CHRISTOPHER & LEE ONG | *Malaysia*

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Public Mergers & Acquisitions in Malaysia

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TABLE OF CONTENTS

CHAPTER 1 KEY LAWS AND REGULATIONS

Public mergers & acquisitions in Malaysia ("**Code Takeovers**") are primarily governed by the Capital Markets and Services Act 2007, the Malaysian Code on Take-Overs & Mergers 2010 (the "**Code**") and its practice notes as well as the Guidelines on Contents of Applications relating to Take-overs and Mergers.

(1) Capital Markets and Services Act 2007 ("CMSA")

The CMSA regulates and provides for matters relating to the activities of markets and intermediaries in the Malaysian capital markets. In terms of Code Takeovers, the CMSA empowers the Securities Commission Malaysia ("**SC**") to make recommendations to the Minister and to administer the Code according to the objectives under the CMSA. The CMSA also provides for compulsory acquisition by offerors in a takeover and rights of minority shareholders under such a scenario.

(2) Malaysian Code on Take-Overs & Mergers 2010

The Code governs the conduct of all parties involved in takeover offers, mergers and acquisitions in Malaysia. The Code is issued and administered by the SC and is enacted pursuant to section 217 of the CMSA. The Code is applicable when the target company ("**Target**") is a Malaysian public company (whether or not listed of any stock exchange), or a real estate investment trust or a foreign company that is listed on Bursa Malaysia Securities Berhad ("**Bursa**") and would apply where such company or trust is subject to a merger and acquisition exercise. As such, a takeover offer must be in compliance with the provisions of the Code and any ruling made by the SC.

Other key laws and regulations that are relevant to Code Takeovers are set out below:

(3) Companies Act 1965 ("Companies Act")

While the CMSA and the Code mainly govern the processes and procedures of a Code Takeover offer, the Companies Act provides for *inter alia* the conduct and affairs of companies, director's duties and disclosure requirements on substantial shareholding in a company.

(4) Bursa Malaysia Securities Berhad Listing Requirements ("Listing Requirements")

Where a company is listed on Bursa (whether on the Main Market or the Ace Market), the company is required to comply with the Listing Requirements (with each of the Main Market and Ace Market having its own requirements) which contains rules that govern matters such as the conduct of a public listed company, the procedures in a Code Takeover, new issue of securities, continuing listing obligations including continuing disclosure requirements, and public spread requirements.

CHAPTER 2 KEY GOVERNMENT REGULATORS AND AGENCIES

There are a number of regulatory bodies that are tasked with overseeing Code Takeovers.

(1) Securities Commission Malaysia

The SC was established under the Securities Commission Malaysia Act 1993. Its function includes encouraging and promoting the development of the capital markets in Malaysia through the regulation of all matters relating to the securities industry. The SC has wide rule-making and enforcement powers which includes regulating Code Takeovers and ensuring compliance with the provisions of securities laws, including the CMSA.

(2) Companies Commission of Malaysia

The Companies Commission of Malaysia ("**CCM**") is a statutory body formed under the Companies Commission of Malaysia Act 2001 which regulates companies and businesses. The CCM serves as an agency to incorporate and register businesses. The CCM ensures compliance with the Companies Act, which regulates all aspects of locally incorporated companies, including instances of sale, conveyance and transmission of its securities as well as substantial acquisitions or disposals of a company's business (assets and liabilities).

(3) Bursa Malaysia Berhad

Bursa Malaysia Berhad is an exchange holding company approved under section 15 of the CMSA. Bursa operates a fully-integrated exchange, offering a comprehensive range of exchange-related facilities including listing, trading, clearing, settlement and depository services. Bursa Malaysia Securities Berhad or Bursa, a wholly owned subsidiary of Bursa Malaysia Berhad, is the main regulator with the primary responsibility to oversee compliance by listed companies with the Listing Requirements.

(4) Labuan International Financial Exchange ("LFX")

LFX is an international financial exchange based in Labuan and is wholly owned by Bursa Malaysia Berhad. LFX was established to complement the various business financial services available in Labuan. LFX is a one-stop financial exchange offering full services from the submission of application to approval, listing, trading and settlement of the instruments listed.

(5) Labuan Financial Services Authority

The Labuan Financial Services Authority ("**LFSA**") was established under the Labuan Financial Services Authority Act 1996. LFSA is the statutory body responsible for the development and administration of the Labuan International Business and Financial Centre ("**Labuan IBFC**"). Labuan IBFC offers a wide range of business and investment structures facilitating cross-border transactions, business dealings and wealth management needs.

(6) Central Bank of Malaysia or Bank Negara Malaysia

Bank Negara Malaysia ("**BNM**") was established in 1959 under the then Central Bank of Malaya Act 1958 (now known as the Central Bank of Malaysia Act 2009) to act as the financial adviser, banker and financial agent of the Malaysian government, as well as the authority responsible to

regulate the banking and financial services industry and to ensure stability of the country's financial system. BNM is the key regulatory for most if not all financial institutions in Malaysia and wields a wide range of powers in order to maintain the stability of the financial system. It reports to the Minister of Finance, Malaysia and keeps the Minister informed of matters pertaining to monetary and financial sector policies and issues. In the context of Code Takeovers, the approval of BNM is required in connection with the acquisition of interests of companies in the financial sectors. For instance, Code Takeovers involving companies in the insurance or banking sectors are subject to the Financial Services Act 2013 or the Islamic Financial Services Act 2013, which are under the purview of BNM. These statutes provide for specific approvals that affect the manner in which a Code Takeover may be carried out.

