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Private Equity

Singapore
Law & Practice
and
Trends & Developmnts

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SINGAPORE

Law and Practice

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Contents

1. Trends

1.1 M&A Transactions and Deals

Singapore is a key hub for fund managers and investment entities and continues to serve as an entry point for regional South-East Asian private equity (PE) and investment activity.

COVID-19, its impact and an unprecedented level of uncertainty has made price discovery a central challenge to deal consummation in Singapore and the region.

For a more detailed discussion on current trends in PE in Singapore, see the separate article by the co-authors under **Trends and Developments**.

1.2 Market Activity

The sectors which have seen more deal activity in 2020 are, unsurprisingly, also the sectors which are perceived to be more COVID-19 resilient and better positioned for the "new normal" – such as healthcare (including digital healthcare), fintech, telecommunications, e-commerce, transport and logistics, e-learning, cybersecurity and data centres.

2. Legal Developments

2.1 Impact on Private Equity

Changes to the law or practice or regulations in recent years which have impacted or may impact the PE community and transactions include:

Changes to Delisting Rules

Public-to-privates have been common in PE transactions in Singapore in recent years (see **7. Takeovers** for more details).

Changes were introduced to the Singapore Exchange's listing rules (Listing Rules) in July 2019 to strengthen the protection of minority investors in a public/delisting buyout. A voluntary delisting now needs to be approved by a majority of at least 75% of the shares held by shareholders of the issuer present and voting, and in order to enhance minority shareholder protection, the offeror and its concert parties are now required to abstain from voting on the delisting resolution. The revised Listing Rules also now require the exit offer to be "fair" in addition to being "reasonable", in the opinion of an independent financial adviser, and to include a cash offer as the default alternative. However, exceptions to these requirements apply if the delisting is pursuant to an offer under the Singapore Code on Takeovers and Mergers, provided that the offeror is exercising its right of compulsory acquisition.

The Listing Rules amendments were expected to increase the costs of privatisations generally and to render voluntary delistings, coupled with an exit offer, less attractive for a PE sponsor acting with existing controlling shareholders to privatise the company. Indeed, 2020 has seen a number of transactions involving PE funds in the offeror consortium where the transaction has instead been structured as a general offer subject to 90% acceptance condition (so as to allow for compulsory acquisition pursuant to the Companies Act). At the time of publication, there is an ongoing consultation to tighten the Companies Act provisions on compulsory acquisition, and these proposed changes are likely to further restrict structuring flexibility in take-private deals.

Variable Capital Companies

A new structure for investment funds was introduced on 14 January 2020 – the Variable Capital Company (VCC). The VCC corporate structure can be used for a wide range of investment funds and gives fund managers enhanced operational flexibility and cost savings.

The introduction of the VCC as a new corporate vehicle dedicated to investment funds is intended to change Singapore's fund management landscape and more fund managers are expected to establish or re-domicile funds in Singapore as VCCs. The VCC is subject to less stringent capital maintenance rules and may pay dividends out of capital, unlike a traditional Singapore company. It can be used for both open-end and closed-end funds and as a standalone fund or umbrella entity with multiple sub-funds, each with segregated assets and liabilities. The VCC provides greater operational flexibility and is entitled to the same tax benefits that existing Singapore funds enjoy.

Dual Class Shares

In mid-2018, the Singapore Exchange (SGX) implemented a regulatory framework for the listing of companies with dual class shares structures allowing for entities with different classes of voting rights, subject to appropriate safeguards including against entrenchment and expropriation, to raise funds through an IPO on SGX.

VIMA Documents

Less a legal development and more a development in practice – the Singapore Venture Capital & Private Equity Association and the Singapore Academy of Law have published a set of Venture Capital Investment Model Agreements (VIMAs) which comprise standardised documentation for use in seed rounds and early-stage financings and which currently include, inter alia, a Series A term sheet and subscription agreement, a shareholders' agreement and a convertible agreement regarding equity.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

General Regulatory Landscape

Singapore's laws and regulations are in line with those of other major financial centres and PE investors should be able to navigate them with ease. Singapore consistently ranks as one of the world's most competitive economies according to the World Economic Forum (in 2019 it was voted the most competitive) and is an investor-friendly jurisdiction.

For example, there are no general foreign shareholding restrictions in Singapore except in a few tightly regulated industries such as banking, broadcasting and newspaper publications. Neither does Singapore have a general national security or national interests regime in respect of foreign investment and acquisitions. Change of control or shareholding in some target companies may be subject to conditions in their licences if they are licensed entities and/or to antitrust regulations, but these are generally in line with antitrust principles which would be familiar to international PE investors.

Key Regulators Relevant to PE Transactions and the PE Community

Monetary Authority of Singapore (MAS)

Fund management is a regulated activity under the Monetary Authority of Singapore (MAS) for which a Capital Markets Services (CMS) licence is required, unless one of the available licensing exemptions applies. Typically, the manager managing the funds in Singapore must either be registered as a Registered Fund Management Company (RFMC) or licensed as the holder of a CMS licence.

Singapore Exchange (SGX) and Securities Industry Council (SIC)

Public-to-private transactions need to comply with the regime under the Singapore Code on Takeovers and Mergers (Takeover Code), which is administered by the Securities Industry Council (SIC), and voluntary delistings under the SGX Listing Rules.

Competition and Consumer Commission of Singapore (CCCS)

The Competition and Consumer Commission of Singapore (CCCS) is the regulator for competition law and regulations.

