1. What are the forms of business entity in Malaysia?

**Common forms of entity**
- Private company limited by shares
- Public company limited by shares (listed/unlisted)
- Partnership

**Less common forms of entity**
- Companies limited by guarantee
- Unlimited companies
- Limited partnership
- Unincorporated associations

2. How is a company managed?

**The basic management structure**

*What form does the management structure take?*
Under the Malaysian Companies Act, 1965 (Companies Act), the business and affairs of the company must be managed by, or be under the direction of, the board of directors. The non-executive directors have voting rights on board decisions and are, as with executive directors, responsible for all decisions taken and powers exercised by the board.

The articles of association of the company set the threshold for decisions of the board (e.g. whether unanimous vote or majority vote is required).

*How are directors appointed to and removed from office?*
In general, the appointment and removal of directors is governed by the articles of association. However, for a public company or its subsidiary, the appointment of a director over the age of 70 years, and for a public company, the removal of its directors, is governed by the Malaysian Companies Act, 1965 (Companies Act). Malaysian case law has indicated that the provisions of the Companies Act regarding removal of directors also apply to private companies and, therefore, a matter of prudence, directors of a private company are also removed in accordance with the provisions of the Companies Act.

*What powers does the board have?*
The board has all the powers of managing, directing and supervising the management of the business and affairs of the company subject to such limitations in the Companies Act (including powers that are specifically reserved to shareholders) and the memorandum and articles of association.

A degree of flexibility can be given to the management under the articles of association, including the ability to change the management, alter procedures and delegate responsibility to committees. Alternatively, the shareholders can, via the articles of association, restrict the powers of management, retaining control over the day-to-day running of the company.

*Are there any residency requirements for directors?*
A company is required to have at least two directors who must have their principal or only place of residence in Malaysia. These two directors may be Malaysian citizens or otherwise. A company must also have at least one company secretary who must have his principal or only place of residence in Malaysia.

*Is there any requirement for directors to hold shares?*
There is no legal requirement for shareholding qualification with respect to directors but the articles of association can provide for such a requirement if the shareholders so decide.

*What duties do directors owe?*

**Overview**
The duties and responsibilities of a director arise under common law and the Companies Act.

As a fiduciary, a director must always exercise his powers for a proper purpose and act in good faith in the best interests of the company. Accordingly, certain duties are placed upon a director, and a director is not permitted to place himself in a situation where his interests conflict with his duty.

**Duty to the company**
Directors owe their primary duty to the company (as distinct from the shareholders) and generally, only the company has a cause of action against the directors for breach of their duties.

Generally, directors are required to act and exercise their powers for a proper purpose and in good faith in the best interests of the company as a whole, and not for their personal interest. A director who is appointed by a shareholder or debenture holder must act in the best interest of the company and in the event of any conflict between his duty to the company and his duty to his nominator, he must not subordinate his duty to act in the best interest of the company to his duty to his nominator.

A director is required to exercise reasonable care, skill and diligence with the knowledge, skill and experience that may reasonably be expected of a director having the same
responsibilities while taking into account any additional knowledge skill and experience that the director has.

A director must not put himself in a position where his personal interests conflict with those of the company. Where a director is directly or indirectly interested in a contract, he may be counted towards the quorum but is required to abstain from voting or participating in the discussion in a board meeting.

A director or an officer of a company must not make improper use of any information acquired by virtue of his position (as a director or an agent) to gain (directly or indirectly) an advantage for himself or for any other person, or to cause detriment to the company.

Duty to the shareholders

The minority shareholders in a company may be entitled to bring an action in their own name (on behalf of the company) against the directors for breach of their duties. To sustain such a claim, the shareholders must show that the company's affairs have been conducted in a manner which either constitutes a “fraud on the minority” or are unfairly prejudicial to their interests or the act complained of is ultra vires.

The shareholders of an unlisted company may also apply to the court under section 181A of the Companies Act for leave to bring an action in the company's name, where such leave will be granted if the court is satisfied that the complainant is acting in good faith and it appears prima facie that the action should be brought.

Duty to creditors

If a company is close to insolvency, the interests of the creditors must be taken into account. If the directors act in a manner with an intent to defraud the creditors of the company or for any fraudulent purposes when the company is insolvent, they may be held guilty of misfeasance.

What types of liability can directors incur?

Directors may incur:

- civil liability for negligent performance of their duties; and/or
- criminal sanctions for violations of specific requirements concerning the organisation and operation of the company.

A person may be disqualified from acting as a director or being involved in the management of a company in certain circumstances, for example, where:

- he is an undischarged bankrupt;
- he had been convicted whether within or outside Malaysia of any offence;
- in connection with the promotion, formation or management of a corporation;
- involving punishable fraud or dishonesty;
- under section 132 (for breach of the statutory duty of directors under the Companies Act) or under section 303 (for breach of the duty to keep proper accounts of the company); or
- of an offence under the securities law or the Companies Act, within a period of five years after his conviction or if he is sentenced to imprisonment, after his release from prison;

- he is or has been a director of an insolvent company which has gone into liquidation and was a director of such other company which went into liquidation within five years of the date on which the first company went into liquidation.

In certain circumstances, a director may also be personally liable to creditors of a company that has gone into insolvent liquidation, for example, where:

- he had knowingly contracted a debt when he had no reasonable or probable expectation that the company would be able to pay that debt; or
- he is guilty of fraudulent trading.

Section 140 of the Companies Act nullifies any provisions (whether contained in the company's articles of association or otherwise) which exempt a company's directors and officers from, or which indemnify them against, any liability which by law would attach to them in respect of any negligence, default, breach of duty or trust of which they may be guilty in relation to the company. However, if a judgment is granted in favour of such a director or officer or if he is acquitted, and the court grants him relief under the Companies Act, then the company may indemnify him against any liability incurred by him in defending the proceedings (whether civil or criminal).

There are a number of ways in which directors can minimise the risk of liability:

- certain actions taken or omissions made by directors can be ratified retrospectively (where permitted under Malaysian law) or approved in advance by the shareholders;
- the directors can maintain directors and officers’ liability insurance policies; and
- the company can maintain a company reimbursement policy to indemnify the company where the company has itself indemnified the directors and officers in the event the directors and officers are found not guilty or a judgment or relief is granted in their favour by the court.
What are the auditing requirements for companies?

There is a statutory requirement of audit applicable to all companies in Malaysia.

3. What are the most common types of M&A transaction?

Private companies

Share acquisitions

A company can issue various types of shares with different rights attached. The most common are ordinary shares with full voting rights and preference shares (which do not entitle the holder to the right to vote at a general meeting or to any right to participate beyond a specified amount in any distribution whether by way of dividend or on redemption in a winding up or otherwise).

A buyer can purchase ordinary shares in a Malaysian private company. By acquiring the ordinary shares in a company, the buyer acquires all voting rights attached to such shares.

An alternative way of acquiring control of a private company in Malaysia is to subscribe for newly issued voting shares which, after taking into account already existing shares, make up over 50 per cent of the entire issued voting share capital of a company (with the existing shareholders being diluted).

Business/asset acquisitions

A buyer can also purchase the business and assets of a company. Each asset has to be transferred subject to the particular formalities required. For some classes of assets, this will mean simply handing over the asset (i.e. physical delivery), although others will require transfer documents (e.g. real property, contracts and intellectual property).

Schemes of reconstruction or amalgamations

Two or more local companies may voluntarily (i.e. without a court order) or in connection with a scheme of reconstruction or amalgamation with a court order in accordance with the Companies Act, amalgamate and continue as one company, which may be one of the amalgamating companies or a new company. The amalgamated company will succeed to all the property, rights and privileges as well as assume the liabilities and obligations of each of the amalgamating companies.

In the case of amalgamation without a court order, the shareholders of the amalgamating companies must approve the amalgamation in accordance with the requirements of its articles of association.

In the case of amalgamation with a court order, a majority in number representing at least 75 per cent in value of the members or class of members of the amalgamating companies and/or a majority in number representing at least 75 per cent in value of the creditors or class of creditors of the amalgamating companies must approve the amalgamation, and the court order is binding on all shareholders and/or creditors. Under the Companies Act, the court order can provide for the transfer to the acquirer of the whole or any part of the assets and business or liabilities of the target, the continuation by or against the acquirer of any legal proceedings pending by or against the target or the dissolution of the target, and any incidental matters.