(7) Other regulatory authorities

In Malaysia, there are also a number of industry regulators responsible for issuing operating licences across different industry sectors. Depending on the industry in which the Target operates, such industry regulators may impose specific conditions or other requirements, or require the Target to obtain approval from such regulator in connection with a Code Takeover. For instance, acquisition of interests in the manufacturing and services sectors may require the approval of the Malaysian Industrial Development Authority and the Ministry of International Trade and Industry ("**MITI**"). In the manufacturing and services sector, manufacturing companies are required to obtain manufacturing license pursuant to the Industrial Co-ordination Act 1975. In this regard, certain merger and acquisition transactions would be subject to conditions imposed under the license, particularly conditions relating to shareholdings or local/ foreign equity restrictions.

CHAPTER 3 TYPES OF CODE TAKEOVERS

Pursuant to the Code, different triggers result in different types of take-over offers. We outline below the types of offers under the Code.

Also discussed is the concept of 'persons acting in concert' ("**PACs**") with the acquirer under the Code. An acquirer needs to be aware of the presumptions that may result in persons deemed acting in concert with the acquirer as actions of the PACs may be attributed to the acquirer as if they were acts of the acquirer. A PAC can also trigger a mandatory obligation under the Code which may have to be undertaken by the PAC and the person with whom it is presumed to be acting in concert.

It should be noted that Paragraph 44 of the Code provides for the Code to also apply to any person who carries out a take-over offer, howsoever effected, including by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction.

(1) Voluntary Offers

A voluntary offer is not one which the bidder is compelled to make by law, and is an offer made by a bidder who may or may not hold shares in a company, to purchase all or part of the shares from all current shareholders of a company. In the case of a voluntary offer, Section 17(4) of the Code provides that the acceptance of the offer shall be conditional upon the bidder having received acceptances which would result in the bidder holding in aggregate more than 50% of the voting shares or voting rights in the offeree. The SC may allow a voluntary offer to be conditional upon a higher level of acceptances subject to the offeror having satisfied the SC that he is acting in good faith in imposing such high level of acceptance.

For a voluntary offer, an offeror may include any conditions except a defeating condition, where the fulfilment of which depends on:

(a) an opinion, belief or other state of mind of the offeror or any person acting in concert with the offeror; or

(b) whether or not a particular event happens, being an event that is within the control of or is a direct result of an action by the offeror or any person acting in concert with the offeror.

(2) Partial Offers

A partial offer is a type of voluntary take-over offer whereby a bidder offers to acquire less than 100% of any class of the voting shares or voting rights of a company. A partial offer can only be made with the prior written consent of the SC. Consent would normally be granted where a partial offer would not result in the bidder and persons acting in concert holding more than 33% voting shares or voting rights of the Target.

(3) Mandatory Offers

As the name suggests, a mandatory offer is one which a bidder is compelled to make by law. A bidder triggers the obligation to extend a mandatory offer to acquire all the shares of the Target which he or persons acting in concert with him do not, already own if the bidder, together with persons acting in concert with him:

(a) acquires more than 33% of a company;

(b) holds between 33% and 50% of the voting shares or voting rights, and acquires more than 2% of the voting shares or voting rights in any period of 6 months; or

(c) acquires between 20% and 33% of the target's voting shares and the Securities Commission exercises its discretion to trigger the mandatory general offer requirements.

(4) Persons Acting in Concert ("PACs")

The Code provides that a voluntary offer becomes a mandatory offer if the PACs with an offeror acquire voting shares or voting rights that may trigger an obligation on the part of the offeror and the PACs to make a mandatory offer.

According to the CMSA, "***persons acting in concert***" shall be construed as reference to persons who, pursuant to an agreement, arrangement or understanding, co-operate to:

(a) acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or

(b) act jointly or severally for the purpose of exercising control over a company.

The arrangement, arrangement or understanding can be formal or informal, whether written or oral, whether express or implied or whether or not having legal or equitable force. In relation to take-over offer of an entity other than a corporation or a public company, SC may specify persons who may be presumed to be a PAC. It therefore appears that, to determine whether a person is presumed a PAC is very much a question of fact.

