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Singapore: Law & Practice
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Singapore: Trends & Developments

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SINGAPORE

Law and Practice

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1. Transaction Activity

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 and investment activity.

Singapore has generally responded well to COVID-19, with comparatively low mortality rates and high vaccination rates. This has increased confidence in setting up in Singapore and investing both in and out of Singapore.

India and South-East Asia remain rich hunting grounds as high-growth companies in the region start to mature. Many South-East Asian and Indian-based businesses have restructured to include Singapore-incorporated holding entities and raised capital through these, which has continued to help drive deal flow in Singapore for M&A activity.

Special purpose acquisition companies (SPACs) also contributed to deal activity in the region, as South-East Asian unicorns prepare for a capital markets exit.

M&A deal activity remained healthy in the first half of 2022 and fundamentals for Singapore and the region as an investment hub remain strong. However, at the time of writing, the outlook for the remainder of 2022 and 2023 in terms of deal pipeline/consummation looks less buoyant, owing to global geopolitical and macro developments such as rising interest costs, sanctions, war, inflationary pressures and difficult capital market and treasury conditions.

1.2 Market Activity

The sectors that have seen more deal activity in 2022 continue to reflect the trends of 2021. Singapore's state investor, Temasek, stated in 2021 that it expected to increasingly shape its portfolio in line with four structural trends: digitisation, sustainable living, future of consumption and longer lifespans. This sums up the trends in investment and M&A activity well. Sectors that continue to see healthy deal interest broadly fall into the above-mentioned categories include digitalisation, technology, data and cybersecurity, renewable energy, transition activities, alternative food sources and healthcare. Perhaps somewhat paradoxically, given the emphasis on the digital and data economy, deal flow in real estate investments and private equity interest in this asset class have both remained robust thus far.

2. Private Equity Developments

2.1 Impact on Funds and Transactions

The following changes to the law, practice and regulations in recent years have either impacted the private equity community and transactions or may do so in the future.

Singapore Exchange SPAC Framework

With effect from 3 September 2021, SPACs are allowed to list on the Mainboard of the SGX-ST by way of a primary listing, providing companies with an attractive alternative capital fund raising route. The new initiative was announced by the SGX–ST on 2 September 2021, following its consultation paper released in March 2021. Changes to the SGX–ST Mainboard Listing Rules (the "SGX Listing Rules") to implement the SPAC listing framework took effect on 3 September 2021.

The SGX–ST has emphasised that its focus on the SPAC listing framework is to seek a balanced regime that effectively safeguards inves-

tors' interests against certain concerns posed by the unique features of SPACs while meeting the capital raising needs of the market.

As well as satisfying existing admission criteria for a primary listing on the Mainboard, a SGX–ST SPAC is subject to additional admission criteria under the new listing framework, such as:

- minimum market capitalisation;
- public float; and
- minimum issue price.

Further suitability assessment factors include:

- profile of founding shareholders;
- experience and expertise of management team;
- nature and extent of management team compensation;
- SPAC business objective and strategy; extent and type of securities participation; and
- alignment of interests.

Changes to Delisting Rules

Public-to-privates have been common in private equity transactions in Singapore in recent years (see **7. Takeovers**).

Changes were introduced to the SGX 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. 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 SGX Listing Rules also now require the exit offer to be "fair" in the opinion of an independent financial adviser (in addition to being "reasonable") 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 (the "Takeover Code"), provided that the offeror is exercising its right of compulsory acquisition.

The SGX Listing Rules amendments were expected to increase the costs of privatisations generally and render voluntary delistings, coupled with an exit offer, less attractive for a private equity sponsor acting with existing controlling shareholders to privatise the company. Indeed, 2020 saw a number of transactions involving private equity funds in the offeror consortium where the transaction was instead structured as a general offer, subject to 90% acceptance condition (so as to allow for compulsory acquisition pursuant to the Companies Act). 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 Sin-

gapore 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 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 the SGX.

VIMA Documents

The Singapore Venture Capital & Private Equity Association and the Singapore Academy of Law published a set of Venture Capital Investment Model Agreements (VIMAs), comprising standardised documentation for use in seed rounds and early-stage financings. VIMAs currently include, inter alia, a Series A term sheet and subscription agreement, a shareholders' agreement and a convertible agreement regarding equity. This is not so much a legal development as a development in practice.