Schemes of arrangement

A scheme of arrangement is a legislative procedure under the Companies Act allowing a company to be acquired.

The use of a scheme of arrangement to acquire a wholly owned subsidiary requires the active co-operation of the directors of the target and a court order.

The scheme can be effected either:

- **by way of a share-for-share exchange:** all shares in the target held by its existing shareholders (other than the acquirer) are cancelled and in exchange new shares in the acquirer are issued to those shareholders. The reserve created in the target by the cancellation of the shares is capitalised and applied in paying up further shares in the target which are issued to the acquirer in lieu of those cancelled. This is usually used to effect the acquisition of minority held shares in a subsidiary or for a share for share offer; or

- **by way of an acquisition of all or part of the assets and business of the target:** the assets and business of the target are acquired by the acquirer in consideration for the issue of shares in the acquirer to the target. The target then distributes the shares in specie to its shareholders. If the target has no remaining assets or liabilities, it is wound up.

A majority in number representing at least 75 per cent in value of the members or class of members of the amalgamating companies and/or a majority in number representing at least 75 per cent in value of the creditors or class of creditors of the amalgamating companies must approve the scheme, and the court order is binding on all shareholders and/or creditors.

The scheme can be carried out as part of the scheme of reconstruction or amalgamation.
Joint ventures

Two or more parties may form a joint venture to pursue a common commercial goal. Joint ventures are governed by the general principles of contract and company law, and can take many different forms.

Takeovers

Prior to 16 July 2009, private companies incorporated in Malaysia had to observe the letter and spirit of the Malaysian Code on Takeovers and Mergers (the Code) where they had either shareholders’ funds or a paid-up capital of RM10 million or more based on the latest audited accounts (on a consolidated basis, if applicable), and where the purchase consideration for the voting shares over a period of 12 months was RM20 million or more (see under Public companies below and section 6 for a more detailed summary of takeovers). With effect from 16 July 2009, such private companies no longer fall within the purview of the Code.

Public companies

Takeovers (see section 6 for a more detailed summary of public takeovers)

A takeover occurs upon a full offer for 100 per cent of the target’s shares. With the prior consent of the Malaysian Securities Commission (SC), a partial offer for (i) less than 33 per cent (this threshold will be reduced to 30 per cent by the end of 2009 once the Capital Markets and Services Act, 2007 comes into force); or (ii) more than 50 per cent of the total voting rights can be made, without having to make a mandatory offer if the partial takeover offer succeeds.

The conduct of takeovers is governed by the Code, which is administered by the SC. The Code applies to, inter alia, listed or unlisted public companies incorporated in Malaysia. A new code on takeovers and mergers, likely to come into force at the end of 2009, will include foreign incorporated companies whose shares are listed on Bursa Malaysia Securities Berhad (Bursa Malaysia). Currently, an undertaking is obtained from the promoters of foreign incorporated companies that they will comply with the Code.

An offer for the shares of a public company may either be recommended by the target’s board of directors, or hostile. A full offer cannot succeed unless the bidder has received acceptances which will result in the bidder (together with persons acting in concert with it) holding more than 50 per cent of the voting rights in the target. In the case of partial offers for more than 33 per cent, the partial offer must be approved by the offeree shareholders holding more than 50 per cent of the voting shares of the offeree not held by the offeror and persons acting in concert with the offeror.

A potential bidder may be required to make a mandatory offer for all the target’s shares if:

- taken together with shares held or acquired by persons acting in concert with it, the potential bidder acquires more than 33 per cent of the voting shares of the target; or
- together with persons acting in concert with it, it already holds more than 33 per cent but less than 50 per cent of the voting shares of the target, and it (or persons acting in concert with it) acquires or intends to acquire voting rights in the target by more than 2 per cent in any six-month period.

The board of the target (and in some cases, the bidder as well) must obtain independent advice in respect of any takeover offer.

Schemes of arrangements

The scheme of arrangement described on page 45 also applies to public companies. The use of scheme of arrangement is identical with a successful share-for-share takeover bid by the acquirer for all outstanding capital of the target, completed by compulsory acquisition where the former shareholders of the target become the shareholders of the acquirer together with the existing shareholders of the acquirer and the target becomes a wholly owned subsidiary of the acquirer.

Schemes of reconstruction and amalgamations

The amalgamation regime described on page 45 also applies to public companies with the important additional factor that the Code applies to an amalgamation involving two or more public companies.

Joint ventures

Public companies are free to enter into joint venture arrangements as described earlier on this page.

Public-to-private acquisitions (P2Ps)

P2Ps are regulated by the Code, various statutes and the Listing Requirements of Bursa Malaysia (the Listing Requirements).

In Malaysia, these acquisitions involve the buyers acquiring publicly held shares in a company by way of a takeover offer under the Code or by way of a scheme of arrangement or scheme of reconstruction under the Companies Act, and subsequently de-listing such a company.

The transaction will often involve the parent company of the listed company (and sometimes a newly incorporated company) as the bidding vehicle to make an offer to acquire the target’s shares not held by the parent company.
The offer will normally be recommended by the independent directors on the board and will not be hostile. The target will sometimes have other significant shareholders prepared to give an irrevocable undertaking to accept the offer prior to announcement. In P2Ps, as the directors or management of the target will often be the directors or management of the offeror, the board of the offeree must appoint an independent adviser to advise the board of the offeree and its shareholders as soon as possible after it becomes aware of the possibility that a takeover offer may be made.

Do the parties have an obligation to negotiate in good faith to one another in M&A transactions?

The laws of Malaysia do not impose any obligation on parties to a proposed transaction to negotiate in good faith. As such, it is possible for a party to pull out of negotiations completely or to negotiate with another prospective buyer without any good reasons and at any time prior to signing of the sale and purchase agreement. To mitigate the risks associated with this, the parties will often enter into an exclusivity agreement which incorporates lock-out clauses and/or break fees. The break fees operate as the upper limit that may be claimed as damages and generally, the non-defaulting party is still required to prove its damages and loss.

4. What percentage shareholding is required to achieve effective control of a company?

A shareholder who holds 75 per cent or more of the voting shares in a company can pass all shareholders’ resolutions at a general meeting except, inter alia, the following:

- the shareholder itself is not able to constitute a quorum for the meeting. Generally under the laws of Malaysia, a meeting requires at least two persons present and a single shareholder who holds 75 per cent of the voting shares present at the meeting may not be able to form a quorum if he is the only member at the meeting; and
- in the case of an approval for a scheme of arrangement or scheme of reconstruction or amalgamation under the Companies Act where approvals of classes of shareholders are required, the requirement to pass a shareholders’ resolution of any class of shareholders in respect of the scheme is a majority of shareholders who collectively hold 75 per cent or more of the voting shares in a company.

Shareholders’ resolutions include both an ordinary resolution (a resolution that has been passed, if on a show of hands, by more than 50 per cent of members or their proxies present and voting at a meeting or, if on a poll, by members or their proxies present and voting at a meeting holding more than 50 per cent of the voting shares) and a special resolution (a resolution that has been passed, if on a show of hands, by a majority of not less than 75 per cent of members or their proxies present and voting at a meeting or, if on a poll, by members or their proxies present and voting at a meeting holding 75 per cent or more of the voting shares). Under the Companies Act, a shareholders’ resolution is required to amend the articles of association, issue and allot shares, approve the acquisition or disposal of an undertaking or property of a substantial value, appoint and remove an auditor and, subject to the court’s approval, to reduce the capital of the company.

5. Regulation, consents and foreign investment restrictions

Are there any regulated industries?

Investments and acquisitions relating to targets that operate in certain industry sectors require approval or a licence from the relevant ministry.

The most common sectors that are subject to these approval requirements or restrictions are financial services, telecommunications, aviation, direct selling, capital market services activities (i.e. dealing in securities, trading in futures contracts, fund management, advising on corporate finance, investment advice, and financial planning) and insurance. These regulated industries are also subject to foreign shareholding limits.

There may be additional, ongoing notification requirements in respect of the operation of the business and approval requirements for any changes to the shareholding.

Are there any restrictions on the foreign ownership of shares in a Malaysian company?