Without prejudice to the generality of the above description of a PAC, the CMSA sets out the following presumptions for a person to be deemed a PAC unless the contrary is established:

(a) a corporation and its related and associate corporations. Associated corporations are established when a corporation holds not less than 20% of the voting shares in the other corporation;

(b) a corporation and any of its directors, or the close relative (i.e. mother, father, child, brother, sister, an adopted child or a step child) of any of its directors, or the spouse of any such director or any such relative, or any related trusts;

(c) a corporation and any pension fund established by it;

(d) a person and any investment company, unit trust or other fund whose investments such person manages on a discretionary basis;

(e) a financial adviser and its client which is a corporation, where the financial adviser manages on a discretionary basis the corporation's funds and has 10% or more of the voting shares in that corporation;

(f) a person who owns or controls 20% or more of the voting shares of a corporation falling within paragraph (a) and any close relative of such person, or the spouse of such person or any such relative, or any related trusts together with one or more persons falling within paragraph (a);

(g) partners of a partnership;

(h) an individual and any person who is accustomed to act in accordance with the instructions of the individual, and the close relative of, companies controlled by, or related trusts of, the individual; and

(i) a person, other than a licensed bank or a prescribed institution, who, directly or indirectly, provides finance or financial assistance, in connection with an acquisition of voting shares or voting rights, with a person who receives such finance or financial assistance.

Notwithstanding so, if the acquirer intends to rebut the presumption of a particular person as his PAC, he may do so by applying to the SC for a rebuttal of the presumption and it is the prerogative of SC to issue rulings allowing or rejecting the rebuttal. The Code also introduces a set of criteria to rebut the presumptions of persons acting in concert. Persons who are not acting in concert can present evidence to rebut the legal presumptions.

CHAPTER 4 HOSTILE BIDS UNDER THE CODE

A hostile bid is a takeover bid that is not favoured by the management or the board of directors of the Target. Notwithstanding that a hostile bid is presented directly to the shareholders of the Target thus, bypassing the board, the Target's board of directors must provide a firm recommendation on whether the hostile bid should be accepted or rejected having considered the evaluations and recommendations by the independent advisor on the "fairness and reasonableness" of the offer.

A recent example of a hostile bid is the take-over offer by Tenaga Nasional Berhad ("**TNB**") of Intergrax Berhad ("**Integrax**"). In 2015, TNB made an offer to acquire all the remaining shares not already held by TNB in Integrax at an initial offer price of RM2.75 per share. Notwithstanding that the offer was "not fair but reasonable", the board recommended that the shareholders reject the offer on the basis that the offer was "not fair" and this outweighed its "reasonableness". The offer price was subsequently revised to RM3.25 per share and ultimately accepted by the shareholders notwithstanding the board recommending that the shareholders reject the revised offer on the basis that underlying value of the shares was at a material premium to the revised offer price.

The Code does not contain any prohibition on hostile bids. In fact, the Code contains provisions relating to competing take-over offers.

Notwithstanding this, hostile bids are not a common practice in Malaysia as the hostile bidder is deprived of an opportunity to conduct due diligence on the Target and hence, is only able to rely on publicly available information such as the constitutional and corporate documents lodged with the CCM, or financial statements lodged pursuant to listing rules and regulations.

CHAPTER 5 SQUEEZE OUT OF MINORITY SHAREHOLDERS

Under section 222 of the CMSA, where a Code Takeover has been made and that offer has been accepted by holders of not less than 90% in the nominal value of those shares of that class (excluding shares already held at the date of the takeover offer by the offeror and persons acting in concert), the offeror can, within 4 months of making that offer, compulsorily acquire shares from the remaining minority shareholders.

The successful offeror is required to give notice to the remaining minority shareholders in the form stipulated in the Fourth Schedule of the Code within 2 months from the date the 90% acceptance condition has been achieved. This notice is to indicate its desire to acquire their shares and should include a copy of a statutory declaration by the offeror that the conditions for the giving of the notice are satisfied.

Upon receipt of such notice, the remaining minority shareholders have the option under section 222(2) of the CMSA to serve a written demand requesting for a written statement of the names and addresses of all other remaining minority shareholders as shown in the register of members. The offeror is not entitled to acquire the shares of the remaining minority shareholders until 14 days after the posting of the written statement.

After the expiration of 1 month from the notice, the offeror is required to send a copy of the said notice and an instrument of transfer executed on behalf of all such minority shareholders by the offeror and pay, allot or transfer to such minority shareholders the amount or consideration for the shares to which the notice relates.

Similarly, under section 223 of the CMSA, where a takeover offer has been accepted by holders of not less than 90% in the nominal value of those shares of that class (excluding shares already held at the date of the takeover offer by the offeror and persons acting in concert), the remaining minority shareholders may within the offer period require the offeror to acquire its shares on terms of the takeover offer or such other terms as may be agreed.

CHAPTER 6 RESTRICTIONS OR OTHER LAWS ON CODE TAKEOVERS

Code Takeovers may be subject to other legislation or requirements by various regulatory authorities depending on the type of transaction being undertaken. Certain licensing authorities are responsible for issuing operating licences in sectors such as the banking, service and manufacturing industry. Approval from such regulators may be required when the Code Takeover will result in a change of the company's status or if required under the relevant regulations/guidelines and/or conditions of the operating licences. For instance, in relation to the banking sector, under the Financial Services Act 2013, the acquisition and disposal of 5% or more of the issued share capital of a licensed financial institution will need to be approved by BNM. Additionally, the approval of the Minister of Finance will be required if the proposed Code Takeovers will result in the acquirer obtaining control or holding more than 50% of the equity interest in the licensed financial institution. Another sectoral regulator is the Ministry of Domestic Trade Co-operatives and Consumerism ("**MDTCC**"). MDTCC's Guidelines on Foreign Participation in the Distributive Trade Services in Malaysia subjects all proposals for foreign involvement in distributive trade, e.g. hypermarkets and department stores, to the approval of the MDTCC. These would include acquisition of interest, and mergers and/or takeover of distributive trade businesses by foreign participation.