Relevant Laws/Regulations

PE players will often encounter these legislative provisions in the course of their business compliance or in transactions:

- Securities and Futures Act (SFA);
- Singapore Code on Takeovers and Mergers (Takeover Code);
- SGX Listing Rules – applicable to all companies listed on the SGX (whether mainboard or the secondary catalist board), this includes rules which require listed companies to obtain undertakings from their controlling shareholders to notify them of any share-pledging arrangements and of any event which may result in a breach of loan covenants entered into by the listed company – this may impact acquisition financing terms for buyouts;
- Competition Act – generally, anti-competitive agreements or any mergers and acquisitions which substantially lessen competition are prohibited under the Competition Act and require clearance/consent from the CCCS;
- Companies Act – this is applicable to all incorporated companies in Singapore; and
- Employment Act – this applies where the transfer of employees is involved or where employment agreements need to be entered into with key employees.

4. Due Diligence

4.1 General Information

Typically, detailed due diligence is carried out by PE bidders covering the usual areas, such as, commercial, financial, tax, legal, insurance, compliance and environment. Materiality and scope depend on the PE investor's risk assessment and financing requirements, the complexity of the target's business, and the timeframe for the particular acquisition.

Legal due diligence usually covers the following areas:

- corporate information;
- regulatory approvals;
- licences or permits, material contracts;
- any change of control or change in shareholding restrictions;
- information relating to assets, including title to real estate, intellectual property rights and information technology;
- employee matters;
- litigation that the target is involved in (including customary litigation and court searches);
- charges and encumbrances registered against the target's assets; and
- compliance matters, such as, data protection and anti-bribery and corruption (although these will typically be conducted with the help of specialist advisers).

4.2 Vendor Due Diligence

Vendor due diligence (VDD) and reliance on VDD reports is not as common in Singapore as it is in other jurisdictions (eg, the UK and Europe) but there has been a growing trend towards this in recent years, especially for competitive auction deals run by PE sellers (who tend to run better-organised sale processes compared to less sophisticated sellers).

Given that VDD is not an established common practice for M&A deals generally, there is also less familiarity with and less acceptance of VDD reports, and bidders typically still conduct fairly extensive due diligence even where a VDD report is available.

Where there is VDD, the starting position is usually for the VDD reports to be provided on a non-reliance basis to bidders, although there is a gradual increase in transactions where the successful bidder/buyer will be granted reliance.

5. Structure of Transactions

5.1 Structure of the Acquisition

Acquisition structures are usually determined by the nature of the target and its assets rather than the identity of the buyer (whether PE or otherwise).

Private/Unlisted Companies

For the acquisition of private/unlisted companies, such acquisitions will be by way of private treaty sale and purchase agreement (whether through bilateral negotiations or through an auction process). Generally speaking, share acquisitions are more common than asset acquisitions.

Public/Listed Targets

For public/listed targets, acquisitions (assuming control deals) will either be by way of general offers (voluntary being more common than mandatory) or court-approved schemes of arrangement. As PE transactions are often leveraged, the "all-or-nothing" nature of schemes of arrangement lends itself better to debt "push down" and is often favoured where there is reasonable confidence that the necessary approval thresholds can be met.

5.2 Structure of the Buyer

It is common for the fund making the acquisition to set up a holding company which in turn holds a special-purpose vehicle as the buyer entity (Bidco). Representatives of the fund shareholder will be appointed to the board of the Bidco but it is the Bidco that contracts with the seller. The fund itself will not usually be involved in or party to any contractual documentation (other than perhaps an equity commitment letter).

5.3 Funding Structure of Private Equity Transactions

Financing

PE deals in Singapore are normally financed by traditional bank financing and banks generally show willingness to support leveraged finance transactions where the track record of the sponsor and the quality of the target assets are not an issue. For leveraged buyout structures, Singapore abolished the concept of financial assistance for private companies (which facilitates debt push-down) in 2015, but financial assistance prohibitions (with exemptions) continue to apply to public companies and their subsidiaries.

Commitment Letter

For acquisitions of private/unlisted targets, equity commitment letters are common, although satisfactory evidence of debt financing will also often be expected in competitive processes.

For acquisitions of public/listed targets which are governed by the Takeover Code, public confirmation of available financial resources will be required by the financial adviser at the time of announcement of the general offer. Accordingly, the financial adviser to the offeror will need to conduct due diligence, and review and be satisfied with the sources of financing. An equity commitment letter may not suffice, as these increasingly need to be supplemented by debt financing documents which are capable of being drawn on if necessary.

Stakes

PE deals see a good mix of control deals versus minority investments. Traditionally, PE deals will see PE funds taking a majority or control stake but there is now also a trend towards minority investment deals. For example, in late 2019, global investment organisation EQT backed the privatisation of a healthcare player, Health Management International Limited (HMI), through a scheme of arrangement with an option for either a cash or securities consideration. The major shareholders and certain key management of HMI had undertaken to elect a securities consideration in the bid vehicle. Assuming no other shareholders had elected for the securities consideration, EQT would have had at best a 30.5% stake in HMI after completion. These minority/partnership investments in buyout transactions could be a reflection of the Asian PE market, where intrinsic value is tied to the operational knowhow and relationships of family owners and family-linked conglomerates, even while there is a desire for professional managers to take the businesses forward.

5.4 Multiple Investors

Consortium Arrangements

PE deals (especially the higher-value ones) are frequently entered into by a consortium, including PE sponsors, but with other investors investing alongside them.