Prior to 30 June 2009, most acquisitions of interest in Malaysian companies by foreigners in the non-industrial sector required the prior approval of the Foreign Investment Committee (FIC) pursuant to the Guidelines on the Acquisition of Interests, Mergers and Takeovers by Local and Foreign Interests (FIC Guidelines). It was the general policy of the FIC to impose equity conditions on the Malaysian company concerned, the standard condition being a requirement that foreign investment be limited to 70 per cent of voting equity, with the remaining 30 per cent being held by Malay and other Malaysian natives (collectively Bumiputera).

With effect from 30 June 2009, the FIC Guidelines have been repealed. Since 30 June 2009, transactions involving purchase of shares in a company incorporated in Malaysia no longer fall within the purview of the FIC and will only be regulated by the respective sector regulators (for example, the Central Bank and the Minister of Finance for the banking and insurance industry, the Ministry of Domestic Trade, Cooperative and Consumerism for direct selling and hypermarkets, the Securities Commission for the capital market services industry, and the Ministry of International Trade and Industry for the manufacturing industry).
Strategic industries such as telecommunications, aviation, ports, water and energy will continue to be subject to the 30 per cent Bumiputera requirement.

However, acquisition of shares in a company which (i) holds total real properties valued at more than RM20 million (approximately USD5.7 million), and (ii) has real properties constituting more than 50 per cent of its total assets, will still require FIC approval and be subject to an equity condition of 30 per cent Bumiputera, if such an acquisition results in a change in control of the company owned by Bumiputera interest and/or government agency. This is pursuant to new Guidelines on the Acquisition of Properties by Local and Foreign Interests. Bumiputera is defined as:

- a Bumiputera individual which shall mean:
  - for Peninsular Malaysia, a Malay individual or aborigine as defined in Article 160(2) of the Federal Constitution of Malaysia;
  - for Sarawak, an individual as defined in Article 161A(6)(a) of the Federal Constitution of Malaysia; or
  - for Sabah, an individual as defined in Article 161A(6)(b) of the Federal Constitution of Malaysia; or

- a Malaysian incorporated company or institution whereby Bumiputera hold more than 50 per cent of the voting rights in such company or institution.

As stated above, equity conditions in the various regulated sectors in Malaysia are generally determined by the respective ministries in Malaysia and are subject to changes and review by the respective ministries.

Schedule 1 on page 61 sets out a general guide to the foreign ownership restrictions in different industries in Malaysia.

Are there any foreign exchange controls?

There are foreign exchange controls in Malaysia:

- investment in foreign currency assets by residents of Malaysia is permitted, save where the resident has domestic credit facilities and it funds the investment either (i) through conversion of Ringgit in which case its investment is limited to RM50 million (approximately USD14.3 million) per calendar year on a corporate group basis, or (ii) from foreign currency credit facilities in which case its investment is limited to RM100 million (approximately USD28.6 million) per calendar year on a corporate group basis;
- a resident is permitted to pay another resident in foreign currency for settlement of goods and services only from its export earnings;
- a financial guarantee issued by a resident to a non-resident or a financial guarantee obtained by a resident from a non-resident is required to be registered with Bank Negara Malaysia (the Central Bank of Malaysia) at least seven working days prior to the issuance or obtaining of the financial guarantee if the aggregate amount of the financial guarantee exceeds RM50 million (approximately USD14.3 million) and that financial guarantee is to secure a credit facility that has not been registered or approved by Bank Negara Malaysia;
- a transaction between a resident and a non resident is required to be reported to Bank Negara Malaysia if the threshold exceeds RM200,000 (approximately USD57,100) per transaction; and
- a resident requires the prior approval of Bank Negara Malaysia to obtain credit facilities in foreign currency in excess of RM100 million (approximately USD28.6 million) in aggregate on a corporate group basis from non residents (other than from a non resident, non-bank parent company, other resident companies within the same corporate group in Malaysia, and licensed onshore banks).

A resident company is free to borrow:

- any amount in foreign currency from its non-resident, non-bank parent company, other resident companies within the same corporate group in Malaysia, and licensed onshore banks; and
- in Ringgit, including the issuance of Ringgit denominated redeemable preference shares or loan stocks, of any amount from its non-resident, non-bank parent company to finance activities in the real sector in Malaysia (i.e. sectors that contribute to the GDP growth of Malaysia and are non-speculative).

A resident company may issue ordinary shares, non-redeemable preference shares and private debt securities to a non resident.

Is there any merger control?

There is no national competition policy nor specific legislation regulating competition in Malaysia except for competition practices for the communications and multimedia industries under the Communications and Multimedia Act 1998. However, the Ministry of Domestic Trade and Consumer Affairs is formulating a draft competition bill.

Currently, for some trading activities, there are statutes protecting the consumer that have an indirect and consequential impact in encouraging competition or restraining anti-competitive conduct (e.g. the Code, referred to under Takeovers on page 46, the Consumer Protection Act 1999, the Price Control Act 1946, the Trade Description Act 1972, the Direct Sales Act 1993 and the Moneylenders Act 1951).
What are the employee issues?

Are works councils/consultation common?

Malaysian companies do not have employee work councils, although participation in trade unions is common in the lower categories of employment in certain sectors. Unions may be national or in-house unions.

Are any actions required prior to or upon an acquisition for employees?

Employees in Malaysia enjoy certain protection in business or asset purchases (as opposed to share acquisitions) under the Employment Act, 1955 (the Employment Act). Such protections include:

- the services of employees must be terminated in writing and the minimum termination notice period must not be less than that provided for in the Employment Act (unless longer notice periods are contractually agreed); and
- payment of the minimum statutory termination benefits (payable within seven days of termination) in accordance with the rates prescribed in the regulations of the Employment Act (unless higher rates have been contractually agreed). Such statutory termination benefits need not be paid if the purchaser offers the said employees continued employment on terms and conditions no less favourable and recognises the said employee’s years of service at the seller (and the employee accepts such continued employment or unreasonably refuses the same). It should be noted that “employee” under the Employment Act is narrowly defined. For employees not falling within the definition of “employee” in the Employment Act, the protection afforded to them will be governed by the terms of their employment contracts.

Automatic transfer of employment contracts in business or asset purchases (as opposed to share acquisitions) is not recognised in Malaysia.

Consultation with employees or their trade unions is encouraged even though it is not expressly required by any laws.

Are there any notification obligations for employees prior to or upon an acquisition?

Save for the termination notices referred to above and below, there is no mandatory obligation for any further notification to employees, unless contractually agreed. Nevertheless, notification and consultation with employees and unions is encouraged.

The seller is however required by the Employment Act to notify the closest Labour Office of such termination of employment 30 days before the termination takes effect followed by two follow-up notifications (within 14 days after termination takes effect and within 30 days after termination takes effect). Notification to the Labour Office is done by submitting a standard form known as the “PK Form”.

Timing

Written termination notices by the seller must be issued to comply with the minimum notice periods prescribed in the Employment Act. If the notice period is short, the seller may indemnify the employee in lieu of notice. If longer notice periods are prescribed by contract the longer notice periods would have to be complied with.

For employees not falling within the definition of “employee” in the Employment Act, the notice periods afforded to them will be governed by the terms of their employment contracts.

Under the Employment Act, termination benefits must be paid by the seller within seven days of termination unless such payment is not applicable (see below).

Under the Employment Act, if offers of continued employment are made by the purchaser, on terms and conditions no less favourable and previous service is recognised (thus avoiding the need for the seller to pay termination benefits), such offers must be made within seven days of termination by the seller.

In practice, the termination by the seller and continued employment by the purchaser is timed to take place simultaneously and accordingly notices and arrangements are prepared and made in advance.

With which stock exchange requirements must listed companies comply?

What rules generally govern listed companies?

Companies whose shares are listed on the Bursa Malaysia must comply with the Listing Requirements.

The objectives of the Listing Requirements include ensuring that:

- all listed issuers are of a certain minimum size, quality and adequate operation;
- investors and the public are kept fully informed by the listed companies of all facts and information that might affect their interests and in particular, full, accurate and timely disclosure is made of any information which may reasonably be expected to have a material effect on the price, value or market activity in the securities of the listed issuers;
- directors, officers and advisers of listed issuers maintain the highest standards of integrity, accountability, corporate governance and responsibility; and
Directors of listed issuers act in the interests of the company as a whole, particularly where the public represents only a minority of the shareholders or where the directors or major shareholders have material interests in transactions entered into by listed issuers.

