Global Private M&A Guide - Limited External Content - Malaysia

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

The regulatory regime can appear disorderly due to the intricate interplay of rules and regulations that are subject to government policy relating to the industry in which the target company is operating.

Not all governmental policies are written, and guidelines or directives may not be publicly available for inspection. Therefore, it is common, as part of due diligence, to contact regulators to confirm the latest policy positions. It is also common for companies to hold "grandfathered" licenses that may not reflect the latest policy positions (for example, the shareholding structure may not reflect the latest equity conditions if an application for a new license is to be made today). This will present difficulties in a share sale that is likely to trigger regulatory approval as a result of the proposed share transfer.

It is important to inspect the internal documents of the target company and not to rely on public searches. Information obtained from searches conducted on public registers maintained by governmental or other regulatory authorities may not be current (due to delays in updating information) or may not be accurately recorded in those registers by the relevant authorities.

There is no official centralized database from which litigation searches may be conducted. However, searches may be conducted at the relevant court registers if the buyer has details of the relevant litigation proceedings.

**Pricing and payment and foreign exchange control**

*Share sale*

A resident is allowed to make or receive payment in Malaysian ringgit or foreign currency in Malaysia to or from a nonresident for the settlement of shares in a Malaysian company.

*Asset sale*

In an asset sale, unless the foreign buyer already has an existing entity in Malaysia, a foreign buyer must first incorporate a local company or, if the buyer is a foreign company, register a branch with the Companies Commission of Malaysia before undertaking the business of the transferred assets.

The registered branch of a foreign company is treated as a resident for exchange control purposes. Payment between residents for a Malaysian asset must be made in the Malaysian local currency (Malaysian ringgit) (even where the payment for the asset transfer is to be settled between foreign shareholders outside of Malaysia) unless the prior written approval of Bank Negara Malaysia (BNM), the central bank of Malaysia, has been obtained for such payment to be made in foreign currency.

**Signing/closing**

*Is a deposit required?*

Paying a deposit is common practice for a share sale or asset sale.

*Is simultaneous signing/closing common?*

Simultaneous signing and closing is not common for the following reasons:

Most industries are regulated and regulatory approvals are typically required for an asset sale or share sale. The approval process can often be lengthy and involve several regulatory bodies.

Licenses are not transferable and the buyer in an asset sale will have to apply for new licenses, permits or approvals to carry on the transferred business prior to closing.

Unless the foreign buyer already has an existing entity in Malaysia to acquire the assets, a new entity needs to be incorporated, which will result in a gap between signing and closing in an asset sale.

It is possible for signing and closing to occur simultaneously when no regulatory approvals or other conditions precedent are required.

## Approvals/registrations

**Foreign investment restrictions**

Malaysia does not have a foreign investment screening procedure. However, foreign investment is regulated by way of imposing foreign equity restrictions and/or “Bumiputera”/local participation requirements in Malaysia. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Merger control in Malaysia currently only applies to mergers in the aviation service market and communications market, and notification is voluntary. There are no specified jurisdictional thresholds for authorities to investigate a merger, but the Malaysian Aviation Commission (MAVCOM) is more likely to investigate a merger where the combined turnover in Malaysia, or worldwide, meets certain thresholds. Licensees under the Communications and Multimedia Act 1998 (CMA) may also apply for authorization, which allows for conduct including mergers that could potentially result in substantial lessening of competition. This process is separate from the voluntary merger assessment regime and an application can be submitted at different times or without it. For further information, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

Generally, government policy (rather than statute) limits acquisitions in specific industries, although certain Malaysian legislation sets caps on foreign equity participation in Malaysian companies operating in particular industries.

An example is that foreign business operators engaged in "distributive trade services" in Malaysia are recommended to obtain the approval of the Ministry of Domestic Trade and Cost of Living before commencing operations under its Guidelines on Foreign Participation in the Distributive Trade Services Malaysia 2020 (DTG). There are shareholding restrictions depending on the format of distribution (such as hypermarkets and convenience stores).

