of the premises is usually liable.

The Department of Environment of Malaysia has issued a guideline on contaminated land management and control, consisting of:

- Malaysian recommended site screening levels for contaminated land.
- Assessing and reporting contaminated sites.
- Remediation of contaminated sites.

Under the guideline, the current landowner has responsibility to determine whether there is any subsurface contamination in its land, and to notify the Department of Environment accordingly. The current landowner is also responsible for identifying the polluter, who is responsible for remediation action if the subsurface contamination is not due to present or previous activities on the land. However, if the polluter cannot be identified or is no longer in operation in Malaysia, the current landowner is responsible for remediation action. Any dispute as to the party responsible for cleaning up the contaminated site is decided by the Director-General of Environmental Quality. However, compliance with the guideline is not mandatory.

ONLINE RESOURCES

Attorney General's Chambers of Malaysia

W www.agc.gov.my/

Description. Official website of the Attorney General's Chambers of Malaysia with legislation in the national language, Malay. Official translations of legislation in English can also be found on this website.

Office of the Chief Registrar, Federal Court of Malaysia

W www.kehakiman.gov.my

Description. Official website of the Office of the Chief Registrar, Federal Court of Malaysia, with decisions in the national language, Malay. Decisions in English can also be found in this website.

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Professional qualifications. Malaysia, Advocate and Solicitor, 1993; Victoria, Barrister and Solicitor, 1991

Areas of practice. M&A; banking; finance; real estate; competition law; foreign investment; venture capital; private equity; personal data protection.

Non-professional qualifications. Bachelor of Science, Monash University

Languages. English, Malay, Mandarin, Cantonese

Professional associations/memberships. International Bar; Malaysian International Chamber of Commerce and Industry; Chinese Chamber of Commerce and Industry of Kuala Lumpur and Selangor; Disciplinary Committee for the Advocates and Solicitors Disciplinary Board of Malaysia.

Publications

- Regularly conducts courses, trainings and seminars on his areas of practice.
- Regular contributor of articles to the Malaysian chapter for the World Bank on *Starting a Business in Malaysia*.
- Authored an article on competition law for the Asian-Mena Counsel magazine by In-House Community.
- Co-author of Malaysia chapter, *Mergers & Acquisitions 2nd Edition*, by *Global Legal Insights*.

Professional qualifications. Malaysia, Advocate and Solicitor, 2003

Areas of practice. M&A; IPOs; banking; finance; real estate; foreign investment; venture capital; private equity.

Languages. English, Malay, Mandarin, Cantonese

Professional associations/memberships. Malaysian International Chamber of Commerce and Industry

Publications. Co-author of Malaysia chapter, *Mergers & Acquisitions 2nd Edition*, by *Global Legal Insights*.

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