The Listing Requirements require listed companies to disclose material information known to the issuer concerning it or any of its subsidiaries which are necessary for informed investing and to ensure that everyone investing in its securities has equal access to such information. Information is considered material if it is reasonably expected to have a material effect on:

- the price, value or market activity of any of the listed issuer’s securities; or
- on the decision of a holder of securities of the listed issuer or an investor in determining his choice of action.

Some examples of events which should be announced include:

- joint ventures or mergers or memoranda of understanding;
- acquisition or loss of a contract, franchise or distributorship rights;
- involvement in litigation or arbitration;
- acquisition or disposal where the percentage ratio (as set out in the Listing Requirements) is equal to or exceeds 5 per cent, or in the case of a related party transaction, where the percentage ratio is equal to or exceeds 0.25 per cent, except where the value is less than RM250,000, or the related party transaction is a recurrent one of a revenue or trading nature which is necessary for day-to-day operations (there are various rules and exceptions on what constitutes related party transactions);
- a change in control or a change in management or change in business direction;
- events of default under financing or sale agreements;
- unusual market activity in the listed issuer’s securities which signifies that a leak of information may have occurred; or
- where the listed issuer learns that there are signs that insider trading may be taking place.

Disclosure of material information may be made after the market closes, and must be made to Bursa Malaysia, the press and newswire services.

In exceptional circumstances, a listed issuer may temporarily refrain from publicly disclosing material information provided that complete confidentiality is maintained. Some examples include:

- when immediate disclosure would prejudice the ability of the listed issuer to pursue its corporate objectives (e.g. if the unfavourable result to the listed issuer outweighs the undesirable consequences of the non disclosure); or
- when the facts are in a state of flux or subject to rapid change and a more appropriate moment for disclosure is imminent.

The Listing Requirements also require listed companies to obtain shareholders’ approval in respect of transactions entered into by the listed issuer or its subsidiaries, such as acquisitions and disposals where the percentage ratio is equal to or exceeds 25 per cent or in the case of related party transactions, where the percentage ratio is equal to or exceeds 5 per cent.

**How does a company delist its share capital?**

An application must be made to Bursa Malaysia to delist and the applicant must fulfill the following criteria:

- shareholders’ approval of delisting must be obtained at a general meeting;
- the resolution must be approved by a majority in number representing at least 75 per cent in nominal value of the shares held by the shareholders present and voting, on a poll, either in person or by proxy at the meeting;
- the resolution must not have been voted against by 10 per cent or more in nominal value of the shares held by the shareholders present and voting, on a poll, either in person or by proxy at the meeting;
- a reasonable exit alternative, normally in cash, should be offered to (i) the shareholders and (ii) the holders of any other classes of listed securities to be delisted; and
- an independent financial adviser has been appointed to advise on the exit offer.

**With which Securities Commission requirements must listed companies comply?**

In addition to obtaining shareholders’ approvals for transactions where the percentage ratio is equal to or exceeds a certain threshold limit, the listed issuer is also required to obtain the prior approval of the SC where it proposes to acquire or dispose of assets (whether or not by way of the issue of securities) which result in a significant change in business direction or policy, i.e.:

- if the acquisition or disposal results in any one of the following percentage ratios being equal to or exceeding 100 per cent; or
- if the acquisition or disposal results in a change in the core business of the listed issuer within 12 months of the completion of the transaction.

There are indications that, with effect from 3 August 2009, the SC’s approval for a disposal which exceeds a certain threshold limit is no longer required. To date, such a change has yet to be gazetted. The calculation of the percentage ratio used by the SC is different from that applied by Bursa Malaysia and inter alia involves a calculation of any of the following:

- the price, value or market activity of any of the listed issuer’s securities; or
- on the decision of a holder of securities of the listed issuer or an investor in determining his choice of action.
net asset value attributable to the shares in the target which are the subject of the transaction compared with net asset value of the listed issuer less net asset value of the shares in the target which are the subject of the disposal;

after-tax profits attributable to the shares in the target which are the subject of the transaction compared with after-tax profits of the listed issuer less after-tax profits attributable to the shares in the target which are the subject of the disposal; or

aggregate value of the consideration for the shares in the target which are the subject of the transaction (including amounts to be assumed by the buyer, such as seller’s liabilities) compared with aggregate market value of all the ordinary shares of the listed issuer.

Is financial assistance prohibited?

What is the nature of the prohibition?

A Malaysian-incorporated company (whether public or private) is prohibited from giving financial assistance (either directly or indirectly) by means of a loan, guarantee or the provision of security or otherwise, for the purpose of or in connection with a purchase of or subscription made or to be made by any person for any shares in itself or its holding company.

The purpose of the financial assistance rules is to maintain capital to protect the company’s creditors and minority shareholders against the deployment of the company’s financial resources, prevent the misuse of assets, and provide for the equal treatment of all shareholders.

Such financial assistance may include gifts, loans, guarantees, provision of security, waiving debt, entering into a joint venture agreement with a third party without any benefit to itself so as to induce the third party to finance a buyer of the company’s shares, or giving financial assistance to a vendor of shares.

The following are arguably not caught by the financial assistance prohibition:

any security or guarantee given for any part of the debt that is not used to acquire or refinance the acquisition of the shares in a company or its holding company (e.g. a working capital facility);

any security or guarantee given by Co. A (previously a target company) for a loan to Co. B (acquiring company) to purchase shares in Co. A where Co. A has pursuant to a scheme of amalgamation or reconstruction of a group of companies under section 176 or section 178 of the Companies Act now become a sister company of Co. B, provided that the scheme of amalgamation or reconstruction was carried out for the commercial benefit or interest of the group;

payment of dividends by the target company to its shareholder (i.e. the acquiring company) which funds are then used by the acquiring company to repay the loan used to finance the purchase of shares in the target company, or distribution of assets as dividends; or

repayment of capital whether by way of cash or in specie pursuant to section 64 of the Companies Act.

Any financial assistance given in relation to borrowings that are used to refinance loans originally used for the acquisition of shares in a company or its holding company may also be caught notwithstanding that it may not be contemporaneous with the purchase or subscription of shares in the company.

What are the sanctions?

The sanctions for breach of the financial assistance rules are serious. The officers of the company may be fined up to RM100,000 and/or imprisoned for up to five years. Directors may also face civil claims for breach of their duties to the company.

The assistance itself (e.g. a loan or guarantee) will be voidable at the option of the company.

Are there any exceptions to the prohibition and is there any procedure which can be followed to make financial assistance possible (i.e. a “whitewash procedure”)?

Depending on the circumstances of the transaction, there are limited statutory exceptions from the prohibition, for public and private companies, such as:

where the lending of money is part of the ordinary business of a company;

the provision of a loan by the company pursuant to an employee share option scheme for the purchase or subscription of shares in the company or its holding company; or

in respect of public listed companies only, they may purchase their own shares provided:

- it is solvent as at the date of purchase and will not become insolvent by incurring debts involved in the obligation to pay for the shares;
- the purchase is made through Bursa Malaysia on which the shares are quoted;
- the purchase is made in good faith and in the interest of the company;

and the shares so purchased may be cancelled and/or retained as treasury shares. Treasury shares may be distributed as dividends to the shareholders or resold on the market of Bursa Malaysia on which the shares are quoted.
6. Public takeovers

What are the forms of a public offer?

A takeover of a public company in Malaysia can be structured as:

- a public offer to acquire all the issued (and to be issued) share capital (or units, as the case may be) of the target from existing shareholders (or unit holders, as the case may be);
- a scheme of arrangement between the target, the shareholders of the target (or unit holders, as the case may be) and the bidder; or
- a scheme of amalgamation or reconstruction.

Other than an offer for all of the issued share capital of the target, partial offers may be permitted with the prior consent of the SC. In general, the SC is strict in approving partial offers (regardless of the percentage involved) and will assess the grounds of an application for partial offer on a case by case basis. Consent may be given if a partial offer is made due to foreign equity restrictions. Where the partial offers would result in the bidder and persons acting in concert with it holding more than 33 per cent but less than 100 per cent of the voting rights of the target, the takeover offer is not successful unless:

- the bidder has received acceptances for not less than that number of voting shares of the target as stated in the offer document; and
- the bidder has received a vote of approval of the takeover offer by offeree shareholders holding in aggregate more than 50 per cent of the voting shares in the target. This may be exempted if the takeover offer has been accepted by one offeree shareholder holding more than 50 per cent of the voting shares.

