The Private Equity Review

Ninth Edition

Editor
Stephen L Ritchie

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NINTH EDITION

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PREFACE

The ninth edition of *The Private Equity Review* follows another extremely active year for dealmakers in 2019. While the number and value of global private equity deals completed declined slightly from 2018, deal activity was still robust, weighted towards the upper end of the market, and included several large take-private transactions. Fundraising activity was also strong with aggregate capital raised just slightly below 2018's record levels, as institutional investors remained extremely interested in private equity as an asset class because of its continued strong performance. That, combined with some caution due to an uncertain market environment, has resulted in private equity funds having significant amounts of available capital, or dry powder. This dry powder, together with competition from non-traditional dealmakers, such as sovereign wealth funds, family offices and pension funds, led to very competitive transactions being completed at increasing purchase price multiples. This has caused private equity firms to become even more creative as they seek opportunities in less competitive markets or in industries where they have unique expertise. Given private equity funds' dry powder and creativity, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. In addition, we expect the trend of incumbent private equity firms and new players expanding into new and less established geographical markets to continue.

While there are potential headwinds – including trade tensions, the upcoming US election and an eventual end to one of the longest-running recoveries in US history – on the horizon for 2020 and beyond, we are confident that private equity will continue to play an important role in the global economy, and is likely to further expand its reach and influence.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. *The Private Equity Review* has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 22 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

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I want to thank everyone who contributed their time and labour to making this ninth edition of *The Private Equity Review* possible. Each of these contributors is a leader in their respective markets, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2020

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Part II

Investing

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Chapter 15

SINGAPORE

Andrew Ang, Christy Lim and Quak Fi Ling[1]

I OVERVIEW

i Deal activity

Despite a 5 per cent dip in deal count in 2019, M&A activity in Singapore continued to thrive with a total deal value for the year of US$35.3 billion, according to a report released by deal intelligence service Mergermarket.[2] This marked a 125.6 per cent increase in deal value from 2018.[3] Corporate finance adviser Duff & Phelps notes that outbound deals continued to lead the overall charge, with 291 outbound deals contributing to approximately two-thirds of Singapore's total M&A deal value between December 2018 and November 2019.[4] Real estate emerged the dominant sector in 2019, overtaking the banking, financial services and insurance sectors.[5] This was driven by significant privatisation and three mega-mergers of real estate investment trusts led by OUE Limited, CapitaLand Limited and Frasers Property Limited, respectively. Technology was the next most active sector, followed by industrials.[6]

Private equity (PE) and venture capital (VC) investments in Singapore remained robust in 2019 as well, with a record high volume of 166 PE/VC investments (amounting to US$6.5 billion), an increase from the 154 deals in 2018.[7] While the total PE/VC deal value in Singapore edged slightly lower than that for 2018 (US$6.6 billion), Duff & Phelps notes that it continued to be greater than that of Indonesia and Malaysia for the same period.[8] Research outfit Preqin also reported that Singapore has maintained its status as the regional hub for VC deals, generating US$2.4 billion out of the US$3.4 billion in total VC deal value in Association of South East Asian Nations markets as at June 2019.[9] As a whole, South East Asia's PE/VC markets have remained upbeat despite global economic volatility,[10] owing largely to the growth in the technology sector in the region over the years.[11]

1 Andrew Ang, Christy Lim and Quak Fi Ling are partners at WongPartnership LLP.
2 Mergermarket, 'Global & Regional M&A Report 2019'.
3 ibid.
4 Duff & Phelps, 'Transaction Trail Report 2019'. This report is compiled based on deal information available during the period from December 2018 to November 2019.
5 ibid.
6 ibid.
7 ibid.
8 ibid.
9 Preqin Ltd, 'Preqin Markets in Focus: Private Equity & Venture Capital in Southeast Asia – September 2019'.
10 ibid.
11 See footnote 4.