The Malaysian government has in recent years, undertaken liberalisation measures and now allows 100% foreign equity participation in a number of services sub sub-sectors, with no equity conditions imposed. These sub-sectors include health and social services, tourism services, transport services, business services and computer and related services. The Malaysian government is also opening up several service sectors such as telecommunications, healthcare, certain professional and environmental services, to allow up to 100% foreign equity participation in phases.

Malaysia's anti-competitive legislation is set out in the form of the Competition Act 2010 ("**Competition Act**"). The Competition Act regulates anti-competitive practices and prohibits abuse of a company's dominant market position and is enforced by the Malaysian Competition Commission ("**MyCC**"). However, there is no requirement for any Code Takeovers to be approved by the MyCC.

CHAPTER 7 DOCUMENTATION FOR CODE TAKEOVERS

Depending on the nature of the Code Takeover, various types of documents will be involved over the duration of the Code Takeover.

(1) Offer Letter / Offer Notice

Code Takeovers may commence with an offer letter or letter of intent issued by the interested acquirer to the owner of the business or company to be acquired in order to engage in discussions. This document usually does not bind the parties to commit to the transaction until the execution of a definitive agreement but may contain provisions subjecting the parties to confidentiality and exclusivity obligations.

(2) Non-Disclosure Agreement / Confidentiality Agreement

Alternatively, parties may opt to enter into a confidentiality agreement or a non-disclosure agreement to set out detailed obligations regarding confidentiality and exclusivity. Such agreements will be binding on the parties for an agreed period and usually contains provisions for the acquiree to seek recourse for any leakage of information by the acquirer in the event the transaction falls through.

(3) Due Diligence Enquiry

Due diligence enquiry is a crucial stage for any Code Takeover. It provides an avenue for the acquirer to understand the Target and its business in a thorough manner and usually, with the help of professionals such as financial advisers (e.g. accountants and auditors), legal advisers, tax advisers and any other professionals (e.g. surveyors) and where necessary, business advisers to advise on issues relevant to the nature of the business to be acquired. Generally, the due diligence process would include documents such as the due diligence enquiry list, due diligence report, and due diligence questionnaires.

In friendly Code-Takeovers, a potential acquirer is usually allowed to conduct its due diligence on the Target. It is however different if it is a hostile Code-Takeover. The Target may feel strongly against the potential acquirer conducting due diligence for the simple reason that there will be disclosure of confidential information which if leaked, may tantamount to a contravention of the insider trading laws or in contravention of the relevant disclosure requirements under the Listing Requirements. The Target may not allow due diligence if within its reasonable view information disclosed contains price-sensitive information. In this regard, the alternative would be for the potential acquirer to rely on information extracted from publicly available sources such as conducting a public search through the CCM or Director of Insolvency Department.

(4) Definitive Agreement

Upon completion or during the course of the due diligence (as the case may be), parties may proceed to negotiate and agree on a definitive agreement usually known as, "sale and purchase agreement", "share purchase agreement" or "asset purchase agreement", depending on the type of transaction being undertaken. The key terms to a definitive agreement would include provisions on conditions precedent, representations and warranties, indemnity, undertakings or covenants and termination rights.

(5) Offer Document and Independent Advice Circular

Under the Code, an offer document is required for Code Takeovers. It is to be submitted to the SC for approval and once approved, it will be despatched to the Target's shareholders for deliberation. As the potential acquirer or offeror, it shall disclose all information that the shareholders would reasonably require and expect to find in an offer document or for the purpose of making an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in doing so.

In the case of the Target or the offeree, the board of directors is required under the Code to appoint an independent adviser to provide comments, opinions, information and recommendation on the Code Takeover to the offeree's shareholders for their deliberation. Such comments and opinions are usually in the form of an independent advice circular, a document subject to the prior consent of the SC.

(6) Documents required under the Listing Requirements

Provisions under the Listing Requirements will have to be adhered to in relation to the Code Takeover. Whether the listed company is the party acquiring or to be acquired, announcement(s) will have to be made and if the transaction exceeds the percentage ratios (which calculation basis are provided under the Listing Requirements), shareholders' approval will be required. A circular will have to be prepared to seek its shareholders' approval for the transaction at the annual general meeting or an extraordinary general meeting (as the case may be) to be held. Such documents are usually prepared by the listed company with the assistance of its financial and legal advisers.

Generally, parties may opt to enter into any other documents they deem fit to better manage the transaction. There may be other elements to the transaction which requires separate agreements to be prepared.

CHAPTER 8 REGULATORY CHARGES AND FEES

For Code Takeovers, certain charges or fees may apply or be imposed by the relevant regulatory bodies and such fees may include perusal or processing fees payable to Bursa and/or SC.