The initial set of VIMA documents is in the process of being updated and refined, with the roll-out of VIMA 2.0 being anticipated soon.

Good Governance

Reflecting global trends, Singapore's regulators have implemented or clarified increased expectations with regard to ESG concerns. In December 2021, the SGX announced enhanced disclosures and reporting requirements aimed at nudging listed issuers in the direction of integrating ESG factors into their corporate governance practices and business strategy. Mandatory climate-related disclosures consistent with recommendations of the Task Force on Climate-Related Financial Disclosures will be required under a "phased approach".

Increased Regulation in Digital Payments Space

With the increased focus on cryptocurrencies, the Monetary Authority of Singapore (MAS) – as Singapore's central banker – has issued various guidelines and regulation aimed at regulating digital payments and digital payment token services.

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 private equity investors should be able to navigate them with ease. Singapore is an investor-friendly jurisdiction and consistently ranks as one of the world's most competitive economies according to the World Economic Forum – it was voted third most competitive in 2022, and was ranked first in 2019.

There are no general foreign shareholding restrictions in Singapore, apart from in a few tightly regulated industries such as banking, broadcasting and newspaper publishing. Neither does Singapore have a general national security or national interests regime with regard to 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 that would be familiar to international private equity investors.

Key Regulators Relevant to Private Equity Transactions and the Private Equity Community

Monetary Authority of Singapore

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

Singapore Exchange and Securities Industry Council

Public-to-private transactions need to comply with the regime under the 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

Private equity players will often encounter the following legislative provisions in the course of their business compliance or in transactions:

- the Securities and Futures Act (SFA);
- the Takeover Code;
- the SGX Listing Rules – these apply to all companies listed on the SGX (whether Mainboard or the secondary Catalist board) and require controlling shareholders to notify listed companies of:
  - (a) any share-pledging arrangements; and
  - (b) any event that may result in a breach of loan covenants entered into by the listed company, which may impact acquisition financing terms for buyouts;
- the Competition Act – generally, anti-competitive agreements or any M&A that substantially lessen competition are prohibited under the Competition Act and require clearance/consent from the CCCS;
- the Companies Act – this is applicable to all incorporated companies in Singapore; and
- the Employment Act – this applies where the transfer of employees is involved or where it is necessary to enter into employment agreements with key employees.

4. Due Diligence

4.1 General Information

Typically, detailed due diligence is carried out by private equity bidders covering the usual areas, such as commercial, financial, tax, legal, insurance, compliance and environment. Materiality and scope depend on the private equity 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 and records;
- 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), IP rights and IT;
- employee and labour law matters;

- litigation that the target is involved in (including customary litigation and court searches);
- charges and encumbrances registered against the target's assets; and
- ESG, responsible investing and compliance matters, such as environmental laws, 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 private equity sellers (who tend to run better-organised sale processes compared with 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. 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 private equity 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 private equity transactions are often leveraged, the "all-or-nothing" nature of schemes of arrangement lends itself better to debt "pushdown" 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 that, 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

Private equity 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 pushdown) 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 that 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 that are capable of being drawn on if necessary.

Stakes

Private equity deals see a good mix of control deals versus minority investments. Traditionally, private equitydeals will see private equity funds taking a majority or control stake but there is now also a trend towards minority investment deals. Early round venture capital investments (including by private equity funds) have also increased in pace and volume.

These minority/partnership investments in buyout transactions could be a reflection of the Asian private equity market, where intrinsic value is tied to the operational know-how and relationships of family owners and family-linked conglomerates, even though there is a desire for professional managers to take the businesses forward.

5.4 Multiple Investors

Consortium Arrangements

Private equity deals (especially the higher-value ones) are frequently entered into by a consortium, comprising private equity sponsors but also 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 private equity sponsors. However, 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 private equity buyout. In April 2021, Soilbuild Group's Lim Family and Blackstone completed the acquisition of Soilbuild Business Space REIT through a trust scheme of arrangement for a total of approximately SGD700 million.

In September 2020, Perennial Real Estate Holdings Ltd was privatised and delisted in a privatisation buyout offer led by its major shareholders. HOPU Investment Management partnered the existing major shareholders in the transaction, with its stake in the consortium (at 17.6%) making it only the third-largest shareholder in the consortium.

Some co-investments between private equity 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 Sin-

gapore 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.