Save with the consent of the SC, a bidder and any persons acting in concert with it cannot acquire any voting shares:

- during the offer period other than by acceptances of the partial offer; and
- that had been the subject of the partial offer during the period of 12 months from the expiry of the offer period. Consent may be given by the SC where the partial offer has resulted in a holding of less than 33 per cent of the voting shares of the company or in a rescue operation where such purchase is necessary to gain control of a company.

Takeovers can be either recommended by the target’s board, or hostile.

What is the regulatory framework for a public offer?

The Code

The principal source of regulation is the Code, which is a set of rules designed to ensure an efficient, competitive and informed market and to ensure that all shareholders of an offeree have equal opportunities to participate in benefits accruing from the takeover offer.

The SC may be consulted by the parties via their advisers who should communicate with the SC, during or before an offer. The Code has the force of law, and any breach of the Code may result in sanctions such as private or public censure or reprimand, a penalty of up to RM1 million depending on the severity, the withdrawal of the facilities of the stock exchange, suspension of trading in the securities or the listing of the person in breach, or requiring the person in breach to take such steps as the SC may direct to remedy the breach or mitigate the effect of any breach, including making restitution to any person aggrieved by such a breach.

There are a number of other laws regulating certain aspects of takeovers, including the general requirements of company law and laws governing the conduct of securities trading (e.g. insider trading prohibitions).

In addition, the Listing Requirements may be relevant if the shares of the bidder (or the target) are listed on Bursa Malaysia.

Application of the Code

The Code is drafted with listed and non-listed public companies in mind. The Code applies to all offerors, whether they are natural persons (resident in Malaysia or not, and citizens of Malaysia or not), corporations or bodies unincorporate (whether incorporated or carrying on business in Malaysia or not), and extends to acts done or omitted to be done in and outside Malaysia.

What are the main offer terms?

Minimum price requirements

Where the bidder (or any of its persons acting in concert) is subject to an obligation to make a mandatory offer under the Code, the consideration offered by the bidder must not be less than the highest price paid or agreed to be paid by the bidder or any persons acting in concert with it in respect of the voting shares of the target during the period starting six months prior to the commencement of the offer period and the terms of the offer must not be on less favourable terms with respect to value. If voting shares have been acquired by the exercise of conversion rights or warrants, the price will normally be established by
reference to the average high and low market prices of the voting shares in question at the close of business on the day on which the relevant notice was submitted to the target.

If, during the offer period, the bidder (or any persons acting in concert with it) purchases shares above the offer price, the bidder must increase its offer to not less than the highest price paid for the shares acquired during the offer period.

**Cash/non-cash terms**

In a voluntary offer, consideration for an offer may be in cash, securities (e.g., loan notes, shares or other securities of the bidder), or a mixture of both. However, where the consideration is:

- securities (including shares, debentures, notes, bonds) of a public company in Malaysia;
- securities (including shares, debentures, notes, bonds) of a company incorporated outside of Malaysia;
- debentures of a private company in Malaysia; or
- securities (including shares, debentures, notes, bonds) of any public company in Malaysia;

the prior approval of the SC will be required for the bidder to offer such securities in the takeover offer in addition to any other approvals required by the bidder from the SC pursuant to the takeover offer.

**Cash consideration**

Cash consideration is compulsory in mandatory offers (see Mandatory offers on page 58). This means that if a bidder wishes to offer securities as consideration, it must give the shareholders of the target an option to receive cash in lieu of securities (the “cash alternative”).

Where 10 per cent or more of the target’s shares have been purchased for cash by the bidder (or any person acting in concert with it) during the offer period or within six months prior to its commencement, the offer must be in cash (or accompanied by a cash alternative) at a price no lower than the highest price paid for such shares during the offer period or within six months prior to its commencement. A cash offer or a cash alternative on the terms described in the foregoing sentence may also be required even though less than 10 per cent of the voting shares have been acquired by the bidder and persons acting in concert with it in the previous six months, if the circumstances are such that, in the view of the SC, a cash offer or a cash alternative is necessary to ensure similar treatment of shareholders of the same class.

**Non-cash consideration**

Generally, non-cash consideration will consist of the bidder’s ordinary shares though other equity related securities may be offered.

Where unlisted securities are offered as consideration for the acceptance of a takeover offer, the bidder shall disclose to the offeree the value of the unlisted securities based on a reasonable estimate by an independent valuer as may be approved by the SC. Where listed securities are offered as consideration for the acceptance of takeover offer:

- in the case of unissued securities, the value must be the price as approved by the SC;
- in the case of issued securities, the value must be the weighted average market price of the securities for the past five market days preceding the date of the written notice of the takeover offer to the board of directors of the target, Bursa Malaysia and the SC; or
- where there is no trading of the securities for a continuous period of five market days immediately preceding the date of the written notice of the takeover offer to the Board of the target, Bursa Malaysia and the SC, the value must be the weighted average market price of the securities for the past five market days preceding the close of trading on the market day when the securities were last traded.

**Conditions**

**Required conditions:** Every takeover offer must be conditional upon a minimum level of acceptance. For both a mandatory offer and a voluntary offer, the minimum level of acceptance is that which would result in the bidder (and persons acting in concert with it) holding more than 50 per cent of the voting rights.

**Prohibited conditions:** A mandatory offer must not be subject to any condition other than the conditions as to the minimum level of acceptance. A bidder in a voluntary offer will normally subject the voluntary offer to a number of conditions which should not be a defeating condition, the fulfilment of which depends on an opinion, belief or state of mind of the bidder or an event that is within the sole control or is a direct result of an action by the bidder (or any person acting in concert with it).

**Usual conditions:** The common conditions attached to a voluntary offer include:

- valid acceptances in respect of 90 per cent of shares being received by the first closing date or in respect of more than 50 per cent of shares being received by the first closing date. Any reduction of the minimum level of acceptance from 90 per cent to more than 50 per cent during the takeover requires the prior approval of the SC and is generally not allowed (see Squeeze outs on page 59 as to the importance of the 90 per cent threshold);
- passing of such resolutions as are necessary to implement the offer at an extraordinary general meeting of the bidder;
- in the context of a securities exchange offer, admission of new shares in the bidder to listing by the Bursa Malaysia;
necessary approvals from the regulatory authorities have been obtained;
- since the latest announced results to Bursa Malaysia, no material adverse change has occurred in respect of the business, financial or trading position or profits or prospects of the target and/or its subsidiaries;
- no contingent liability has arisen which is likely to materially and adversely affect the target and/or its subsidiaries. Any adverse change of 5 per cent or more in the consolidated net tangible assets of the target since the last announced results may be considered material by the bidder for this purpose;
- no governmental or regulatory body or any other person having proposed, threatened or effected any action, proceedings, suit, investigation or enquiry, or enacted, made or proposed any statute, regulation or order prior to the date when the minimum level of acceptance is met, that would make the voluntary offer void, unenforceable or illegal;
- no material adverse change in national or international, social, monetary, financial, political or economic conditions or exchange control that affect the business, financial or trading position of the target group; and
- no dividends being declared by the target from the date of the notice of takeover offer up to completion of the offer.

All conditions in a voluntary offer must be fulfilled within 21 days after the first closing date or after the minimum level of acceptance is fulfilled, whichever is later, but in any event no later than seven days after the 60 days from the date the offer document is despatched, failing which the voluntary offer lapses.

Funding the acquisition

In a cash offer or where the offer involves an element of cash, the bidder must include in its offer announcement a statement by the financial adviser that the financial adviser is reasonably satisfied that there are sufficient financial resources available to the bidder such that the bidder would be able to carry out the offer in full by way of cash.

What is the timing of a public offer and what is the procedure to be followed?