(1) Fees payable to the SC

The SC is the principal regulatory authority overseeing Code Takeovers. The Capital Markets and Services (Fees) Regulations 2012 ("**Regulation**") sets out the fees payable to the SC in respect of such Code Takeovers. The relevant items in Schedule 3 and 4 of the Regulation are reproduced below:

Proposal	Fees	
Acquisition or restructuring scheme resulting in significant change in business direction	Total enlarged paid-up capital from RM1.00 to RM2.9 billion	RM50,000.00 + 0.05% of the total enlarged paid-up capital (up to RM2.9 billion); and
	Any remaining sum above total enlarged paid-up capital of RM2.9 billion	0.025% of the remaining total enlarged paid-up capital
Clearance of offer document	Offer value from RM 1.00 to RM2.98 billion	RM10,000.00 + 0.05% of offer value (up to RM2.98 billion); and
	Any remaining sum above offer value of RM2.98 billion	0.025% of the remaining offer value
Clearance of independent advice circular	RM5,000.00	
Exemption from mandatory take-over offer obligation	RM15,000.00	
Exemption from provisions of the Code other than for item 3 above	RM7,000.00	
Ruling	RM7,000.00	
Procedure for compulsory acquisition	RM2,000.00	
Extension of time	RM2,000.00	
Others	RM2,000.00	

(2) Fees payable to Bursa

Bursa governs, amongst others, listing of issuers and products on the local stock exchange and imposes fees for the listing and quotation of shares, perusal fees, processing fees etc. The fees imposed are set out below:

Perusal Fees	For the perusal of documents, e.g. circulars, notices and reporting thereon, the Exchange will charge fees as determined from time to time.
Processing fee for application for subdivision / consolidation of shares	A fixed fee of RM10,000

Processing fee for application for waiver, modification of or extension of time to comply with the provisions of the Listing Requirements	A fixed fee of RM2,000
Processing fee for application for new issuance of securities	(a) Bonus issue – RM5,000 + 0.005% of the issued and paid up capital to be listed subject to a maximum amount of RM300,000 (b) Share issuance scheme – a fixed fee of RM3,000 (c) All other offering of securities (rights issue, private placements etc.) – RM10,000 + 0.01% of the nominal value of the new securities issued subject to a maximum amount of RM300,000.

CHAPTER 9 SHAREHOLDERS' APPROVAL IN CODE TAKEOVERS

Generally, directors are empowered to make decisions relating to the business of a company, including approving Code Takeovers. This is however subject to certain transactions requiring shareholders' approval to be obtained under the Companies Act and the memorandum and articles of association of the company.

Section 132C of the Companies Act requires shareholders' approval to be obtained for transactions which involve the (a) acquisition of an undertaking or property of a substantial value; or (b) disposal of a substantial portion of the company's undertaking or property. Transactions entered into in contravention of Section 132C shall be void, except in favour of a person dealing with the company in good faith for valuable consideration.

In respect of an unlisted company, "substantial value" or "substantial portion" is determined according to the highest of the following: (a) its value exceeds 25% of the total assets of the company, (b) the net profits attributed to it amounts to more than 25% of the total net profit of the company, or (c) its value exceeds 25% of the issued share capital of the company.

For deals involving a subscription of shares in a company (as opposed to a share purchase), shareholders' approval are also required pursuant to Section 132D of the Companies Act. Any issue of shares in contravention of this section shall be void.

Section 132E of the Companies Act prohibits any transaction involving shares or non-cash assets of a requisite value between a company and its director or substantial shareholder or persons connected to its director or substantial shareholder unless the prior approval of the shareholders is obtained. This requirement does not however apply to transactions entered into between a company and its wholly-owned subsidiary, its 100% holding company, or another wholly-owned subsidiary of its 100% holding company.

"Persons connected" includes a family member, an associated company, a trustee of a trust to which the director or substantial shareholder is a beneficiary or a partner of such director or substantial shareholder or persons connected to him. In respect of unlisted companies, a non-cash asset of the "requisite value" refers to a non-cash asset with (a) a value exceeding RM250,000; or (b) a value of at least RM10,000 and less than RM250,000, but exceeds 10% of the company's asset value.

The Listing Requirements contains more stringent requirements. A listed company intending to enter into a major transaction, being a transaction with a percentage ratio of 25% or more, requires the prior approval of the shareholders in a general meeting.

The percentage ratio is calculated in accordance with certain bases set out in Chapter 10 of the Listing Requirements ("**Percentage Ratio**"). This includes: (a) the value of the assets which are the subject matter of the transaction compared with the net assets of the listed company; (b) the net profits of the assets which are the subject matter of the transaction compared with the net profits attributable to the owners of the listed company; (c) the aggregate value of the consideration relating to the transaction compared with the net assets of the listed company; and (d) the total assets of the transaction compared to the total assets of the listed company.

If the transaction to be entered by a listed company involves a related party and has a Percentage Ratio of 5% or more, then the prior approval of its shareholders is also required. A related party includes a director, major shareholder or persons connected with such director or major shareholder.