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Some of the larger deals in the VC space were YY Inc's US$1.5 billion acquisition of Singapore-based Bigo Technology Pte Ltd[12] and Softbank Vision Fund's US$1.46 billion investment in Singapore-based Grab Holdings Inc.[13] Sovereign wealth funds continue to be the key drivers behind M&A activity in 2019, with notable examples including the acquisition by GIC Private Limited (GIC), with consortium members, of Ultimate Software Group Inc for US$11 billion[14] and Genesee & Wyoming Inc for US$8.4 billion.[15] In October 2019, Singapore investment firm Temasek Holdings announced a S$4.08 billion pre-conditional partial offer for Singapore-based diversified group Keppel Corporation, to gain a controlling stake in the conglomerate.[16] On the PE front, the privatisation of 800 Super Holdings Limited, a Singapore-listed environmental solutions provider, was funded by KKR through a hybrid combination of debt and structured equity financing,[17] and EQT Mid Market Asia invested in Health Management International Ltd, a reputable private healthcare provider with a regional presence in Singapore, Malaysia and Indonesia.[18]

In terms of exits, Temasek Holdings sold the Ascendas-Singbridge group of companies to Singapore-listed real estate giant CapitaLand Limited for US$8.1 billion, which resulted in the creation of the largest diversified real estate group in Asia.[19] Another significant real estate deal was the sale by M+S Pte Ltd, which is 60 per cent owned by Malaysian sovereign wealth fund Khazanah Nasional and 40 per cent held by Temasek Holdings, of DUO Tower and DUO Galleria, a premium grade-A office asset with ancillary retail in Singapore, to Allianz Real Estate and Hong Kong private equity firm Gaw Capital Partners.[20]

ii Operation of the market

Due to the continued volatility in the capital markets, more PE exits are carried out through trade sales, redemptions and secondary sales, rather than the traditional public flotation of target company shares.

12 'YY Announces Completion of Acquisition of BIGO' (4 March 2019): http://ir.yy.com/news-releases/news-release-details/yy-announces-completion-acquisition-bigo.

13 'Grab lands US$1.46b in fresh funds, raising coffers to US$8b' (6 March 2019): www.straitstimes.com/singapore/transport/grab-lands-us146bn-in-fresh-funds-raising-coffers-to-us8bn-0.

14 'Ultimate Software acquired by investor group led Hellman & Friedman in partnership with GIC' (21 May 2019): www.gic.com.sg/news-and-resources/ultimate-software-acquired-by-investor-group-led-hellman-friedman-in-partnership-with-gic.

15 'GIC and Brookfield Infrastructure to acquire Genesee & Wyoming' (1 July 2019): www.gic.com.sg/news-and-resources/gic-and-brookfield-infrastructure-acquire-genesee-wyoming.

16 'Temasek to raise stake in Keppel Corp to 51% with $7.35-per-share offer' (21 October 2019): www.straitstimes.com/business/companies-markets/temasek-to-raise-stake-in-keppel-corp-to-51-with-735-per-share-offer.

17 '8S Capital Holdings Announces Voluntary Conditional Cash Offer for 800 Super Holdings' (5 May 2019): https://media.kkr.com/news-releases/news-release-details/8s-capital-holdings-announces-voluntary-conditional-cash-offer.

18 'EQT invests in Asia based Health Management International' (7 January 2020): www.private-equitynews.com/news/eqt-invests-in-asia-based-health-management-international.

19 'CapitaLand and Ascendas-Singbridge complete transaction to form one of Asia's largest diversified real estate groups' (30 June 2019): www.capitaland.com/international/en/about-capitaland/newsroom/news-releases/international/2019/jun/capitaland-asb-complete-transaction-to-form-unified-group.html.

20 'M+S selling office, retail areas of Duo complex for $1.6b' (30 July 2019): www.straitstimes.com/business/ms-selling-office-retail-areas-of-duo-complex-for-16b.

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A trade sale process by way of a controlled auction has the advantage of creating competition among bidders, thereby encouraging higher prices and more favourable terms for the vendors. The controlled auction process also provides a greater degree of confidentiality and allows for greater control of the data room.