Broadly speaking, it is more common to see existing controlling shareholders/management as co-investors in these consortiums than other limited partners or PE sponsors but there are notable high-value exceptions, such as the acquisition and privatisation of Global Logistic Properties Limited in 2017 by Nesta Investment Holdings Limited (which is controlled by a consortium comprising various investors, including HOPU Logistics Investment Management Co, Ltd, Hillhouse Capital Logistics Management, Ltd, Bank of China Group Investment Limited, and Vanke Real Estate (Hong Kong) Company Limited) by way of a scheme of arrangement in what was Asia's largest-ever PE buyout.

Some co-investments between PE players and strategic investors have also recently been announced. In August 2020, it was announced that a Gobi Partners managed fund (Meranti ASEAN Growth Fund) and Alibaba Singapore would be shareholders in a bid vehicle to acquire the entire e-commerce, e-commerce enabler and logistics business of Synagie Corporation Ltd, which is listed on the SGX. In the same month, Asian Healthcare Specialists, another SGX-listed entity, announced its completion of a subscription into a co-investment vehicle with an entity managed by Heliconia Capital Management, to undertake investments in healthcare or healthcare-related businesses in South-East Asia.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

Transaction Terms: Private Acquisitions

Consideration structures which entail post-completion audits and consequential purchase-price adjustments are more common in the sale of private companies than locked-box mechanisms, although PE sellers would usually prefer and insist on the latter.

Earn-outs are not typically used where the buyer and the seller want a clean break after the acquisition is complete. For example, a PE fund looking to divest a portfolio entity at the tail-end of its fund cycle will not be inclined to accept earn-out as a form of deferred payment. Conversely, where PE investors are buyers, earn-outs to incentivise management sellers would be common.

Generally speaking, PE buyers are less likely to provide protection for consideration (whether in the form of a guarantee or enforceable commitments) than a corporate buyer would.

6.2 Locked-Box Consideration Structures

Interest on leakage for locked-box consideration remains a negotiated point in most deals and there is no established norm, especially because locked-box mechanisms are not that widespread in the first place, but probably, more often than not, no interest would be charged.

6.3 Dispute Resolution for Consideration Structures

In locked-box and completion accounts adjustments, it is fairly common for saleandpurchase agreements to provide for resolution of disputes by expert determination by an independent accountant, rather than resort to a dispute resolution mechanism.

6.4 Conditionality in Acquisition Documentation

Conditionality of deals is usually a heavily negotiated area and there is no "standard" norm.

PE sellers will usually insist on certainty of transaction and will not agree to conditions other than those which are absolutely necessary or mandatory/regulatory.

Financing conditions are generally resisted and are relatively rare, while limited material adverse change (MAC) clauses are usually agreed to.

6.5 "Hell or High Water" Undertakings

"Hell or high water" undertakings are not common in Singapore and PE-backed buyers will resist this very strongly.

6.6 Break Fees

Whilst not a general practice, break fees are agreed for some transactions. For public deals, there are restrictions and prescribed requirements to be met in the Takeover Code for a listed target to agree to any break fees. The directors of the target company (both public and private) must also consider their fiduciary duties in agreeing to such break fees, as well as the possible breach of any financial assistance prohibition under the Companies Act. For a public transaction, the financial adviser to the target company would also be required to confirm that, inter alia, they believe the fee to be in the best interests of the offeree company shareholders.

Reverse break fees are even less common in Singapore.

6.7 Termination Rights in Acquisition Documentation

PE buyers and sellers are usually extremely focused on deal certainty and termination rights are typically heavily resisted.

Sale and purchase agreements typically contain a long-stop date by which the closing conditions must be fulfilled, failing which the agreement will terminate but as mentioned previously, the conditions and necessity thereof will usually be heavily negotiated and any attempt at a "back door" termination will generally be viewed with suspicion.

The right to terminate for breach of pre-closing undertakings or representations/warranties will usually be resisted and at the very least pegged to some material thresholds.

It should be noted that in a going-private transaction subject to the Takeover Code, the termination of the purchase agreement is subject to the SIC's approval, even when the condition giving rise to the termination right has been triggered.

6.8 Allocation of Risk

Parties are generally free to negotiate the representations, warranties and indemnities. The scope of these varies widely from transaction to transaction and will depend on the relative bargaining power of the parties. PE sellers will want to minimise their continuing/residual liability on the sale of a portfolio company and generally, the risks they are prepared to accept (whether in the form of warranties or indemnities or covenants) will be lower compared to corporate sellers.

Refer also to **6.9 Warranty Protection** and **6.10 Other Protections in Acquisition Documentation**.

6.9 Warranty Protection

Warranties and Limits on Liability

General

See also **6.8 Allocation of Risk**. A PE seller will usually give fundamental warranties pertaining to title, capacity and authority, but willingness to provide extensive business warranties will depend on the extent of participation and the involvement of management. Where management holds a significant stake, they are expected to give comprehensive warranties to the buyer, together with a management representation made to the PE sellers. Where the management stake is not significant, the PE sellers may be prepared to increase the scope of the warranties, subject to limited liability caps of between 10% to 30% of the consideration.

Limits on liability

Customary limitations on a seller's liability under a sale and purchase agreement include:

- for fundamental warranties – capped at an amount equal to or less than the purchase price;
- for other warranties, typical caps between 10% to 30% of the consideration;
- a de minimis threshold (normally about 0.1% of the purchase price for each individual claim and 0.5% to 1% of the purchase price for the aggregate value of such claims);
- a limitation period of 18 to 36 months for non-tax claims and between three to six years for tax claims; and
- qualifying representations and warranties with disclosure contained in the disclosure letter and all information in the data room.