CHAPTER 10 DUTIES OF DIRECTORS AND CONTROLLING SHAREHOLDERS TO STAKEHOLDERS

(1) Directors

The fiduciary duties of directors set out under the Companies Act and common law principles require directors to act in the best interest of the company as a whole. These are generally set out as follows:

(a) To act bona fide and in the interest of the company as a whole;

(b) Use powers for their proper purposes;

(c) Avoid conflict of interest; and

(d) Exercise care, diligence and skill.

Section 132 of the Companies Act sets out specific statutory duties and liabilities of directors. Section 132(1A) requires a director to exercise reasonable care, skill and diligence, with not only the knowledge, skill and experience which such director in fact has, but also with the knowledge, skill and experience, which a director, having the same responsibilities, is expected to have.

A director who makes a business judgment is deemed to have met the preceding care, skill, and diligence, provided that such director:

(a) makes the business judgment in good faith for a proper purpose;

(b) does not have a material personal interest in the subject matter of the business judgment;

(c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) reasonably believes that the business judgment is in the best interest of the company.

Directors may rely on information, professional or expert advice, opinions, reports or statements on a particular deal made by:

(a) any officer of the company believed on reasonable grounds to be reliable and competent in the matters concerned;

(b) any other person retained by the company as to matters involving skills or expertise in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;

(c) another director in relation to matters within the director's authority; or

(d) any committee to the board of directors within the committee's authority.

However, pursuant to section 132(1D) of the Companies Act, a director's reliance is only deemed to be on reasonable grounds if such director independently assessed such information before placing any reliance on the information when making any decision.

In instances where directors have delegated any powers of the board of directors to any delegatee, Section 132(1F) of the Companies Act requires such directors to be responsible for the exercise of such power, as if such power delegated had been exercised by the delegating directors themselves.

Depending on the type of dispute or issue, directors generally must place higher priority on the interest of persons truly affected. For instance, in a case of a de-listing of the company, the Court of Appeal held that since the shareholders were the most affected and not so much the company, the directors must act in the best interest of the shareholders (*Pioneer Haven Sdn Bhd v Ho Hup Constructions Co Bhd & Anor and other appeals* [2012] 3 MLJ 616).

It is worth noting that the Companies Act imposes criminal liability on directors for breach of fiduciary duties where directors are liable to imprisonment of up to five years or a fine of thirty thousand ringgit. A director who is found to be in breach of his duties may also be held liable for the losses arising from the abuse of his position and the company may resort to various remedies to recover from such director any loss suffered unless the courts are of the view that such director had acted honestly and reasonably. However, in the event of any irregular action exercised by a director, the majority shareholder may in a general meeting of the company, decide to ratify such irregular action.

(2) Controlling Shareholders

Controlling shareholders must not oppress or unfairly discriminate against minority shareholders of a company. Under Section 181 of the Companies Act, the courts have the power to make an order to, amongst others, prohibit any oppressive or discriminatory act, or even regulate the conduct of the affairs of the company in the future. Hence, if controlling shareholders pass resolutions which are oppressive against minority shareholders, or disregard minorities' interests, Section 181 of the Companies Act can be invoked (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 22). The Federal Court held that damages can be awarded in cases where minority oppression has been established (*Koh Jui Hiong @ Ko Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another* appeal [2014] 3 MLJ 10).

For public listed companies, the Code contains principles and rules governing the conduct of all persons or parties involved in a take-over offer, merger or compulsory acquisition, including an acquirer, offeror, offeree and their officers and associates. The basic policy underlying the Code is the fair and equal treatment to all shareholders, in particular, minority shareholders, in relation to the takeover offer, merger or compulsory acquisition and to ensure that protection of minority shareholders is achieved in a proposed change in management of a company.

CHAPTER 11 BREAK-UP FEES PAYABLE BY THE TARGET COMPANY

Break-up fee is a fee that requires a party (the "**Exiting Party**") to pay the other if the Exiting Party backs out of a deal.

The breakup fee paid by the Exiting Party is meant to compensate the other for the cost of the time and resources expended in negotiating the original agreement and also for the loss of opportunity.

There is no specific provision on break-up fees under the Code. However, under section 67 of the Companies Act, a company is prohibited from giving, whether directly or indirectly any financial assistance for the purpose of or in connection with a purchase or subscription of its own shares. Hence, a Target is prohibited under section 67 of the Companies Act to pay a break-up fee in any circumstances.

Payment of break-up fees is however not a common practice in Malaysia and especially not in a Code Takeovers. In a private deal, a potential purchaser will usually pay a deposit prior to entering into the transaction and in the event it backs out from the deal, the said deposit would then be forfeited.

CHAPTER 12 FINANCING FOR CODE TAKEOVERS

(1) General

Pursuant to the Code, in take-over offers involving cash or an element of cash, the offeror shall ensure, and its financial adviser must be reasonably satisfied, that the takeover offer will not fail due to insufficient financial capability of the offeror and that every target shareholder who wishes to accept the offer will be paid in full.

The First Schedule to the Code states that the offer document shall include:

(a) the offer price and its basis for the securities of the offeree and, in the event of a securities exchange offer, the basis of the consideration for the securities exchange offer;

(b) where a take-over offer is for the securities in a downstream entity, the basis of valuation of the offer price of the downstream entity; and

(c) a statement by the offeror and the offeror's financial advisers that they satisfied that where the take-over offer is by cash, either in part or in whole the offeror has sufficient financial resources and the take-over offer would not fail due to insufficient financial capability of the offeror.