More recently, in August 2021, GK Goh Holdings Limited and Symphony House Sdn Bhd agreed to dispose a respective 92.4% and 7.6% stake in Boardroom to a consortium comprising 65 Equity Partners and Tower Capital Asia, valuing the corporate services provider at approximately SGD312 million.

Additionally, it was reported in December 2021 that a management buyout team, backed by private equity firm CVC Capital Partners, made an offer to acquire 43.81% in Razer. The listed Singapore-based manufacturer and seller of gaming hardware was not already owned by the bidder consortium. The consideration was approximately USD1.4 billion, with Razer's privatisation completed in May 2022.

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 private equity 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. A private equity fund looking to divest a portfolio entity at the tail-end of its fund cycle, for example, will not be inclined to accept earn-out as a form of deferred payment.

Conversely, where private equity investors are buyers, earn-outs to incentivise management sellers would be common.

Generally speaking, private equity 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. However, in most cases it is unlikely that interest would be charged.

6.3 Dispute Resolution for Consideration Structures

In locked-box and completion accounts adjustments, it is fairly common for sale and purchase agreements to provide for resolution of disputes via 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.

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

Financing conditions are generally resisted and are relatively rare, whereas limited material adverse change clauses are usually agreed to.

6.5 "Hell or High Water" Undertakings
"Hell or high water" undertakings are not common in Singapore and private equity-backed buyers will resist this very strongly.

6.6 Break Fees
Although 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
Private equity 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. However, as mentioned previously, the conditions and necessity of said agreement 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 the termination of the purchase agreement is subject to the SIC's approval in a going-private transaction subject to the Takeover Code, 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. Private equity 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.

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

6.9 Warranty Protection
Warranties and Limits on Liability
General

A private equity 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 private equity sellers. Where the management stake is not significant, the private equity sellers may be prepared to increase the scope of the warranties, subject to limited liability caps of between

10% to 30% of the consideration. See also **6.8 Allocation of Risk**.

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 fundamental warranty and 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 (W&I) insurance to mitigate deal risk for private equity firms has gained traction in recent years and is now widely accepted (in fact, it is a prerequisite for most private equity parties). On the sell-side, it bridges the gap on the extent of warranties coverage and liability caps; on the buy-side, it enhances the attractiveness of the private equity investor's bid in competitive bid situations. Seller-initiated, limited or no recourse W&I insurance appears to be on the uptrend, as more private equity sellers seek clean exits by requiring buyers to take out buy-side insurance as stapled deals (commonly known as the sell-buy flip).

Target Company Management's Involvement
A private equity 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 private equity sponsors insisting that the terms of the transaction give them the right to negotiate with the existing management of the target company or offer them the opportunity to participate with an equity stake in the bidding vehicle or enter into new service agreements. See **8. Management Incentives** for more 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; however, it is extremely rare for any private equity 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 private equity M&A deals in Singapore.

7. Takeovers

7.1 Public-to-Private

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 private equity 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. 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:

- their interest;
- any change in the percentage level of their interest; or
- when they cease 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 that (added together with shares held or acquired by persons acting in concert with them) 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, acquiresadditional shares within any six-month period that carry 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 that carries votes and in which such person, or persons acting in concert with them, hold shares. Each of the principal members of the group of persons acting in concert with such person 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 judgment by the bidder. If this lies in the bidder's hands, the SIC should be consulted on condi-

tions to be attached. Even where a condition is permitted, SIC consent is required to revoke a general offer that has been announced in case of non-fulfilment of conditions.

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, such as:

- 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 (Chapter 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 both:

- shares already held by the acquirer or its related corporations (or their respective nominees) at the date of the general offer; and
- treasury shares (90% squeeze-out threshold).

Acquisitions of the listed company's shares outside 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;
- 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 Funds and Transactions**, there has been an ongoing consultation to tighten the Companies Act provisions on compulsory acquisition in order 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 private equity 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). 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, which is possibly due to the relatively concentrated shareholding structure of many Singapore public companies.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Alignment of management interests with the private equity investor's financial objectives is a key consideration and, therefore, equity incentives are a common feature of private equity 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 private equity 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 private equity sponsor, usually within in a 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 with regard to 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 private equity sponsor will normally be limited.