6.10 Other Protections in Acquisition Documentation

Warranty and Indemnity Insurance

The use of warranty and indemnity insurance to mitigate deal risk for PE firms has gained traction in recent years and is now widely accepted (in fact, it is a prerequisite for most PE parties). On the sell-side, it bridges the gap on the extent of warranties coverage and liability caps, and on the buy-side, it enhances the attractiveness of the PE investor's bid in competitive bid situations.

Target Company Management's Involvement

A PE sponsor will also typically look to greater commitment and support for the transaction from the management of the target company to ensure management continuity. As such, it is not uncommon to find PE sponsors insisting on the terms of the transaction, giving them the right to negotiate with or offer to the existing management of the target company the opportunity to participate with an equity stake in the bidding vehicle or enter into new service agreements. See **8. Management Incentives** on usual management participation terms.

Escrows and Security

Where known risks are identified, an escrow account may be set aside from the consideration to satisfy such claims and to secure any indemnity obligations but it is extremely rare for any PE seller to agree to provide any such escrow or security.

6.11 Commonly Litigated Provisions

There do not appear to have been many litigation suits in connection with PE M&A deals in Singapore.

7. Takeovers

7.1 Public-to-Privates

Take-privates are common in Singapore. As companies listed on the SGX often trade at a discount to their book values, delistings have outnumbered listings on the SGX for the past five years.

Many of these take-privates are backed by PE investors (often as part of a consortium with existing controlling shareholders).

However, due to changes in the voluntary delisting regime and possible changes in compulsory acquisition provisions, it is expected that privatisations will become increasingly difficult to structure and it is therefore also expected that the pace will slow somewhat.

7.2 Material Shareholding Thresholds

For listed entities, a substantial shareholder (5% or more) needs to give notice to the listed corporation within two business days of his interest and any change in the percentage level of his interest, or when he ceases to be a substantial shareholder. The issuer is then required to make the corresponding disclosures via SGX announcements. Substantial shareholders include persons who have the authority to dispose of – or exercise control over the disposal of – the relevant securities, and deemed interests are included in such securities. It should be noted that fund managers and their controllers would have to disclose their interests under this regime.

7.3 Mandatory Offer Thresholds

Under Rule 14.1 of the Takeover Code, the thresholds for triggering a mandatory general offer are as follows:

- where any person acquires, whether by a series of transactions over a period of time or not, shares (added together with shares held or acquired by persons acting in concert with them) which carry 30% or more of the voting rights of a company; or
- any person who, together with persons acting in concert with them, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with them, acquires in any six-month period, additional shares carrying more than 1% of the voting rights.

Such persons who trigger the threshold must extend offers immediately to the holders of any class of share capital of the company which carries votes and in which such person, or persons acting in concert with them, hold shares. In addition to such person, each of the principal members of the group of persons acting in concert with them may, according to the circumstances of the case, have an obligation to extend the offer as well.

7.4 Consideration

For voluntary and partial offers, the offeror can offer cash or securities or a combination of the two as consideration for the shares of the target, except for in certain limited instances under the Takeover Code where a cash or securities offer is required.

For mandatory offers, the offeror must offer cash or a cash alternative for the shares of the target.

7.5 Conditions in Takeovers

The ability to introduce offer conditions is limited by Takeover Code restrictions.

Mandatory Offer

In the case of a mandatory offer, the only condition that can be imposed – apart from merger control clearance by the CCCS – is on the minimum level of acceptance.

Voluntary or Partial Offer

In the case of a voluntary or partial offer, conditions cannot be attached where their fulfilment depends on the subjective interpretation or judgement by the bidder, or if this lies in the bidder's hands, the SIC should be consulted on conditions to be attached. Even where a condition is permitted, the ability to revoke a general offer which has been announced due to non-fulfilment of conditions will require SIC consent.

Cash Offer

Financing conditions would not generally be permitted. Where the offer is for cash or includes an element of cash, the bidder must have sufficient financial resources unconditionally available to allow it to satisfy full acceptance of the offer before it can announce the offer. The SIC requires the financial adviser to the bidder or any other appropriate third party to confirm this unconditionally.

Exclusivity Clauses

Deal protections could include "no-shop" or exclusivity clauses.

Break Fees

The provision of a break fee could be included subject to Takeover Code restrictions. This break fee will be payable should certain specified events occur (eg, where a superior competing offer becomes or is declared unconditional with regard to acceptance within a specified time or the board of the target public company recommends to the shareholders that they should accept a superior competing offer).

7.6 Acquiring Less Than 100%

Under Section 215(1) of the Companies Act (Cap 50), an acquirer can exercise the right of compulsory acquisition to buy out the remaining shareholders of a listed company if it receives acceptances pursuant to the general offer in respect of not less than 90% of the listed company's shares, excluding those already held by the acquirer or its related corporations (or their respective nominees) as at the date of the general offer, and excluding treasury shares (90% Squeeze-Out Threshold). Acquisitions of the listed company's shares outside of the general offer may be counted towards the 90% Squeeze-Out Threshold provided that these acquisitions are made during the period when the general offer is open for acceptances, up to the close of the general offer, and provided that the acquisition price does not exceed the offer price (or the offer price is revised to match or exceed the acquisition price).

As mentioned in **2.1 Impact on Private Equity**, at the time of publication, there was an ongoing consultation to tighten the Companies Act provisions on compulsory acquisition to increase minority protection, with the proposed amendments focused on the acceptances to be included and excluded in the 90% threshold.