(2) Types of Financing

The traditional methods of financing would include using internally generated funds or raising money from equity markets through secondary fundraising exercises. Examples of such financing are set out below:

(a) Debt Financing

(i) M&A Senior Lenders

A senior lender is usually a bank that lends a company money (a senior loan), often for the express purpose of financing an acquisition. As the name implies, this lender is senior to all other lenders, which means that the senior lender gets paid before the other lenders in the event the borrower goes bankrupt.

(ii) Lines of Credit

A line of credit ("**LOC**") is simply a loan from a bank, often used to help finance acquisitions. Unlike a senior loan, the borrower pays interest on the amount it has used. A company may have a RM5 million LOC, but only RM2 million was used to help pay for an acquisition, the company only pays interest on the RM2 million, not the full RM5 million available.

(b) Equity Financing

Equity financing involves the offer and sale of the buyer's securities for the purpose of raising the capital to pay the seller and to provide working capital for the new company. Typically the buyer seeks equity from sources such as private equity firms, venture

capitalists, and angel investors. This is different than a loan in that the buyer does not need to focus on repaying the debt but the buyer has to be prepared to give up partial ownership and in some cases, control.

(c) Mezzanine Financing

Mezzanine Financing is a hybrid of debt and equity financing. Financing programs or acquisitions by this mechanism typically involve some combination of lending by the source of money and provision of equity by the borrower.

As stated above, Section 67 of the Companies Act prohibits the giving of financial assistance by a company in relation to the purchase of its own shares subject to certain limited exceptions. The penalty for contravention of this section may result in imprisonment of 5 years or a fine of RM100,000 or both. This prohibition does not apply to acquisition of assets.

CHAPTER 13 TRANSACTION TIMELINES

Generally, there is no prescribed timeline in law within which a business transaction must be completed. In cases where approvals (such as those from the regulators) are required, the time frame required to secure such approvals depends primarily on the policy and practices adopted by the respective governmental department/organisation.

Whilst the Code does not specify a timeline in which a business transaction should be completed, the Code specifies the timeline for Code Takeovers once a firm intention to make an offer is announced until the offer is closed or lapses. The timeline for Code Takeovers is as follows:

Day(s)	Event
T	An offeror who makes a take-over offer or proposes a possible take-over is required to make a public announcement of the take-over offer or the possible take-over offer by way of a press notice. The offeror must also send a written notice of the same subject matter ("**Written Notice**") to the Target's board of directors, the SC, and Bursa if the securities of the Target are listed.
T + 1	The Target's board of directors shall, within 24 hours of the receipt of the Written Notice, make an announcement (that they have received the Written Notice) ("**Announcement**") to: (a) the public by way of a press notice (for non-listed Target); or (b) Bursa (for listed Target).
T + 4	The offeror is required to submit the draft offer document to the SC for its consent.
T + 7	The Target's board of directors is required to dispatch the Announcement to all its shareholders.
T + 21 ("**D**" or "**Dispatch Date**")	The offeror is required to dispatch to the Target's board of directors and shareholders the offer document as consented by the SC, within 21 days from the date of the sending of the Written Notice.
D + 10	The Target's board of directors is required to issue a circular with comments, opinions and information (including any other forms of consideration offered by the offeror) on the take-over offer to its shareholders. The independent adviser appointed by the Target's board of directors is required to issue an independent advice circular with its comments, opinions, information and recommendation on the take-over offer to the Target's board of directors, shareholders and holders of convertible securities.
D + 21	The offeror is required to keep the take-over offer open for acceptance for a period of at least 21 days from the Dispatch Date ("**Acceptance Period**"). The take-over offer may be accepted by the Target at any day after the Dispatch Date, but in any case shall not be more than 74 days from the Dispatch Date. However, if the offeror revises its offer, the offeror shall: (a) announce such revision in public by way of a press notice (for listed Target), or in writing to Bursa (for non-listed Target); (b) post the written notification of the revised take-over offer to all shareholders of the Target; and

Day(s)	Event
	(c) keep the offer open for an additional 14 days from the date of the posting of the written notification of the revised offer to the Target's shareholders.
D + 46	An offeror shall not revise a take-over offer or cause a take-over offer to be revised after the 46th day from the Dispatch Date. Where a competing take-over offer has been announced, the offeror shall not revise the take-over offer after the 46th day from the date on which the offer document relating to the competing take-over offer was dispatched to the shareholders of the Target.
D + 60	The take-over offer shall lapse on the Dispatch Date + 60 if, by 5.00p.m. on that day, the offeror fails to receive acceptances which would: (a) in the case of a mandatory offer, result in the offeror and all persons acting in concert with the offeror holding in aggregate, more than 50% of the voting shares or voting rights of the Target; or (b) in the case of a voluntary offer, result in the offeror holding in aggregate, more than 50% of the voting shares or voting rights of the Target. Where a take-over offer has become or been declared unconditional as to acceptance as at the Dispatch Date, the closing date of the take-over offer shall not be later than 60th day from the Dispatch Date. Where a take-over offer has become or is declared unconditional as to acceptance on or before Dispatch Date + 46, the offeror shall keep the take-over offer open for at least 14 days from the date on which the take-over offer becomes or is declared unconditional, which in any event shall not be later than Dispatch Date + 60.
D + 74	Where a take-over offer has become or is declared unconditional as to acceptance on or before Dispatch Date + 46, the offeror shall keep the take-over offer open for at least 14 days from the date on which the take-over offer becomes or is declared unconditional, which in any event shall not be later than Dispatch Date + 74.