The DTG is not law and it represents the Malaysian government's current policy. Although there are no legal sanctions against noncompliance, the DTG is enforced administratively via the refusal to register new business branches of foreign companies or through licensing restrictions and the issuance of immigration passes by other regulatory authorities (such as the immigration department).

## Employment

**Share sale**

In a share sale, there is no change of employer, as the employees remain employed by the target company post-share sale. As such, no consent by employees is required.

**Asset sale**

There is no automatic transfer of employees in a business or asset sale in Malaysia, and an employer cannot unilaterally transfer an employee to another employer without the employee's consent. The employees must either resign or be terminated by the seller and offered new employment by the buyer.

If the employees are: (i) in West Malaysia or Labuan; and (ii) either earn MYR 4,000 per month or less, or are engaged in specified work (e.g., manual labor, supervising manual labor or operating a motor vehicle) regardless of wages), the payment of termination benefits may be required, under the Malaysian Employment Act. The provision of minimum termination notice or payment of salary in lieu (which applies to all employees in West Malaysia and Labuan) as prescribed under the Malaysian Employment Act may also be required, depending on the employee transfer route.

## Tax

**Share sale**

The following taxes are applicable on a share sale:

Stamp duty is payable on the share transfer form, as the instrument of transfer (and not the definitive agreement), at a rate of 0.3% of the consideration price or market value of the shares (calculated based on the net tangible assets value).

Real property gains tax (RPGT). Please see "Asset sale" below in respect of RPC Shares.

**Asset sale**

The following taxes are applicable in an asset sale:

Stamp duty is levied on the instruments of transfer (such as an asset transfer agreement or assignment agreement) at an ad valorem rate of 1% on the first MYR 100,000, 2% on the next MYR 400,000, 3% on the next MYR 500,000 and 4% on any amount in excess of MYR 1 million on the balance of the market value of the property or the consideration given for it, whichever is higher. The instrument of transfer must be submitted to the stamp office for adjudication within: (i) 30 days of the date of execution if executed in Malaysia; or (ii) 30 days after it was received in Malaysia if executed outside of Malaysia. The stamp duty must be paid within 30 days from the date of the notice of assessment issued by the stamp office.

RPGT is imposed on gains arising from the disposal of real properties or the disposal of shares in a real property company (i.e., where real property forms 75% or more of the tangible assets of such company) ("**RPC Shares**") at a sliding rate of 10% to 30% depending on the holding period of the real property and whether the seller is a company incorporated in Malaysia, a citizen or a permanent resident. Where RPGT is payable: (i) the buyer must retain 3% of the purchase price (7% if the seller is not a citizen, permanent resident or a company incorporated in Malaysia) and they must pay such amount to the Inland Revenue Board (IRB) within 60 days of the disposal of the real property or the RPC Shares ("**Date of Disposal**"); and (ii) both the seller and buyer must file returns for the RPGT in the forms prescribed by the IRB to the IRB within 60 days from the Date of Disposal. From 1 January 2022 onwards, the retention rate of 3% was increased to 5% for disposals by a company incorporated in Malaysia within three years from the date of acquisition of the real property or RPC Shares.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

As in other jurisdictions, the acquisition of a business in Malaysia may be structured as either a sale of shares or a sale of assets (or a combination of the two). In particular, the buyer may purchase the shares of the company operating the business from its shareholders or purchase the assets of the business directly from that company.

Auction processes are not uncommon in Malaysia and are becoming increasingly prevalent, especially when they involve significant target businesses. They are customary for businesses being sold by private equity firms and large corporations. Bid letters are widely used to regulate the auction process. Typically, the sellers may require the bidders to submit an indicative nonbinding bid based on limited information, followed by a final, binding bid upon the completion of a reasonably extensive due diligence exercise.

Malaysia has long had provisions in its Companies Act for schemes of arrangement. These were originally modeled on the UK Companies Act 1948 and they have remained largely intact under the current version of the Companies Act (which came into effect in January 2017). The scheme involves a court-convened meeting to approve the scheme followed by the sanction of the high court if requisite majorities are obtained at the court-convened meeting. The Companies Act also contains provisions to facilitate schemes of the amalgamation of companies, which are often used in corporate reorganizations.