7.7 Irrevocable Commitments

It is common for a bidder to seek irrevocable undertakings from key shareholders to accept its proposed offer (or to vote favourably) and thereby increase the likelihood of the offer (or scheme) being successful.

Similarly, where shareholders' approval for the sale is required, the PE buyer may seek irrevocable undertakings from certain existing shareholders to vote favourably.

The undertakings can either be "soft" (which allows an out to the undertaking shareholder if a better offer is made) or "hard" (which does not allow any such out) but where the offer terms are favourable, "hard" undertakings have become increasingly common.

Given the highly confidential and price-sensitive nature of such transactions, any approach for irrevocable undertakings will need to be handled with sensitivity and the timing carefully judged (with appropriate non-disclosure agreements and wall-crossing measures in place).

7.8 Hostile Takeover Offers

It is possible to undertake hostile bids in Singapore. However, they are not common (in fact, they are rare), possibly due to the relatively concentrated shareholding structure of many Singapore public companies.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Alignment of interests of the management with the PE investor's financial objectives is a key consideration and therefore, equity incentives are a common feature of PE transactions.

8.2 Management Participation

The form of management participation varies and could either be ordinary or preferred.

Equity securities may be subject to ratchets measured by key performance indicators. These would usually be subject to restrictions on transfer and claw-back mechanisms, or only exercisable on exit.

For take-private transactions, subject to clearance with the SIC on any "special deals" issues under the Takeover Code, management may be offered the opportunity to participate (with an equity stake) in the bidding vehicle or its holding company, where management agree to swap their shares for equity in the bidding vehicle. As shareholders in the bidding vehicle, the management is likely to be subject to the usual restrictions that a PE sponsor would expect to impose in terms of voting rights and transferability of shares.

8.3 Vesting/Leaver Provisions

Management equity is commonly subject to good leaver and bad leaver provisions. Vesting periods, as well as any moratorium or restrictions, would usually be for at least a period that coincides with the time anticipated for management to achieve an exit for the PE sponsor, usually in the range of three to five years.

8.4 Restrictions on Manager Shareholders

Management shareholders generally agree to non-compete, non-solicitation undertakings.

Such undertakings will need to be "reasonable". Restrictive covenants such as non-competition and non-solicitation clauses are generally not enforceable under Singapore law unless and until they are proven to be:

- reasonably required to protect a legitimate proprietary interest of the party seeking to enforce such a covenant;
- reasonable in respect of the interests of the parties concerned; and
- reasonable in the interests of the public.

8.5 Minority Protection for Manager Shareholders

Management may have pre-emption rights to subscribe for fresh equity on the same terms but typically would not have evergreen anti-dilution rights.

The reserved matters list will also usually be kept short and restricted, and the ability of the management team to control or influence the exit of the PE sponsor will normally be limited.

9. Portfolio Company Oversight

9.1 Shareholder Control

Oversight by the PE fund is usually achieved through a combination of board appointments, veto rights and information rights. PE investors typically enjoy veto rights over material corporate actions, including restrictions on further issuances of debt/equity, change of business, winding-up and other related party transactions. Depending on the size of the minority stake, the PE investor may also have veto rights over operational matters such as capital and/or operational expenditures above a certain threshold, and material acquisitions and disposals.

Directors of the portfolio company appointed by the PE investor may disclose information received by such directors if such disclosure is not likely to prejudice the portfolio company and is made with the authorisation of its board of directors, in respect of all or any class of, or specific, information.

9.2 Shareholder Liability

As a fundamental principle of company law, a company is a separate legal entity from its shareholders and its shareholders are not liable for the company's actions. The Singapore courts would not generally pierce the corporate veil. Accordingly, it is unlikely that a PE investor will be liable for the liabilities of underlying portfolio companies, except in very unusual circumstances.

9.3 Shareholder Compliance Policy

PE funds typically impose their own compliance policies on portfolio companies – eg, those relating to applicable anti-bribery and anti-corruption laws and environmental and social policies.

10. Exits

10.1 Types of Exit

Most exits in recent years are through trade sales rather than through public offerings.

Holding periods seem to be on the rise and average about five to six years.

Dual-tracked exit processes are only undertaken when PE sellers are truly unsure which option is more likely to be consummated, but they are usually keen to end the dual track as soon as possible.

10.2 Drag Rights

Drag rights are common in the event of an exit by the PE investor, but it is less common for the drag to actually be enforced, since interests are usually aligned and most exits are done on a consensual basis.

Drag thresholds vary but will typically be 50% or more. In transactions where there is a significant minority or institutional co-investor, it could be that a hurdle needs to be achieved before the drag can be activated.

10.3 Tag Rights

Tag rights in favour of management and co-investors are not uncommon, but they depend on the bargaining powers of the management shareholders. Institutional co-investors would typically expect a quid pro quo tag right for drag rights.

10.4 IPO

Lock-Up

Moratorium requirements are set out under the SGX Listing Rules for the mainboard and catalist respectively.