CHAPTER 14 INDUSTRY-SPECIFIC RULES APPLICABLE TO A TARGET COMPANY

In Malaysia, there are various industry specific rules that could be applicable to a Target, whether public or private. The types of rules applicable would depend on the industry the company is in and the existing government policy for that industry. Examples of industry-specific rules include equity restrictions where only a certain percentage of foreign ownership is allowed, regulatory approval for any change of ownership, and minimum paid-up capital requirements in the event of foreign ownership etc. The government has, in recent years, undertaken liberalisation measures and now allows 100% foreign equity participation in a number of sectors, with no equity conditions imposed. These sectors include health and social services (such as veterinary services and child day-care services), rental/leasing services without operators (such as bareboat charters and rental/leasing services of ships excluding cabotage and offshore trades), tourism services (theme parks, convention/exhibition centres with seating capacity of above 5,000, and 4 and 5 star hotels), and certain computer and related services (consultancy services relating to the installation of computer hardware, software implementation services, and data processing services).

Some industry specific rules are set out below:

(1) Distributive Trade Services

The distributive trade services/retail sector (e.g. hypermarkets and department stores) remains a highly regulated sector, with its regulator being the MDTCC and the relevant policy document being the Distributive Trade Guidelines 2010 issued by the MDTCC. Proposals for foreign involvement in this sector (including acquisition of interest, and mergers and/or takeover of distributive trade businesses by foreign participation) are subject to the approval of MDTCC. All distributive trade companies with foreign equity are required to, amongst others, appoint Bumiputera director/directors, hire personnel at all levels including management to reflect the racial composition of the Malaysian population, formulate clear policies and plans to assist Bumiputera participation in the distributive trade sector, and utilise local companies for legal and other professional services which are available in Malaysia.

(2) Education and Industrial Training Services

Generally, foreign equity is allowed for the participation in private higher education institutions, private/international schools, and technical and vocational training institutes, subject to certain thresholds such as foreign equity not exceeding 49% (under the General Agreement on Trade in Services ("**GATS**")) or 51% (under the ASEAN Framework Agreement on Services ("**AFAS**")).

(3) Manufacturing

The Industrial Co-Ordination Act 1975 requires manufacturing companies (whether Malaysian or foreign owned, with shareholders' funds of RM2.5 million and above or engaging 75 or more full-time paid employees) to be licensed by the MITI. Although equity and export conditions imposed on manufacturing companies prior to 17 June 2003 will be maintained, foreign equity participation of up to 100% is allowed for most new investments and the expansion or diversification of projects.

CHAPTER 15 RECENT PROPOSALS AND REGULATORY CHANGES

The Capital Market and Services (Amendment) Act 2015 ("**CMSA Amendment**") which came into effect on 15 September 2015 introduces various amendments to the CMSA that will have an impact on Code Takeovers. The CMSA Amendment provides enhanced protection to the offeree shareholders as the SC is empowered to appoint an independent adviser if the offeree company fails to do as required under the Code. The compulsory acquisition provisions under the CMSA has also been extended to cover convertible securities and thus, providing greater certainty for an offeror participating in a take-over offer.

The Companies Bill 2015 ("**Companies Bill**") which was tabled in Parliament in October 2015, if passed, will replace the entire legal landscape currently provided for under the Companies Act. The Companies Bill overhauls the existing legal framework and is expected to have a significant bearing on Code Takeovers.

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Chapter 2
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Chapter 3
Types of Code Takeovers *by Hew Li-Sha, Gillian Chew*

Chapter 4
Hostile Bids under the Code *by Jenny Hong, Chor Jack*

Chapter 5
Squeeze out of Minority Shareholders *by Philipp Lum, Hew Li-Sha, Chor Jack*

Chapter 6
Restrictions or Others Laws on Code Takeovers *by Loy Ee Lin, Leslie Kok, Chor Jack*

Chapter 7
Documentation for Code Takeovers *by Gillian Chew*

Chapter 8
Regulatory Charges and Fees *by Tan Yi Li, Yim Kit Kwan, Chor Jack*

Chapter 9
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Chapter 10
Duties of Directors and Controlling Shareholders to Stakeholders *by Choo Yuen Phing, Goh Yau Jun, Lim Siaw Wan*

Chapter 11
Break-up Fees payable by the Target Company *by Jenny Hong, Stephanie Wong, Evelyn Ch'ng*

Chapter 12
Financing for Code Takeovers *by Debra Leow, Lim Siaw Wan*

Chapter 13
Transaction Timelines *by Jorin Tan, Nick Yap, Jenny Hong*

Chapter 14
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