9. Portfolio Company Oversight

9.1 Shareholder Control

Oversight by the private equity fund is usually achieved through a combination of board appointments, veto rights and information rights. Private equity 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 private equity 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 private equity investor may disclose information received by such directors if such disclosure is:

- not likely to prejudice the portfolio company; and
- made with the authorisation of the portfolio company's board of directors, with regard to all, 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 private equity investor will be liable for the liabilities of underlying portfolio companies, except in very unusual circumstances.

9.3 Shareholder Compliance Policy

Private equity 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 or even more.

Dual-tracked exit processes are only undertaken when private equity sellers are truly unsure which option is more likely to be consummated; however, 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 private equity 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 that may be sold as vendor shares at the time of the IPO. But if the investor has shares that 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 Catalist

The Catalist Listing Rules set out 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. They are broadly similar to the Mainboard requirements – except that, in the case of promoters' shareholdings, at least 50% is required to be subject to a lock-up of six months following the expiry of the initial six-month period where their entire shareholding is locked up.

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

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RAJAH & TANN ASIA

Trends and Developments

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An Overview of the Private Equity Landscape in Singapore

Singapore continues to remain a key hub for fund managers and a popular domicile for the establishment of investment entities. In light of 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 India and South-East Asia. The set-up of managers and family offices in Singapore continues to grow, largely as a result of the incentives available to set up in Singapore. The Greater China region's stricter COVID-19 policies have also pushed others to relocate and headquarter in Singapore.

Deal Activity

COVID-19 has had varying impacts across different segments of the private equity investment market. As movement restrictions are gradually lifted for many countries and more borders begin to open up, some areas have benefited from changes in consumer behaviour, technology developments and regulations. However, China's insistent "zero COVID" policy continues to restrict economic and social activity, with its rippling effects having a negative impact on global supply chains.

Although COVID-19 generally dampened growth prospects in certain sectors such as oil and gas, tourism and aviation in 2020 and 2021, thus far there has been an uptick in deal activity in these sectors in 2022. There has been an uptrend in oil and gas prices due to the Russia–Ukraine crisis and inflation, while tourism and aviation are recovering as a result of borders re-opening and renewed travel activity.

The sustainability sector is riding a megatrend and continues to see increased activity in the impact-investing space, with a focus on renewable energy.

In line with rising interests rates and inflationary pressures, overall deal volume and value slowed in the first part of 2022. According to DealStreetAsia, the total deal count of venture capital funding in South-East Asia fell approximately 20% quarter-on-quarter to 250 in the second quarter of 2022. Major deals such as Coda Payments' USD690 million Series C funding and Xendit's USD300 million Series D funding supported the region, which recorded a total deal value of USD4.77 billion.

The total tally for the first half of 2022 was 580 deals worth USD9 billion, compared with 437 deals worth USD9.3 billion in the first half of 2021. Total disclosed value for general M&A deals in South-East Asia in the first half of 2022 was approximately USD51.1 billion, down 53% from the approximate USD108.8 billion in the first half of 2021.

The sectors that have seen more deal activity in 2022 continue to reflect the trends of 2021. Singapore's state investor, Temasek, stated in 2021 that it expected to shape its portfolio increasingly in line with four structural trends:

- digitisation;

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- sustainable living;
- future of consumption; and
- longer lifespans.

This sums up the trends in investment and M&A activity in Singapore and the surrounding region well. Sectors that continue to see healthy deal interest broadly fall into the above-mentioned categories include digitalisation, technology, data and cybersecurity, renewable energy, alternative food sources and healthcare. Perhaps somewhat paradoxically, given the emphasis on the digital and data economy, deal flow in real estate investments and private equity interest in this asset class have both remained robust thus far.

Push towards Sustainability

The Singapore Green Plan 2030 is a government drive towards tackling climate change. Targets to be met by 2030 include:

- increasing solar energy deployment by fivefold to at least 2 GWP, which can meet around 3% of Singapore's 2030 projected electricity demand;
- a diversified electricity supply with clean electricity imports;
- greener infrastructure and buildings; and
- cleaner energy vehicles accounting for all new vehicle registrations.

Several landmark transactions have been announced in this area as renewable energy private equity activity (both investments and exits) tick up. The following notable transactions occurred in 2021–22.