For the mainboard

- For promoters (which include persons with a shareholding of 15% or more and their associates), the moratorium:
  - (a) is for the entire shareholding for at least six months after listing; and
  - (b) may be subject to a lock-up of no less than 50% of the original shareholding (adjusted for bonus issue, subdivision or consolidation) for an additional six months thereafter, depending on the admission criteria.
- For investors with 5% or more of post-invitation share capital who acquired and paid for their shares less than 12 months prior to the date of the listing application, their shares will be subject to a six-month lock-up to be given over the proportion of shares representing the profit portion of the shares.
- For investors with less than 5% of the issuer's post-invitation issued share capital who acquired and paid for their shares less than 12 months prior to the date of the listing application, there is no limit on the number of shares which may be sold as vendor shares at the time of the IPO. But if the investor has shares which remain unsold at the time of the IPO, the remaining shares will also be subject to a six-month lock-up to be given over the proportion of shares representing the profit portion of the shares.
- For investors who are connected to the issue manager for the IPO of the issuer's securities, shareholdings will be subject to a moratorium of six months after listing. The moratorium will not apply to fund managers where the funds invested are managed on behalf of independent third parties, with separate and independent management teams and decision-making structures and policies and procedures to address conflicts of interest.

For the catalist

Moratorium requirements in respect of promoters, investors who acquired and paid for their securities less than 12 months prior to listing, as well as any investors who are connected to the sponsors are set out in the Catalist Listing Rules.

Post-IPO relationship agreements are not entered into between a PE seller and the target company.

Rajah & Tann Singapore LLP is a leading full-service law firm and a member of Rajah & Tann Asia, one of the largest regional networks, with over 800 fee-earners in South-East Asia and China. The private equity and venture capital (PEVC) practice is a highly integrated, multidisciplinary group of recognised experts who work closely with other practices across the firm and network. The team has extensive experience in providing comprehensive solutions throughout every stage of a private equity or venture capital investment cycle, including fund establishment and formation, fundraising, buyouts, distressed deals, exit planning, restructuring and financing. Clients include private equity firms, equity investors, funds, founders, start-up companies, leaders, banks, sovereign wealth funds, institutional investors, strategic investors, portfolio companies and management teams. The firm has offices in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, Thailand, Philippines and Vietnam, as well as dedicated desks focusing on Brunei, Japan and South Asia.

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Trends and Developments

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Introduction
Singapore continues to remain a key hub for fund managers and a popular domicile for the establishment of investment entities. Given this, as well as its extensive network of double taxation treaties, Singapore naturally serves as the entry point for regional private equity and investment activity in South-East Asia and India.

Deal Activity
COVID-19 has had differing impacts across different segments of the private equity investment market. Whereas some segments are likely to benefit from changes in consumer behaviour, technology developments and regulations, others will struggle temporarily or permanently. Whilst COVID-19 has dampened growth prospects in certain sectors, such as the oil and gas, tourism, aviation, corporate real estate and banking sectors, there has been an uptick in deal activity in other COVID-19-resilient sectors, such as healthcare, telecommunications, e-commerce, fintech, data centres, transport and logistics, and sectors which are able to cater to the new normal of home-based functioning (eg, e-learning, digital healthcare and cybersecurity).

General M&A activity in Asia slowed to a seven-year low in Q1 2020. Aggregate M&A deal value across the Asia-Pacific region, at USD177.4 billion (SGD252.6 billion), was down 20% in the first three months of 2020 compared to the same period a year earlier, according to data from Refinitiv. Q1 2020 was the slowest quarter for a number of years with an aggregate deal value of USD3.3 billion in private equity-backed buyout deals in Asia, representing only 25% of the 2019 quarterly average. Data for Q2 2020 in this sector was more promising, with an aggregate deal value of USD27 billion, the best performing quarter since Q3 2017. The return of deal activity in Q2 2020 for Asia reflects possible pent-up demand from Q1 2020, as well as a general recovery from the effects of the pandemic in the North Asian markets.

New normal in deal evaluation
First-time private equity buyouts and investments have proved challenging in 2020 as investors adapt to new methods of transaction evaluation. Several investors have highlighted that they have revisited old targets, given the familiarity they have with these assets and the comfort level achieved with management previously. With physical meetings and travel being a key limiting factor, specific country-based managers without a regional presence may find it difficult to assess regional targets properly with site visits. The trade tensions between the US and China continue to weigh on investment decision-making, with enhanced due diligence and structuring concerns in sectors vulnerable to increased tariffs.

Focus on continuity and exits
According to McKinsey's Global Private Markets Review 2020, Asia's exit environment appears to have become more challenging in recent years, as 2019 marked the third year in a row that exit volume and count decreased. Given this backdrop and the difficulty in securing new investments, investors are also more actively managing and focusing on existing portfolio companies, with a view to managing cash flow, reviewing strategies and supply chains to ensure business continuity and recovery, and planning for potential exits following the record highs of private equity investments between 2016 and 2018. Price discovery has been a key theme in H1 2020, with several existing private equity-backed assets being run through sale processes, although many of these processes have been deferred where assets were in affected segments. Pricing assets will remain challenging until the full financial, operational, human capital and even political effects of COVID-19 are better understood. Similarly, given the increased stress on financial institutions who have been supporting government stimulus and support measures, the leveraged debt market may also face tightening.

Trends in the Private Equity Market
Growth of family offices
As at September 2019, Singapore was home to approximately 1,300 family offices. According to data from the Monetary Authority of Singapore (MAS), this number quadrupled between 2016 and 2018. Most of these family offices have traditionally invested in funds, or co-invested as shadow capital alongside managers. Some of the larger family offices, however, are now pursuing, executing and managing direct investments in varying asset classes. Based on a report by FINTRX, 41% of family offices now invest directly (across asset classes), with close to 60% of these in Asia. Family offices are generally sufficiently well connected to have first looks at smaller-to-medium ticket private equity transactions, with these assets being snapped up before seeing the light of day. The mid-market sector, where the bulk of managers operate, is likely to see direct competition from family offices.