Depending on the management of the process and complexity of the sale assets, a controlled auction process in Singapore may take anywhere from five months to a year to complete. While the specific mechanics may differ in each case, a standard sale by way of controlled auction would generally involve a few stages.

The process usually commences with the circulation of a teaser or fact sheet about the sale assets to potential bidders. Sufficient information has to be provided (i.e., business model, strategy for growth, principal assets and limited financial information) to generate interest and elicit meaningful bids. Upon execution of non-disclosure agreements, potential bidders that have expressed interest will be provided with an information memorandum and process letter setting out the bid process rules, timeline and parameters for indicative proposals. Bidders that are shortlisted to progress to the next phase of the sale process will be allowed access to the data room (although there may still be black box items, in some cases depending on whether the bidder is a strategic bidder or another financial sponsor); scheduled management presentations and interviews with the management; and participation in site visits. When dealing with bidders that are competitors of the target company, precautions should be taken to prevent the sharing of commercially sensitive information and, where necessary, such bidders may have to establish a 'clean team' to undertake the due diligence.

The bidders will be required to submit a final proposal and proposed markups on the definitive agreements by the end of this phase. In selecting the final bidders for final negotiations on the definitive agreements, the PE sponsor will weigh the bid price offered against the terms each bidder is seeking (especially with regard to retention sums, warranties and indemnities). The use of warranty and indemnity insurance to mitigate deal risk for PE firms is widely accepted now. The auction process concludes with the selection of the winning bidder and the execution of the definitive agreements.

One important factor that drives a successful exit for a PE sponsor is the ability to effectively retain the management of the portfolio company that it invests in, and to align the interests of the management with its financial objectives. Therefore, it is fairly common for a PE sponsor undertaking a Singapore going-private transaction to offer incentive plans to the management of the target company to ensure that they are retained and incentivised to achieve the exit desired by the PE sponsor.

If the management holds shares in the target company, they are typically expected to reinvest a portion of their proceeds from the transaction to subscribe for shares in the bidding vehicle. In cases where the target company is subject to the Singapore Code on Take-overs and Mergers (the Take-over Code), this may give rise to special deals that require consultations with the Securities Industry Council of Singapore (SIC), which administers the Take-over Code. The PE sponsor may also set aside a portion of its shareholding in the bidding vehicle to establish a share incentive scheme where the shares are offered to management upon fulfilment of stipulated performance targets. Some PE sponsors may also make a distinction between classes of management personnel (i.e., between key management, who are instrumental to the operations and success of the target group, and the more rank-and-file management personnel, who are in charge of the day-to-day running of the business). The former would typically have a greater equity stake in the target group (through rollover arrangements and share option schemes) and may be delegated the discretion to

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administer the equity incentive programmes for the latter, who might not be allocated equity stakes but might have some other form of reward-sharing (for instance, through bonus payouts or phantom share option schemes).

It is not uncommon for the PE sponsor to impose a moratorium or restrictions on transfers of equity held by the management in the target company or to subject the incentives received by the management to 'good-leaver' and 'bad-leaver' provisions in the event that the management leaves the employment of the target company. Such a moratorium or restrictions would usually be at least for a period that coincides with the anticipated time management would take to enhance the value of the target group and achieve an exit for the PE sponsor. The PE sponsor would normally also reserve the right to require the management to co-sell its shares in the target company to procure the sale of the entire share capital of the company in an exit event. Other additional terms that are commonly built into the employment contracts of the management are non-compete and non-solicitation provisions.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

The transaction structure in an M&A transaction will depend on various factors, such as the eventual stake that the PE sponsor wishes to hold in the target company, timing and conditionality of the transaction. If the intention is to privatise a target company listed on the Singapore Exchange Securities Trading Limited (SGX), the transaction is likely to be structured either as a general offer subject to the Take-over Code or a scheme of arrangement (SOA) subject to both the Take-over Code and the Companies Act (Chapter 50 of Singapore) (the Companies Act). Briefly, the two structures differ in terms of timing, thresholds and outcomes.