In addition to the sale of shares, assets or businesses, and schemes of arrangement and amalgamation, there are provisions in certain statutes (such as the Financial Services Act and the Capital Markets and Services Act) that enable the transfer of assets and liabilities through vesting orders issued by a court following the approval of the transaction by the sectoral regulatory authority. The foregoing methods of effecting mergers often involve one or more of the following:

Transferring one company's business assets to another company, followed by the liquidation or disposal of the transferor company.

Establishing a new company that acquires the assets of two or more entities that, following the transfer of assets, are liquidated or disposed of.

Transferring the shares in one company (company A) to another company (company B), followed by the liquidation of company A and a distribution of its assets in its present form (in specie) to company B.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Under the Companies Act, a company may be limited by shares, limited by guarantee or unlimited. The usual form of a subsidiary company is a company limited by shares. If a company is limited by shares, the liability of its members (shareholders) is limited to the amount, if any, unpaid on their shares.

## What are the different types of limited liability companies?

Companies limited by shares and companies limited by guarantee.

## Is there a restriction on shareholder numbers?

The limit of the number of members is 50 (exclusive of employee members) for private companies. There is no limit for public companies.

## What are the key features of a share sale and purchase?

A share acquisition is generally simpler to implement from both the seller's and buyer's point of view. A share acquisition involves the transfer of ownership of only the shares in the target company, which, as a matter of Malaysian law, is a relatively straightforward process. It also provides continuity of the business for the buyer and a clean break for the seller.

## What are the key features of an asset sale and purchase?

An asset sale involves identifying and transferring title to specific assets or categories of asset and, as such, it is generally more complicated. The target's assets will commonly include land and premises, inventory and work in progress, book debts, intellectual property rights, goodwill, insurance, leasing, hire purchase and other contracts, and plant and machinery. It is therefore often necessary to transfer each asset or category of asset from the target to the buyer by way of different conveyances, assignments and transfers that, in some instances, will also require consents from third parties not directly involved in the transaction. New permits or authorizations may also be required to carry on the business. The transfer of assets also raises additional concerns in relation to the employees of the business.

One of the main advantages of asset acquisition is that the buyer may choose specific assets or liabilities to be purchased or assumed, leaving behind those assets and liabilities that it does not require. The asset buyer will not generally inherit the target company's liabilities unless those liabilities are specifically acquired.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

It is not uncommon for parties to enter into a term sheet or a letter of intent to set out the commercial terms of the transaction. Such terms are not typically binding, but parties will often provide for certain binding terms, e.g., confidentiality and exclusivity.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: Exclusivity provisions are commonly included in term sheets/letters of intent.

**Break fee**: Break fees are not common provisions in term sheets/letters of intent. In Malaysia, deposits are more common, that is, the seller will request that the buyer pay a deposit at the time of the execution of the transaction as part of the purchase price. It is rare for the seller to ask for the payment of a break fee.

**Confidentiality**: Confidentiality provisions are commonly included in term sheets/letters of intent.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Once the term sheet has been signed and the parties progress to a definitive agreement, the agreement will usually have a confidentiality clause. The definitive agreement will not usually have an exclusivity clause because it is not necessary, as the agreement represents a binding legal commitment to conclude the transaction based on the terms of the agreement. Break fee clauses are not common in Malaysia.

## Is there a duty or obligation to negotiate in good faith?

There is no general duty or obligation to act in good faith unless provided for in the term sheet or letter of intent (which is uncommon). Similarly, it is uncommon for parties to agree, in a term sheet or letter of intent, on "break fees" payable in the event that the sale and purchase agreement is not entered into. However, if a party breaches any of the binding terms under the term sheet or letter of intent, the party will be liable for breach of contract. However, it is customary for a seller to ask for a deposit of up to 10% of the purchase price to be paid by the buyer upon the execution of the purchase agreement, which may be forfeited by the seller if the transaction is not completed due to the nonperformance of the buyer's obligations.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Very common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash-free/debt-free and working capital are very common. Net asset value (NAV) is fairly common. The type of adjustment (whether based on earnings before interest, tax, depreciation and amortization (EBITDA), EV, NAV, etc.) will typically depend on the industry, type of business and stage of the target's business life cycle.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Collars are rarely used.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: The target company usually prepares this (but the buyer may be involved in the process of preparing the accounts).