Attractive SGX valuations and partnership transactions

Attractive valuations of listed entities on the Singapore Exchange (SGX), which trade at discounts to their peers, could lead to further buyout activity. At the time of writing, whilst US indices like the S&P 500 were already reaching record highs notwithstanding the pandemic, Singapore's Straits Times Index was still in excess of 20% lower than its January 2020 levels.

Private equity players were active in this space both prior to and during the pandemic. Most recently, HOPU Investment Management partnered the existing major shareholders of Perennial Real Estate Holdings Ltd in a privatisation buyout offer. Interestingly, HOPU's stake in the consortium was only 17.6%, making it only the third-largest shareholder in the consortium. At the end of 2019, an EQT-backed entity privatised Health Management International Limited (HMI) through a scheme of arrangement with an option for either a cash or securities consideration. The major shareholders and certain key management of HMI had, prior to the launch of the transaction, undertaken to elect for securities consideration in the bid vehicle. Assuming no other shareholders had elected for the securities consideration, EQT would have had at best a 30.5% stake in HMI after completion. In mid-2018, when Tat Hong Holdings was privatised by its controlling shareholders and Affirma Capital (then Standard Chartered Private Equity), Affirma Capital only had a minority 31.2% stake in the bid vehicle, with the rest held by the family.

There have also been some announced co-investments between private equity players and strategic investors. In August 2020, it was announced that a Gobi Partners managed fund (Meranti ASEAN Growth Fund) and Alibaba Singapore would be shareholders in a bid vehicle to acquire the entire e-commerce, e-commerce enabler and logistics business of Synagie Corporation Ltd, which is listed on the SGX. In the same month, Asian Healthcare Specialists, another SGX-listed entity, announced its completion of a subscription into a co-investment vehicle with an entity managed by Heliconia Capital Management, to undertake investments in healthcare or healthcare-related investments in South-East Asia.

These minority/partnership investments in buyout transactions could be an increasing reflection of the reality of the Asian private equity market, where the intrinsic value tied to the relationships of family owners and family-linked conglomerates is paramount. Leveraging on the operational know-how of partners in transactions may also continue, as this could lead to significant savings and reduced emphasis on employing professional managers to take businesses forward.

Impact investing

Almost all bulge bracket and mid-market private equity firms now have written and formalised responsible investment policies, which incorporate an emphasis on environmental, social and governance (ESG) considerations. In KKR's Responsible Investment Policy updated on 15 May 2020, it committed to, amongst others, incorporating material ESG considerations into its investment decision-making and management practices. Carlyle also focuses on its holistic impact strategy when making investment decisions. This includes creating diverse teams, engaged employees, sustainable growth, climate resilience and stronger communities. These private equity sponsors may require portfolio companies to comply with a pre-determined ESG plan.

Whilst Asia lags behind its US and European counterparts in impact investing, there are signs that this is changing. Standard Chartered Private Bank's Sustainable Investing Review 2020 highlighted that 43% of investors (affluent and high net worth investors) in Asia consider investing between 5–15% of their funds in sustainable investments, with 8% of such investors looking to invest more than 25%. The three local banks in Singapore, DBS Bank, United Overseas Bank and OCBC Bank have also in recent years developed new sustainability-linked loans, where interest rates are linked with performance on ESG criteria.

Impact of government support measures on distressed M&A deal activity

Distressed M&A activity has not been at the forefront of deal activity, primarily because of the extensive government measures put in place to stem the fallout from the pandemic, particularly in Singapore.

The Singapore government has earmarked close to SGD100 billion over four budgets to support Singaporean businesses and workers. The measures include:

- an extensive job support scheme which was first introduced in February 2020 has subsidised the wages of Singaporean workers by between 25% and 75% (up to a certain threshold). This will gradually reduce from September onwards to subsidies of between 10% and 50% of wages for qualifying sectors. The worst-affected sectors, such as those in the aviation and tourism sectors, will receive the higher end of the subsidy;
- increasing the debt thresholds for bankruptcies and insolvencies, and lengthening the statutory period to respond to demands from creditors; and
- directors being given temporarily relief from their obligation to prevent their companies from trading whilst insolvent, if

the debts are incurred in the company's ordinary course of business.

Many local SMEs on the cusp of distress have been allowed to defer performance of contractual obligations required by certain contracts listed in the COVID-19 (Temporary Measures) Act, if they have been unable to fulfil such obligations due to the pandemic. Key scheduled contracts include:

- leases or licences for non-residential immovable property; and
- secured loans from a bank or finance company:
  (a) made to a local SME (being an entity at least 30% owned by Singaporean residents or permanent residents, with a turnover not exceeding SGD100 million for the last financial year); and
  (b) secured against non-residential property in Singapore, or against any plant, machinery or fixed asset used for business purposes.

A new Temporary Bridging Loan Programme (TBLP) was introduced to provide additional cash flow support for all sectors. Under the TBLP, eligible enterprises can borrow up to SGD5 million, with the interest rate capped at 5% per annum, from participating financial institutions. The Singapore government took an 80% risk share on these loans. Loan quantums under other existing Enterprise Financing Schemes were also temporarily increased, with increased risk share undertaken by the Singapore government.

These measures have provided considerable short-term relief on cash flow to distressed businesses. It remains to be seen whether these businesses will be able to continue supporting a full work force and at the same time fulfilling their deferred contractual obligations, once the stimulus measures cease in early 2021. Many are likely to face considerable pressure, given the large one-off amounts they may need to pay by way of rental expense and principal and interest repayments, once the deferment period is over for scheduled contracts. The pressure will be even higher on entities that have not been able to tap into the TBLP or the other Enterprise Financing Schemes.