In the case of a general offer under the Take-over Code, there is a timeline prescribed under the Take-over Code, to be adhered to once a firm intention to make an offer is announced by the bidding vehicle. This announcement triggers the obligation of the bidding vehicle to despatch the offer document to the target company's shareholders (no earlier than day 14 and no later than day 21 after the offer announcement) and the target company is then obliged to respond with an offeree document (within 14 days of the despatch of the offer document). The Take-over Code also stipulates how long the offer can be kept open and the circumstances under which the offer can be extended. Depending on whether the general offer is made subject to specific conditions that are permitted by the SIC, the offer will either lapse as a result of the conditions not being satisfied, or close successfully.

An SOA generally involves a longer transaction timeline, mainly on account of the documentation required and the steps involved in the implementation of the SOA. Unlike the general offer process, where the offer document is driven by the offeror and is not subject to any review process, an SOA involves the preparation of a scheme document that requires the cooperation of the target company, as well as review by the SGX. The documentation and the SGX review process may take up to eight weeks following the joint announcement by the bidding vehicle and the target company of the proposed scheme. Once the scheme document is cleared by the SGX, the target company will have to apply to the High Court of Singapore (the High Court) for leave to convene a meeting of the shareholders to consider the scheme (the scheme meeting) and to give notice to shareholders to convene the scheme meeting. After the requisite approval is obtained at the scheme meeting, the target company will have to apply to the High Court again to sanction the SOA. The SOA will only become effective

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after the relevant court order is lodged with the Accounting and Corporate Regulatory Authority. Unless an objection is raised at the court hearing, an SOA is likely to take effect approximately four months after the initial joint announcement was made.

Except in the case of a partial offer, a general offer must be conditional upon an offeror receiving acceptances in respect of more than 50 per cent of the voting rights in the target company (although the acceptance threshold may be set at a higher level in a voluntary general offer, such as 90 per cent to achieve the right of compulsory acquisition under Section 215(1) of the Companies Act). An SOA is subject to the approval of a majority in number of shareholders representing 75 per cent in value of the members or class of members present, and voting either in person or by proxy at the scheme meeting.

A general offer under the Take-over Code does not necessarily result in privatisation, as that would depend on whether the offeror is able to invoke the right of compulsory acquisition under Section 215(1) of the Companies Act to 'squeeze out' the minority shareholders. On the other hand, an SOA offers an all-or-nothing result and may be the preferred route for PE sponsors that wish to acquire 100 per cent of the target company through a single transaction rather than end up with a majority stake in a listed entity (which is still subject to issues of potential minority oppression challenges, listing rules and other compliance requirements). If the target company is not a Singapore-incorporated company, the provisions in the Companies Act relating to SOAs and compulsory acquisition will not be applicable, in which case it will be necessary to examine the applicable legislation in the jurisdiction of incorporation of the target company to determine the appropriate take-private structure.

A going-private transaction in Singapore may also be structured as a voluntary delisting by the listed target company from the SGX pursuant to the listing rules of the SGX (the SGX Listing Rules), coupled with an exit offer typically made by an existing major shareholder of the target company. This structure may be preferred over a general offer if the primary objective is to delist the target company from the SGX (so that it is no longer subject to the SGX Listing Rules) regardless of whether 100 per cent of the target company is acquired by the close of the exit offer. In this regard, revisions were made to the voluntary delisting regime in July 2019 with a view to affording minority shareholders greater protection. Such revisions arguably render voluntary delisting coupled with an exit offer a less attractive privatisation option in certain circumstances (see Section IV).

The framework for acquisition of private companies by PE sponsors is dependent on the requirements or restrictions in the company's constitution (the constitution) or the shareholders' agreements between existing shareholders. The presence of pre-emption rights or tag-along or drag-along rights might hinder the speed, ease and flexibility with which the PE sponsor may implement the acquisition, as much would depend on whether the relevant consents or waivers can be obtained, or upon the timing in which these processes are carried out.