- Fourth quarter of 2021 – Singapore sovereign wealth fund GIC, US private equity firm Sequoia Capital and Chinese private equity firm Primavera Capital invested more than US$1 billion in Envision Group, which is a Singapore-based green technology company aimed at meeting the challenges of a net zero future.
- First quarter of 2022 – EDP Renewables acquired more than a 90% stake in Sunseap for approximately USD900 million. The transaction included the sale by Thai energy firm Banpu Public Company Limited, which was the biggest shareholder, of its 47.5% stake. Temasek, ABC World Asia (a Temasek-backed private equity fund) and other investors also sold their shares. Sunseap is a renewable energy firm based in Singapore, and an established player in the solar energy industry in the Asia-Pacific region. EDP Renewables is the world's fourth-largest renewable energy producer and intends to invest $10 billion by 2030 to establish its Asia-Pacific headquarters in Singapore, while continuing to develop new clean energy projects across the region.
- Second quarter of 2022 – Keppel Corporation and other affiliated funds and co-investors increased their stake in Cleantech Solar Asia by acquiring a 50% interest for US$115 million. The stake was purchased from a fund managed by Climate Fund Managers. Cleantech Solar is a Singapore-headquartered solar developer that finances, constructs, owns and operates solar projects across India and South-East Asia.

Valuation Down Rounds and a New SPAC Regime

Globally, several high-profile start-ups (such as Stripe and Instacart) have experienced down rounds, as weak equity markets and lacklustre IPO activity has forced companies to raise funds at a substantially discounted rate compared to their past fundraising valuations.

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Down rounds in Singapore have not been as high profile as those in the US. Anecdotally, however, firms are no longer clamouring to be on capitalisation tables for the sake of visibility and involvement in the new start-up economy. What used to be week-long processes for a quick fundraise have now turned into full-blown multi-month due diligence processes. Down rounds are also not uncommon for issuers as easy money in the inflation-induced high-interest-rate environment dries up.

Against the backdrop of growing domestic interest in special purpose acquisition companies (SPACs), the Singapore Exchange (SGX) introduced new rules that granted the go-ahead for the listing of SPACs on its mainboard in September 2021. This prompted a spurt of the first three SPAC listings in Singapore in January 2022. Vertex Technology Acquisition Corporation, Pegasus Asia and Novo Tellus Alpha Acquisition all listed on the SGX within that month, raising aggregate IPO proceeds of about SGD528 million. All three sponsors are private equity firms and in line with the SGX's vision for experienced and reputable track records and reputations.

The rules also provide that the sponsor is required to have a certain level of minimum equity participation (between 2.5% to 3.5% of funds raised by the SPAC) to align their interests with those of other shareholders. This can either be in the form of direct subscription for units, warrants or even by way of a forward-purchase commitment.

However, IPO activity has dropped to a 13-year low in the US since then, with exits becoming increasingly challenging. There was also a dramatic decrease in new SPAC listings, which have been a key tool for private equity investments and exits in the past three years.

Macroeconomic headwinds (eg, the war in Ukraine, COVID-19 restrictions in China, global inflation and the corresponding rising interest-rate environment) have caused investors to feel more cautious when considering private investment in public equity (PIPE) tranches in conjunction with business combinations.

Reflecting the poorer global market conditions and sentiments, there have not been any new listings since the first three SPACs were listed on SGX – and several prospects have now put listings on hold indefinitely as a result of the challenging conditions. No definitive agreements have been reached as yet regarding a business combination for those SPACs already listed.

Nevertheless, SGX SPAC activity will hopefully benefit from the increased private equity investment into South-East Asia resulting from Singapore's prominence as a global financial hub and regional financial powerhouse. According to PitchBook data, as of 23 May 2022, Singapore has attracted more venture capital investment per capita in 2022 than any other country that received more than USD1 billion. Start-ups in Singapore pulled in USD4.1 billion, which is equivalent to approximately USD695 per capita. The US, the world's largest venture capital market, ranked third (with USD357 in venture capital funding per person).

Pivot towards Non-traditional Private Equity

Web3

Notwithstanding headwinds in the sector at the time of writing (the third quarter of 2022), private equity and venture capital investors have been aggressively pursuing investments in the third generation of evolution in web technologies (more commonly referred to as Web3).

SINGAPORE TRENDS AND DEVELOPMENTS

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Web3 is the latest version of the internet, which focuses on decentralisation and user ownership. In simpler terms, the investments being pursued are in in blockchain-based apps and platforms, which are commonly supported by built-in cryptocurrencies that support the virtual economies of such apps and platforms.