Simplified offer timetable

<table>
<thead>
<tr>
<th>Date/Time period</th>
<th>Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>D-21</td>
<td>Earliest possible date for the press announcement and notification to the Board of target, Bursa Malaysia and the SC</td>
</tr>
<tr>
<td>D-20</td>
<td>Board of target to inform Bursa Malaysia and make press announcement</td>
</tr>
<tr>
<td>D-14</td>
<td>Last date for board of target to post notification of the written notice to all offeree shareholders</td>
</tr>
<tr>
<td>D-17</td>
<td>Bidder to submit offer document to the SC (Takeover Department) and Bursa Malaysia for clearance. Application to be made to any other authorities whose approval is required under the target’s licence (e.g. Minister of Finance for financial institutions or insurance companies or Minister of International Trade and Industry for licensed manufacturing companies)</td>
</tr>
<tr>
<td>Day 0 (D)</td>
<td>Offer document despatched no later than 21 days after the press announcement</td>
</tr>
<tr>
<td>D+10</td>
<td>Last date for despatch of comments by target’s board and independent advice circular by independent adviser (who shall be approved by the SC) recommending acceptance or rejection of the takeover offer and risks involved</td>
</tr>
<tr>
<td>D+21</td>
<td>Earliest date for first closing date</td>
</tr>
<tr>
<td>First business day after first closing date (and all subsequent closing dates)</td>
<td>Announcement to press, Bursa Malaysia and the SC of closing of offer, acceptance levels, revision (if appropriate) and extension (if appropriate) of offer</td>
</tr>
<tr>
<td>D+46 (assuming first closing date is D+21)</td>
<td>Last day for despatch of notice on revision of offer. An offer, if revised, must be kept open for at least 14 days. Since the offer period must end on D+60 (save for special circumstances), the last day for the despatch of notice on a revision of offer is on D+46</td>
</tr>
<tr>
<td>D+60</td>
<td>Last date for fulfilment of minimum level of acceptance conditions</td>
</tr>
<tr>
<td>D+74</td>
<td>Last closing date. If an offer becomes unconditional on D+60, the closing date will fall 14 days thereafter</td>
</tr>
</tbody>
</table>
Announcements

An announcement of a firm intention to make an offer is made by the bidder after approaching the target board. In a hostile offer, the announcement is usually made immediately after approaching the target board to restrict the time for the target board to marshal its defences. An immediate announcement is required where an obligation to extend a mandatory offer is triggered. Where there is unusual market activity which signifies a leak regarding a possible offer or rumours or reports concerning the information have appeared, Bursa Malaysia will require an immediate announcement to avoid the risk of a false market developing. Such announcements are essential even if the matter has yet to be presented to the listed issuer’s board for consideration.

The announcement of a firm intention to make an offer crystallises the obligation to make an offer (subject to any offer conditions). A bidder will only be permitted by the SC to withdraw its offer in highly exceptional circumstances.

Acceptance period

The offer must be initially open for at least 21 days from posting of the offer document.

The bidder may on any closing date extend the offer by announcing a revised closing date until the offer becomes unconditional as to acceptances which must happen on or before D+60. The takeover offer is generally extended by not less than 14 days from the date in which the takeover offer becomes and is declared unconditional, but in any event the closing date shall not be later than D+74.

On the first business day after the first closing date, any subsequent closing dates and any date on which the offer is revised, extended or declared unconditional as to acceptances, announcements must be made concerning acceptance levels and specifying the percentages of the relevant classes of share capital represented by these figures.

If revised, the offer must be kept open for at least 14 days from the date the revised offer is posted. For this reason, the offer may not be revised after D+46.

Satisfying offer conditions

The last possible date for announcing that the offer is unconditional as to minimum level of acceptances is D+60. Where there is a competitive offer situation and an extension is required, the SC’s approval will be required.

Except with the SC’s consent, in a voluntary offer, all conditions (other than minimum level of acceptances) must be fulfilled within 21 days of the first closing date, or of the date the offer becomes or is declared unconditional as to minimum acceptances (whichever is the later), provided it is not later than D+67, failing which the voluntary offer shall lapse.

Offer unconditional - payment

The bidder must pay for the target’s shares as soon as practicable, but in any event:

- within 21 days after the offer becomes or is declared unconditional in all respects;
- within D+21 in the event the takeover offer has already become or been declared wholly unconditional at the date of posting the offer document; or
- within 14 days of the receipt of valid acceptances where such acceptances were tendered after the offer has become or been declared unconditional in all respects.

Competing bids

An original bidder will be allowed to depart from the offer timetable and revise its offer if a competitive situation arises.

The Code requires that information, including particulars of shareholders, given to one bidder or potential bidder must, on request, be furnished equally and promptly to any other bona fide bidder or potential bidder, who should specify the questions to which it requires answers.

Failed bids and further offers

When an offer has been withdrawn (which is permitted only with the prior consent of the SC) or failed, the bidder and all persons acting in concert with it cannot:

- make a further offer within 12 months without the consent of the SC; or
- acquire any voting rights of the target if the bidder or persons acting in concert with it would thereby become obliged to make a mandatory offer; or
- acquire any voting rights of the target if the bidder holds voting rights carrying over 48 per cent but not more than 50 per cent of the voting rights.

A bidder who wishes to make an offer for the same target within 12 months from the date of the close of a previous partial offer (whether successful or not) must also obtain prior consent from the SC. The bidder (and all persons acting in concert with it) must furnish the SC with details of any acquisition by them of any shares in the target including an option to acquire any shares in the target each month for a period of 12 months from the date that the offer was withdrawn or failed.
What documentation is involved in the process?

Press announcement

An announcement of a firm intention to make an offer must contain (amongst other things):

- the terms and conditions of the offer;
- details of existing holdings in the target held by the bidder and any persons acting in concert with it;
- the total number of shares in respect of which the bidder or any persons acting in concert with it has received an irrevocable undertaking from the offeree shareholders to accept the takeover offer;
- details of any existing or proposed agreement, arrangement or understanding relating to voting shares between the bidder or any persons acting in concert with it and the offeree shareholders; and
- confirmation that the bidder has sufficient financial resources to extend the offer.

Offer document

Where an offer is recommended, the board of the target will, through its independent adviser (approved by the SC), issue an independent advice circular to the offeree shareholders giving the independent adviser’s and the board’s recommendation with respect to the offer.

The offer document issued by the bidder through its adviser must contain the minimum information prescribed under the Code including without limitation:

- the terms of the offer and the conditions attached to it;
- the acceptance procedure;
- the rationale for the offer;
- the bidder’s intention regarding the continuation of the bidder’s business;
- the bidder’s intentions regarding any major changes to be introduced to the business, including any plans to liquidate the target, sell its assets or re-deploy the fixed assets of the target or make any major changes in the structure of the target;
- whether the bidder has any intention to resort to compulsory acquisition powers; and
- whether or not any agreement, arrangement or understanding exists between the bidder or any person acting in concert with it and any of the offeree shareholders or past shareholders (i.e. persons who were shareholders of target during the period six months’ prior to the offer) having any connection with or dependence upon the offer.

The offer document must contain a responsibility statement that each director of the bidder accepts responsibility for the information and that each of them has taken reasonable care to ensure both the facts stated and opinions expressed are fair and accurate and that no material facts have been omitted.

Target documentation

After receipt of notification of an offer, the target board must make an announcement to its shareholders informing them of the offer. The target board must advise the shareholders of the target of its views by way of a circular which must contain the board’s recommendation and the evaluation of the offer by an independent adviser appointed by the board within 10 days after the bidder has despatched the offer document.

What are the practices relating to break fees and lock-out?

A break fee arrangement, whereby a fee is paid by the target to the bidder if a specified event occurs which prevents the offer from succeeding is not practised in Malaysia and it is unlikely that the SC will allow it because such an arrangement would be contrary to minority interest protection.

It is not a common practice for the bidder and the target to enter into a lock-out agreement whereby the target agrees not to enter into, or solicit, negotiations with another potential bidder.

Care must be exercised in entering into a lock-out agreement as the target board has a duty not to take any action which could frustrate an imminent bona fide offer without the shareholders’ approval in a general meeting. A target also has to provide information on an equal basis to all competing bidders.

What are the rules on information gathering/provision?

The Code requires information to be provided equally to all shareholders and also competing bidders.

A bidder may sometimes undertake some due diligence on the target before extending an offer. If price-sensitive information is proposed to be provided by the target to the bidder, this may potentially create an insider trading offence for the bidder to acquire the target shares from the target shareholders.