Tax-related issues tend to drive the deal structure (in particular, the holding structure and domicile of an acquisition vehicle) on a cross-border going-private or PE transaction, as parties seek to minimise the tax costs of the acquisition as well as tax leakages in the existing operations. Specifically, the impact of withholding taxes on dividends, local taxes, distributions and interest payments, and restrictions on the PE sponsor's ability to repatriate earnings should be taken into account when structuring such cross-border transactions.

A PE sponsor looking to implement a leveraged transaction would also have to consider the laws in the jurisdiction where the target company and its assets are located, as these may prohibit or restrict companies in the relevant jurisdictions from providing financial assistance

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in the form of security arrangements or guarantees for the acquisition financing. These limitations may compel the PE sponsor to procure separate bank financing in a jurisdiction outside where the bidding vehicle is incorporated to provide the lenders with an appropriate security arrangement to support the credit assessment.

ii Fiduciary duties and liabilities

As a general rule, a PE sponsor is entitled to act in its own interest in its capacity as a shareholder. The exceptions to this general principle are circumstances where the sponsor's acts breach the provisions of the constitution (usually the minority protection provisions) or constitute minority oppression under Section 216 of the Companies Act. Section 216 of the Companies Act allows minorities to seek recourse in the courts where there is 'oppression' of a member; where a member's interests are 'disregarded'; or where there is a resolution or act that 'unfairly discriminates' against or is otherwise 'prejudicial' to a member. The common thread underlying Section 216 of the Companies Act is the element of unfairness and the court, in determining whether to grant relief under this provision, may take into consideration whether there was any disregard of the legitimate expectations of a member (which may arise otherwise than from the constitution). The court has wide powers under Section 216 of the Companies Act to remedy or put an end to the matters complained of.

The directors of a Singapore-incorporated company have fiduciary duties to act in the best interests of the company. If the company is listed on the SGX, its directors are also required to comply with the SGX Listing Rules, and with the principles and guidelines of the Code of Corporate Governance (the CG Code). The CG Code was revised in August 2018 and seeks to promote high levels of corporate governance in Singapore, as having good management practices will help to build investor and stakeholder confidence.[21] Companies are required to describe their corporate governance practices with reference to the revised CG Code and how they conform to its principles (see Section IV).

When a PE sponsor appoints representatives as officers of portfolio companies, it should remind its representatives not to gain an advantage for themselves or any other person, or to cause detriment to the companies by virtue of their position as an officer of the companies. Such representatives should also not neglect the interests of minority shareholders while discharging their duties towards their appointer, and be especially careful not to be seen to abuse their position regardless of whether they have obtained information from the portfolio companies.

Under the Companies Act, the board of directors is also permitted to allow the disclosure of company information, whether by general or specific mandate, subject to the overarching consideration that there should not be any prejudice caused to the company. Thus, a director of a portfolio company who is a representative of a PE sponsor should be careful to obtain the board's authorisation before he or she discloses the relevant information to the PE sponsor.

Where the portfolio company is listed on the SGX, the PE sponsor would be subject to the disclosure regime in the Securities and Futures Act upon becoming a substantial shareholder of the company (i.e., upon acquiring 5 per cent or more of the voting rights of the company) and when there is any change in the percentage level in its substantial shareholding, and the disclosure must be in a form prescribed by the Monetary Authority of Singapore (MAS). As the disclosure regime seeks to flush out the ultimate controllers of those

21 'Code of Corporate Governance' (6 August 2018): www.mas.gov.sg/regulation/codes/code-of-corporate-governance.

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voting rights, PE sponsors should note that their fund set-up (including layers of holding companies, general partners, investment managers and even the founders) may become public information.

Under Singapore's insider-trading laws, if a party is in possession of price-sensitive information (PSI) in relation to a company that is not generally available, that party is prohibited from trading (and from procuring another person to trade) in the company's securities. A contravention of these laws may give rise to both civil and criminal liabilities. PSI is essentially non-public confidential information that, if it were generally available, a reasonable person would expect it to have a material effect on the price or value of the company's securities (i.e., the information would or would be likely to influence parties that commonly invest in securities in deciding whether to trade or invest in the company's securities). Given this broad definition, it is difficult to exhaustively list the types of information that would be regarded as PSI for the purposes of insider trading laws. One obvious example would be a profit forecast or financial projections of the target company that have not been made known publicly. Thus, where a PE sponsor is conducting due diligence on a potential target company, it should be circumspect in requesting information and mindful not to obtain PSI, unless the target company is prepared to disclose that PSI in the public domain before the PE sponsor deals in the securities of the target company.