According to data from Pitchbook, venture capital investment in such projects totalled USD10 billion globally in the first quarter of 2022. This is the largest quarterly sum ever and over double the level seen in the first quarter of 2021 and compared with full-year totals for 2019, 2020 and 2021 amounting to USD3.7 billion, USD5.5 billion and USD28 billion respectively.

Prominent venture capitalists, who traditionally focused on technology and/or related start-ups, have also been active in the crypto/blockchain field. Polygon, a decentralised scaling platform for the Ethereum blockchain, announced in February 2022 that it raised USD450 million in a funding round that was led by Sequoia Capital India and also included investments from SoftBank's Vision Fund 2.

Web3 firms in Singapore, including Avium, Nodereal, Navigate and Samudai, have also raised a significant amount of funds from various more traditional venture capital firms such as Sequoia Capital and Saison Capital. Additionally, Singapore-based Insignia Ventures Partners raised USD516 million in the third quarter of 2022, which it intends to allocate in part towards Web3 investments.

Democratisation of private equity

Investors who have access to private market assets (eg, private equity, private debt and real estate) have traditionally been high net worth individuals or, alternatively, entities that can access such private market assets either as private banking clients or through direct connections with private equity and venture capital firms.

Singapore has seen a greater interest in third-party digital exchange platforms that allow issuers to raise funds via the digitisation of their securities and assets in the form of security tokens. Such platforms also support secondary trading of these security tokens. This grants issuers access to an alternative avenue for fundraising.

Accredited investors, financial institutions and family offices are also able to access private market assets with a reduced investment size, and there is potentially greater price transparency and liquidity in secondary market trading. One such Singapore-based market player, ADDX, raised USD58 million in pre-Series B funding from several strategic and institutional investors in the second quarter of 2022.

Headwinds in certain parts of the Web3 ecosystem

Three Arrows Capital, a Singapore-based multi-billion-dollar cryptocurrency hedge fund, is now in liquidation following the turmoil in cryptocurrency markets. Several other Singapore-based/-headquartered cryptocurrency firms (including exchanges and lenders) have faced liquidity challenges in the second quarter of 2022. Despite drastic cost-cutting measures and freezing of withdrawals, some of these firms (eg, Hodlnaut, Zipmex and Vauld) have applied to the Singapore courts for protection from creditor action under Singapore's Insolvency, Restructuring and Dissolution Act 2018 (IRDA).

Of particular note in the Singaporean context is the super priority for rescue financing introduced

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under the 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 outlined for super-priority status under Section 67(1) of the IRDA. If these conditions are satisfied, the court may then exercise its discretion to grant super-priority status. It will interesting to see if any white knights utilise the fairly new regime as their investment entry point when it comes to distressed Web3 assets.

Increasing regulation

Insofar as they are (or are intended to be) accepted as payment for goods or services or for discharge of debt, cryptocurrencies are now regulated in Singapore as digital payment tokens (DPTs) under the Payment Services Act 2019 (PSA).

The Monetary Authority of Singapore (MAS) issued *A Guide to Digital Token Offerings* in order to provide general guidance for applying the relevant laws it administered in relation to offers or issues of digital tokens in Singapore. This guide refers to the PSA licensing regime and illustrates how it – along with securities laws outlined in the Securities and Futures Act 2001 and the Financial Advisers Act 2001 – applies to digital tokens.

Furthermore, on 17 January 2022 the MAS issued *Guidelines on Provision of Digital Payment Token Services to the Public*. These guidelines set out the regulator's expectations that DPT service providers should not promote their DPT services to the general public in Singapore. DPT service providers include payment institutions, banks and other financial institutions. DPT services include the buying or selling of DPTs, or facilitating the exchange of DPTs.

The definition of regulated DPT services will soon be expanded to include:

- the transfer of DPTs;
- provision of custodian wallet services for DPTs; and
- facilitating the exchange of DPTs without possession of moneys or DPTs by the DPT service provider.

Out of more than 100 applicants, only a handful have received licences or in-principle approvals to be DPT service providers. The very stringent and rigorous licensing regime requires applicants to meet certain regulatory and risk management standards, including those relating to money laundering, terrorism financing and technology risks.

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