In spite of the support and stimulus measures, Singapore still remains on track for its worst recession since independence in 1965, with policymakers expecting the economy to contract by between 5% and 7% in 2020. For funds looking towards distressed rescue of entities that have had the benefit of these measures, a key consideration would be whether investors would be able to retain the local shareholding requirement which is a prerequisite for access to certain of these support measures, such as the TBLP and Enterprise Financing Schemes.

Regulatory Developments – Distressed Deals and the New Super-Priority Rescue Financing Regime

Distressed private capital dry powder globally reached a record high in June 2020 of USD122 billion, according to data from Preqin. Based on historical data, distressed M&A were especially active between 2007 and 2009 during the global financial crisis. It is unlikely to be different in this recession, in spite of the government's support and stimulus measures.

Of particular note in the Singapore context is the super-priority rescue financing concept introduced under the Insolvency, Restructuring and Dissolution Act 2018 (IRDA), which is a similar concept to debtor-in-possession financing under Chapter 11 of the US Bankruptcy Code. In summary, to qualify as rescue financing, the financing must be necessary for the survival of the company as a going concern, and/or necessary to achieve a more advantageous realisation of the assets of a company than on winding-up. The applicant must also meet the statutory conditions in one of the limbs of super-priority under Section 67(1) of the IRDA. If these conditions are satisfied, the court may then exercise its discretion to grant super-priority.

The IRDA provides four different levels of priority (from lowest to highest) which an applicant can seek:

- on par with winding-up costs and expenses as a preferential unsecured debt (subsection (a));
- super-priority over all preferential unsecured debts, ie, priority even over the winding-up costs and expenses;
- to be secured by a security interest over property of the company which is unsecured, or which is subordinate to existing security; or
- to be secured by a security interest over property of the company already subject to an existing security, of the same priority as, or a higher priority than, that existing security (referred to as "priming").

The applicant would be required to show that reasonable efforts were made to secure rescue financing without super-priority. Whilst it is not a statutory requirement under subsection (a), it is nonetheless a factor that the court will have regard to. Other factors which the court may consider include:

- whether the terms of the proposed financing are fair, reasonable and adequate;
- whether the proposed financing is an exercise of sound and reasonable business judgment;
- whether no alternative financing is available on any other basis;
- whether the financing is in the best interests of the distressed company and its creditors; and

- whether there are better offers, bids or timely proposals presented before the court.

Additionally, regard must be given to the interest of the holders of existing security being adequately protected in the event an application for priming is considered.

Whilst the jurisprudence on super-priority rescue financing in Singapore continues to develop since the introduction of the super-priority rescue financing regime in 2017, it provides an avenue for distressed M&A funds to structure and consider hybrid debt instruments which may ultimately provide control in the event of a successful rescue. In the first successful known application for super-priority rescue financing, Asiatravel.com Holdings Ltd, an online travel company listed on the SGX, agreed to issue shares as part of its proposed scheme of arrangement for the repayment of rescue financing.

Key Manager-Related Regulatory Developments

Variable Capital Companies

There have been significant regulatory developments in the establishment of investment entities. The Variable Capital Company (VCC) is a new corporate structure for investment fund vehicles constituted under the Variable Capital Companies Act which took effect on 14 January 2020. As at August 2020, at least 100 VCCs had been set up or redomiciled to Singapore.

The VCC will be a strong option for managers as it allows for an umbrella structure with separate sub-funds for each investment or each category of investments.

Managers will be able to deploy different investment strategies and establish different sub-funds to be held for different investments, meanwhile enjoying the economies of scale of operating a single fund. This gives the fund managers the protection of ring-fencing, as the assets and liabilities of each sub-fund are segregated.

Like a company, a VCC has shareholders and a board of directors. It can be a standalone or an umbrella structure with multiple sub-funds that have discrete portfolios of assets and liabilities. This enables a VCC to combine the advantage of a single legal entity at the umbrella VCC fund level, with segregation of assets and liabilities at the sub-fund level.

A VCC has multiple advantages over prior corporate structures. VCCs are permitted to use Singapore and international accounting standards in preparing financial statements to better meet the needs of global investors. Unlike traditional or alternative funds, a VCC's variable capital structure allows it to be either open-end or closed-end, allowing investors the best of both worlds with regard to redemption and exit. VCCs are also not subject to restrictions on capital reduction, thereby enabling payment of dividends out of capital and not only out of their profits. Umbrella VCCs may additionally achieve cost-efficiencies by using common service providers across the various sub-funds.

Rajah & Tann Singapore LLP is a leading full-service law firm and a member of Rajah & Tann Asia, one of the largest regional networks, with over 800 fee-earners in South-East Asia and China. The private equity and venture capital (PEVC) practice is a highly integrated, multidisciplinary group of recognised experts who work closely with other practices across the firm and network. The team has extensive experience in providing comprehensive solutions throughout every stage of a private equity or venture capital investment cycle, including fund establishment and formation, fundraising, buyouts, distressed deals, exit planning, restructuring and financing. Clients include private equity firms, equity investors, funds, founders, start-up companies, leaders, banks, sovereign wealth funds, institutional investors, strategic investors, portfolio companies and management teams. The firm has offices in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, Thailand, Philippines and Vietnam, as well as dedicated desks focusing on Brunei, Japan and South Asia.

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