III YEAR IN REVIEW

i Recent deal activity

Singapore has maintained its status as the region's leading dealmaker, with transactions and deal values surpassing figures in Malaysia and Indonesia.[22] The list of high-profile M&A deals in Singapore in 2019 includes:

a GIC's US$11 billion acquisition of Ultimate Software Group Inc, as part of an investor group led by Hellman & Friedman and comprising Blackstone Group LP, Canada Pension Plan Investment Board and other investors;[23]

b GIC's and Brookfield Infrastructure's acquisition of Genesee & Wyoming Inc for US$8.4 billion;[24]

c Temasek Holdings' sale of the Ascendas-Singbridge group of companies to CapitaLand Limited for US$8.1 billion;[25]

d Temasek Holdings' proposed acquisition of a 30.55 per cent stake in Keppel Corporation for S$4.08 billion;[26] and

e YY Inc's US$1.5 billion acquisition of Singapore-based Bigo Technology Pte Ltd.[27]

22 See footnote 4.
23 See footnote 14.
24 See footnote 15.
25 See footnote 19.
26 See footnote 16.
27 See footnote 12.

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ii Financing

Financing structures – debt financing

Acquisition financing for PE transactions in Singapore continues to be achieved primarily by way of debt financing, with equity investment by management and investors and other forms of financing taking on a less prominent role. On balance, debt financing provides greater certainty of funding (primarily through the use of 'certain funds' provisions in debt financing agreements) and also a means for acquisition even where an acquirer does not possess sufficient funds or does not wish to pay the entire price out of its own funds up front. The certainty offered by debt financing is usually preferred in light of the requirement of confirmation of financial resources and the (relatively limited) financing conditions in acquisition facility agreements (see below for further discussion of this requirement of confirmation of financial resources). The continued use of debt financing is also reflective of the sustained liquidity and availability of funds from traditional lending sources. Therefore, despite the varied forms of financing available, debt financing remains dominant in the acquisition financing space.

The typical debt-financing structure used by PE firms to finance an acquisition is the leveraged buyout. The debt is usually expected to be senior and secured by the assets of the target company and the target company's subsidiaries, with debt repayments being made by the target company through its own resources or future debt refinancing.

Given the involvement of the target company in the financing structure, financial assistance restrictions in Singapore present additional issues for leveraged buyouts and other financing arrangements that are secured by assets, or expected to be repaid from the cash flow, of the target company or its subsidiaries if the target company is, or remains, a public company or a subsidiary of a public company. These financial assistance restrictions and their continued application in certain situations are discussed further below.

Security

Financiers typically look to the assets of the target group in seeking to maximise its collateral pool. The scope of the security package is fundamentally premised on the availability of the target group's asset pool and the feasibility of taking security over those assets (bearing in mind the legal prohibitions and restrictions applicable to the relevant security providers and assets in question across each relevant jurisdiction, including financial assistance issues). Therefore, the feasibility and practicability of taking security over the target group's asset pool must be carefully considered, especially if the target group's assets are located across multiple jurisdictions (as issues of dealing with local law requirements arise). Financiers may also require additional safeguards in the form of corporate or individual guarantees from, or the provision of other support arrangements by, parties and sponsors related to the acquirer.