Publicly available information about the target may be obtained from the Companies Commission of Malaysia and Bursa Malaysia announcements made by the target. The target should not make price-sensitive information available to the bidder (i.e. information which would tend to, on becoming generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of securities).

If non-publicly available information (which is not price sensitive) is proposed to be given, it must be examined whether the target...
What is the position regarding insider trading?

Insider trading is a criminal offence that may also carry civil liabilities.

In general, any person who has information concerning a corporation that is not generally available and which a reasonable person would expect to have a material effect on the price or value of the corporation’s securities, would be guilty of insider trading if he:

- deals in the securities;
- procures others to deal in the securities; and
- communicates the information to a third party where the third party is likely to deal in the securities.

Insider trading applies to:

- acts and omissions in Malaysia in relation to securities of any body corporate formed or carrying on business or listed in or outside Malaysia; and
- acts and omissions occurring outside Malaysia in relation to securities of any body corporate formed or carrying on business or listed in Malaysia.

The consequences for insider trading are:

- a fine not exceeding RM1 million or imprisonment not exceeding 10 years or both; and/or
- the SC may, if it is in the public interest to do so, by civil action (i) recover an amount equal to three times the unlawful profit gained or loss avoided, and (ii) claim a civil penalty not exceeding RM1 million; and/or
- a person who suffers loss or damages may recover the amount of loss or damages by instituting civil proceedings against the other person, whether or not the other person has been charged with an offence.

What are the public disclosure requirements in a takeover scenario?

Bidder

In general, a person who has acquired an interest in 5 per cent or more of a Malaysia incorporated company listed in Malaysia is required to disclose his interest to the company and the SC. Any subsequent changes in the percentage level and cessation of his substantial shareholding must also be disclosed.

During the offer period, the bidder or any persons acting in concert with it shall not dispose of any voting shares of the target unless the disposal is between the bidder and persons acting in concert with it. The following persons, inter alia, must publicly disclose to the press, Bursa Malaysia and the SC, by noon the following market day, dealings by them in the shares of the target and the bidder: (i) the bidder (including purchase of its own shares), (ii) persons acting in concert with it, (iii) chief executives, directors or senior officers of the bidder, (iv) its related companies and associated companies, or (v) their discretionary investment clients (discretionary investment clients include individuals and funds for whom the bidder or any of their associates manage on a discretionary basis). Where shares of the bidder are offered as consideration for the target shares, dealings in shares of the target or bidder by the shareholders of the bidder holding 5 per cent or more must also be disclosed.

Target

During the offer period, the following persons, inter alia, must publicly disclose to the press, Bursa Malaysia and the SC, by noon the following market day, dealings by them in the shares of the target and the bidder: (i) the target, (ii) shareholders of the target holding 5 per cent or more, (iii) chief executives, directors or senior officers of the target, (iv) its related companies and associated companies or (v) their discretionary investment clients (discretionary investment clients include individuals and funds for whom the target or any of their associates manage on a discretionary basis).

Does a memorandum of understanding (MoU) need to be disclosed?

Whether a MoU should be disclosed will depend on the type of acquisition, the parties involved and the terms of the MoU. Once announced, the listed issuer must inform Bursa Malaysia of the status on a quarterly basis or more regularly upon the occurrence of a material change, whichever is earlier. In general, the Listing Requirements stipulate that a listed company must disclose information that is material (i.e. where it is reasonably expected to have a material effect on the price, value or market activity of securities of that company and the decision of an investor in determining his choice of action).

In cases of doubt, the presumption must always be in favour of disclosure. Some exceptional circumstances where disclosure may be temporarily withheld include:

- when immediate disclosure would prejudice the ability of listed issuer to pursue its corporate objectives (e.g. where it would
prevent the listed issuer from carrying out its plan to acquire assets due to the resulting increase in cost); or
ii. when the facts are in a state of flux and subject to rapid change and a more appropriate moment for disclosure is imminent when the situation has stabilised.

What are the limitations to stakebuilding?

Acquisition of shares carrying more than 33 per cent of the voting rights of a company will usually trigger a mandatory offer.

In general, a person who acquires an interest in 5 per cent or more of a Malaysia incorporated company listed in Malaysia is required to disclose to the company and the SC his interest and any subsequent change in the percentage level of his interest or cessation of his substantial shareholding.

Is there a requirement to make a mandatory offer?

There is a requirement under the Code to make a mandatory offer for the target’s shares if the shareholding of a person exceeds certain thresholds. The SC may grant dispensations in limited circumstances.

A mandatory offer must be made when:

i. a person acquires (together with shares held or acquired by persons acting in concert with him) shares which carry more than 33 per cent of the voting shares of a company; or
ii. any person who (together with persons acting in concert with him) holds more than 33 per cent but less than 50 per cent of the voting shares, or any person acting in concert with him, acquires additional shares which increase his percentage of the voting shares by more than 2 per cent in any six-month period.

In general, the acquisition of convertible securities does not give rise to a mandatory obligation but the exercise of any conversion or subscription rights or options is an acquisition of voting shares. There are comprehensive rules relating to whose shareholdings must be aggregated and who will be treated as a person acting in concert with the bidder.

The mandatory offer must offer a cash consideration or a cash alternative at not less than the highest price paid by the bidder or any person acting in concert with him for shares of that class in the previous six months. It must be conditional only upon acceptances of more than 50 per cent of the target shares.

The SC may waive the requirement to make a mandatory offer in the following circumstances:

i. where a person incurs such an obligation by reason of the issue of new securities to him as consideration for a sale or disposal of assets or interest by that person;
ii. where a person incurs such an obligation by reason of the person subscribing for new voting shares for (a) cash (e.g. rights issue) or (b) pursuant to an exercise of any conversion or subscription rights or options;
iii. where a person incurs such an obligation by reason of the person acquiring new securities in fulfilment of obligations under an underwriting agreement;
iv. where a person incurs such an obligation by reason of the person exercising the conversion or subscription rights in his convertible securities in order to maintain his previous level of voting shares of the target which has been diluted as a result of the exercise of conversion by other holders;
v. where a person incurs such an obligation by reason of an acquisition of voting shares of a company and the remaining holders of voting shares of a company have given written undertakings not to accept an offer (this generally applies to a private or public non listed company); and
vi. where a person incurs such an obligation in respect of transactions involving the acquisition of additional voting shares by members of a group acting in concert, provided that in (i), (ii) and (iii) (a) the independent shareholders of the target pass a resolution in a general meeting by way of a poll to waive their rights to receive a general offer from the bidder and persons acting in concert with him, (b) the person to whom shares have been issued and persons acting in concert with him has not purchased voting shares in the six months prior to the posting of the circular relating to the proposal and subsequent to negotiations, discussion, understanding or agreement with the directors of the company relating to the proposed issue of the new securities, whichever is the shorter period, and (c) the person to whom shares have been issued and persons acting in concert with him have not acquired any voting shares of the target during the period between the posting of the circular or application to the SC for an exemption and the granting of an exemption by the SC. Statutory rules apply if such a resolution referred to in (a) above (“white-wash resolution”) is sought from the target’s independent shareholders.

What defences are available to a target company during the stages of an offer?

A target may attempt to ward off a hostile offer by undertaking defences.

Defences available before a takeover offer is made (e.g. poison pills) are rarely used by companies incorporated in Malaysia as there are concerns of conflicts with the target board’s fiduciary duty. In general, whether by design or otherwise, some Malaysian companies may have a capital structure which may make it more difficult or time consuming and expensive to obtain voting control of the target, especially where there are convertible securities, warrants or other subscription rights and employees
share options. A controlling shareholder may thwart an offer by converting its securities to voting shares thus expanding the equity and making it difficult for the bidder to know the precise number of shares involved.

During the offer period, the target’s board is not allowed to take any action which might deny shareholders an opportunity to decide on the merits of an offer that has been received or a bona fide offer which is reasonably believed to be imminent without shareholders’ approval at a general meeting.

After an offer has been received in a hostile takeover, the defence is usually confined to seeking a “white knight”, or stating in the target documentation that the target’s board does not believe that acceptance of the offer is in the best interests of the target or its shareholders.

Apart from the duty not to frustrate an offer, the target’s board must generally act in the best interests of the target’s shareholders as a whole.

What obligations are the directors of the bidder and target under?