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely.

## Is an earn-out common?

Frequency/market practice: It is fairly commonly requested but sellers will typically push back. Earn-outs are commonly capped.

## Is a deposit common?

Frequency/market practice: It is fairly commonly requested by local sellers but foreign buyers will typically push back.

## Is an escrow common?

Frequency/market practice: It is fairly common to have an escrow arrangement where a deposit is payable. It is less common to have a deposit used as a break fee.

## Is a break fee common?

Frequency/market practice: Rarely, but it is seen occasionally.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: This is becoming increasingly common, though it is typically used in the context of targets exposed to significant risks or where parties expect it will take a long time for the conditions precedent to be fulfilled.

## Is the MAE general or specific?

Frequency/market practice: Both are seen and it is increasingly more specific.

## Is the MAE quantified?

Frequency/market practice: Yes, it is common to have quantitative criteria.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common; it is more common for sales of businesses. There may be enforceability issues if used in share sales, as it may be a restraint of trade.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Yes, it is common to use a blue pencil method as long as the parties include an express provision to such effect. If the parties do not include such a provision, then a court may still interpret the terms of the agreement based on the intention of both parties and taking the facts and circumstances of the transaction into account.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: It is fairly common for parties to agree on certain pre-completion covenants.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Rarely. Access is typically restricted to limited types of information (such as management accounts).

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Rarely. Notification of a possible breach is common. Where there is a material breach, there is a right to rescind or terminate.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common. Materiality qualifiers are commonly seen but they are often not quantified (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are increasingly common. They are often limited to the actual knowledge and due inquiry of a specified list of senior management personnel.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Rarely. Sellers are increasingly resisting information warranties.

## Is disclosure of the data room common?

Frequency/market practice: This is becoming increasingly common.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Repetition at completion is common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: It is rare to repeat warranties at all times between signing and completion (unless the buyer is in a very strong bargaining position relative to the seller). Well-advised sellers will always try to resist repeating the warranties at all times between signing and completion.

## Is a bring-down certificate at closing common?

Frequency/market practice: Bring-down certificates are not common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is common but there will often be carve-outs for fundamental representations that must be true.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely. Double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: Title and capacity warranties are usually uncapped or capped at 100%. Business and operational warranties are often in the range of 20% to 50%.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Warranties only. Sellers with a strong bargaining position (typically in auction processes) ask for the cap to apply to the whole agreement.

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties are often excepted or capped at 100% of the purchase price (e.g., title, capitalization and authority). Tax and other specific areas of concern may also be excepted or specific higher caps may be applied. Separate caps can be negotiated.

## Is a deductible or basket common?

Frequency/market practice: Fairly common. This is determined on a case-by-case basis, and it depends on the industry and target in question.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: A general survival of 18-24 months is common, tied to one to two audit cycles. Tax is commonly seven years, which ties to the tax audit statutory limitation period.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud.

## Is warranty insurance common?

Frequency/market practice: Only common if financial sponsors are involved (either as a buyer or seller).

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: It is not commonly seen.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: It is fairly common for proceeds actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: It is fairly common for proceeds actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: It is not usually express, but it is required by law.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: It is fairly common that buyers will limit knowledge to matters referred to in the agreed bundle of due diligence documents, the purchase agreement and the disclosure letter and that, otherwise, the buyer's knowledge does not affect the ability to make warranty or indemnity claims.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes.

## What is the common governing law?

Frequency/market practice: Malaysian law.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: On balance, arbitration is more common. Foreign parties prefer arbitration outside Malaysia, usually Singapore, Hong Kong or London.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: The buyer, by law, pays the stamp duty and it is unusual to agree otherwise. The rate is 0.3% of the purchase price or market value of the transacted shares.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is fairly common to have tax indemnities, usually included in the purchase agreement.

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