**Bidder**

The Code imposes considerable obligations on the directors of the bidder. In addition, the directors of the bidder must consider the insider trading legislation if they are contemplating dealing in the shares of the target and in the bidder.

The advisers to the bidder should prepare a comprehensive memorandum of the directors’ obligations as soon as the bidder starts to consider the possibility of making an offer.

**Target**

The Code imposes considerable obligations on the directors of the target. In addition they must comply with their obligations under the Listing Requirements as well as their fiduciary duties to the target.

The directors of the target must not take any action which might constitute oppression of the minority shareholders of the target. The minority shareholders may seek statutory redress against oppression.

The advisers to the target should prepare a comprehensive memorandum of the directors’ obligations immediately following any offer approach.

What is the procedure for a squeeze-out of the minority?

Where a takeover offer is made for a company incorporated in Malaysia and acceptances are received in respect of 90 per cent or more of the shares to which the offer relates (other than shares already held at the date of the takeover offer by the bidder, its nominee, including persons acting in concert with it, or a related corporation) within four months of the making of the offer, the bidder may compulsorily acquire the shares of the non-accepting shareholders. Once the Capital Markets and Services Act, 2007, comes into force (probably by the end of 2009), the threshold will be 90 per cent or more of the shares of the target (including shares already held at the date of the takeover offer by the bidder or persons acting in concert with it).

Shares acquired by the bidder, its related corporation or a nominee of the bidder or its related corporation prior to making the offer cannot be taken into account in calculating whether the 90 per cent threshold has been reached, although shares subject to an irrevocable undertaking to accept the offer can usually be taken into account.

Notices must be served on the non-accepting shareholders within two months of reaching the 90 per cent threshold, and the non-accepting shareholders have a right to apply to the court for an order that the bidder shall not be entitled to acquire the shares or specifying terms of acquisition different from those of the offer. If the bidder has, together with shares held by the bidder, its nominee (including any person acting in concert with it) or related corporation, acquired not less than 90 per cent of all of the shares in the company, a minority shareholder also has a right to be bought out by the bidder.

7. Overview of a private company acquisition

**Timing**

The timing of a private acquisition depends on the cooperation between the parties, and the progress of negotiations and other matters specific to the transaction.

**Steps**

In general, the acquisition can be an auction process or a privately negotiated deal in Malaysia.

An example of an overview of the steps involved in an auction process involving an acquisition of a private company incorporated in Malaysia is as follows:

- seller issues an information memorandum (IM), which describes the business and affairs of the target, and must be deposited with the SC within seven days after it is first issued;
bidders sign a confidentiality agreement when receiving the IM;
bidders carry out due diligence on the target;
bidders are given a draft sale and purchase agreement, any other ancillary agreements and disclosure letter;
bidders submit their bid and their mark up of the draft sale and purchase agreement;
seller chooses the highest bidder and parties may negotiate further on the draft sale and purchase agreement;
parties sign the sale and purchase agreement;
satisfaction of conditions precedent;
completion; and
post completion matters.

8. What tax issues should be considered?

Capital gains

There is no capital gains tax in Malaysia.

Transfer taxes

Transfer tax (i.e. stamp duty) is payable on certain written agreements and transfer documents for the sale of shares. Stamp duty is also payable on the conveyance or transfer of immovable property.

The rate of stamp duty for the transfer of shares of a company incorporated in Malaysia is 0.3 per cent on the highest of the following:

- consideration paid per share;
- the net tangible asset value per share (normally determined by reference to the latest available audited financial statements of the company);
- the par value per share; or
- the price earnings ratio (which is based on profit after tax per share) at a multiple depending on the industry.

The rate of stamp duty for the transfer of immovable property is 1 per cent on the first RM100,000, 2 per cent on any amount between RM100,001 and RM500,000, and 3 per cent on any amount exceeding RM500,000.

Stamp duty must be paid if title needs to be proved or the agreements or documents are to be produced in evidence before a court, tribunal, board, commission or similar body in, or registered in, Malaysia.

Thin capitalisation/interest deductions

A company may in general claim a deduction from interest paid under a loan used for the purposes of producing income when calculating its taxable profits.

If an interest payment is re-characterised as a distribution then the borrower will not be entitled to a deduction in calculating its profits for corporate tax purposes.

If the consideration given by the company for the use of the principal represents more than a reasonable commercial return, the excess may not be available for tax deduction when calculating the profits for corporate tax purposes.

The tax authority is empowered to disallow the portion of the interest charges that relates to the amount of financial assistance, which is excessive by reference to the fixed capital. Until a tax ruling is issued, it is unclear what constitutes “financial assistance” and “fixed capital” and how the arm’s length ratio is to be determined. However, the tax authority has indicated that the debt to equity ratio should not be more than 3:1 and that any interest attributable to the debt over and above the 3:1 ratio will not be deductible as an expense.

Withholding tax

If a person makes a payment of Malaysian source interest to a person not resident in Malaysia, that person may be obliged to deduct income tax at the prevailing rate of 15 per cent.

Withholding tax at the rate of 10 per cent is applicable on payments of royalties and rents for any moveable property which is deemed to be derived in Malaysia to a person not resident in Malaysia. Such income shall be deemed to be derived in Malaysia if the payer is a resident or the payment is charged as an outgoing or expense in the account of the business carried on in Malaysia.

Withholding tax rates may be reduced by applicable tax treaties between Malaysia and the country of residence of the non-resident person.

There are a number of exemptions where there is no requirement to withhold tax; for example, interest paid by a Malaysian licensed bank and interest paid out of certain qualifying debt securities.

There is no withholding tax on dividend payments.
### Schedule 1: General guide to the foreign ownership restrictions in Malaysia

<table>
<thead>
<tr>
<th>Type of business</th>
<th>General maximum permissible foreign shareholding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Activities which involve national interest, e.g. water and energy supply, broadcasting, defence and security</td>
<td>30%</td>
</tr>
<tr>
<td>Airlines</td>
<td>30%</td>
</tr>
<tr>
<td>Commercial banks (local domestic banks)</td>
<td>30% (100% will be considered for two new commercial banks in 2009 and three new commercial banks in 2011 to be established by world class banks)</td>
</tr>
<tr>
<td>Investment banks</td>
<td>70%</td>
</tr>
<tr>
<td>Insurance</td>
<td>70% (a higher foreign limit will be considered on a case-by-case basis)</td>
</tr>
<tr>
<td>Money broking</td>
<td>100% (acquisition of current seven money broking firms, no new entrants)</td>
</tr>
<tr>
<td>Dealing in securities</td>
<td>70% (with minimum 30% Bumiputera equity)</td>
</tr>
<tr>
<td>Fund management</td>
<td>70% (with minimum 30% Bumiputera equity but 100% foreign shareholding will be considered on a case-by-case basis for qualified applicants)</td>
</tr>
<tr>
<td>Advising on corporate finance, financial planning</td>
<td>70% (with 30% local shareholding)</td>
</tr>
<tr>
<td>Supply of products and services to oil and gas companies and marketing activities and distribution of petroleum goods</td>
<td>49% with at least 51% Bumiputera equity. (Priority is given to Bumiputera individuals/100% Bumiputera-owned companies to operate petrol stations/skid tank/floating barge owned and built by oil companies)</td>
</tr>
<tr>
<td>Upstream oil and gas industry</td>
<td>All foreign energy investment is conducted through production sharing contracts between foreign operators and Petronas</td>
</tr>
<tr>
<td>Company that is set up to acquire non-performing loans from financial institutions in Malaysia</td>
<td>49%</td>
</tr>
<tr>
<td>Owns Malaysian vessels registered under the Merchant Shipping Ordinance 1952 in Malaysia</td>
<td>49% (with at least 30% Bumiputera equity and the majority of the voting shares must be held by a Malaysian free from all encumbrances)</td>
</tr>
<tr>
<td>Freight forwarding agent</td>
<td>49% with at least 51% Bumiputera equity</td>
</tr>
<tr>
<td>Shipping agent</td>
<td>70% with at least 30% Bumiputera equity</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>First five years: 61% Sixth year and thereafter: 49%</td>
</tr>
<tr>
<td>Retail and distributive trade e.g, hypermarkets, convenience stores, direct selling</td>
<td>70%</td>
</tr>
</tbody>
</table>
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