Timing-wise, security or guarantees from the target group are generally expected to be in place only on and from completion of the acquisition, as the acquirer would typically not have control over the target group prior to that stage and financial assistance restrictions may (to the extent that the target company remains a public company or a subsidiary of a public company) apply. As such, depending on the security matrix, clean-up periods may feature in financing documentation to allow time for the provision of security and guarantees by the target group. The length of the clean-up period would depend on the extent to which the acquirer has been able to appraise the assets of the target group and the restrictions (legal, contractual or otherwise) and encumbrances thereon. To the extent that such an appraisal prior to completion is not practicable, the provision of security and guarantees by the target group must be assessed and clean-up periods adjusted accordingly. This period, however, is

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generally truncated in situations where the target is not a public company or a subsidiary of a public company such that financial assistance restrictions do not apply and where the acquirer has sufficient visibility over the target group's assets for appraisal prior to completion.

Where security arrangements are expected to be in place relatively quickly upon or following the completion of the acquisition, the form of the security documents would also have been negotiated and, if possible, agreed beforehand. In situations where the target's assets cannot be perfected within a practical time frame (which may be the case if the assets are situated in multiple jurisdictions with differing legal systems), bridging guarantees or indemnities are sometimes sought from the sponsor to protect the financiers against any losses due to the non-perfection of security, with such guarantees or indemnities released once all security comprising the security package has been perfected.

Confirmation of financial resources and certain funds

In a transaction governed by the Take-over Code, the financial adviser to the acquirer is required to issue a confirmation of financial resources. Hence, in the context of debt financing (which is typically subject to an extensive list of conditions precedent), conditions precedent to the utilisation of any bridge loan used to finance an acquisition, and particularly a takeover offer, must be kept to a minimum to ensure certainty of funding (i.e., that funds are available, when required, to satisfy settlement of acceptances of the offer). Clauses or conditions that could constitute a draw-stop and allow the financier to walk away from its commitment may also not be feasible in these circumstances.

Financing structures – other financing methods

Several alternative types of financing structures that have been utilised in acquisition financing (involving a larger quantum) include the following.

Mezzanine debt and direct lending

Apart from senior debt that has typically formed the lion's share of the entire debt package, the introduction of a mezzanine tranche is not uncommon and, if advanced, is typically provided by financial institutions or direct lending arms of funds. The mezzanine tranche may be contractually subordinated in terms of priority of repayment and security by way of a subordination agreement, and may also be structurally subordinated to the senior tranche. In return, mezzanine lenders and direct lenders expect a higher margin and incentives via equity kickers such as options to subscribe for shares in the acquirer or offeror at prescribed points. Payment-in-kind tranches of mezzanine debt may also be adopted where interest is capitalised during the life of the facility, resulting in higher and more attractive returns to mezzanine lenders. Further, financial covenants in mezzanine debt may be more relaxed and, when employed in a debt package alongside senior debt, commonly allow for breaches of senior debt financial covenants to be resolved in collaboration with senior lenders without unnecessary interference by the mezzanine tier.[28] The use of mezzanine tranches or mezzanine financing terms may be seen in acquisition deals where senior debt is not sufficiently available from traditional lending sources for the purposes of the acquisition, which necessitates further alternatives in financing sources.

28 PLC, 'Mezzanine finance in leveraged transactions'.

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Fund-level financing

Debt financing has increasingly been taken at the PE fund level, primarily to complement the use of debt at the level of the portfolio company. Motivations that PE funds have for turning to debt financing at the PE fund level include lower cost of debt (as lenders find greater comfort in multiple income streams and a diversified pool of collateral by virtue of taking security over the PE fund's multiple portfolio companies), the ability to draw on the debt facility quickly (as this obviates the need to arrange for debt facilities at the portfolio company level contemporaneously with the anticipated acquisition, circumventing the complex issues that may arise from the taking of security at the target level) and possible decreased transaction costs from arranging only one debt facility per PE fund (as opposed to target-level debt facilities being arranged for each acquisition).

A PE fund that wishes to take up fund-level financing can look to either net asset value (NAV) debt facilities or subscription debt facilities. While lenders of the former look downwards to the investments of the PE fund as the primary source of repayment, those of the latter look upwards to the unfunded capital commitments of the PE fund for assurance. A hybrid of both structures has also been explored, where the proportion of the borrowing base made up of unfunded capital commitments as against NAV changes over time; as capital commitments are called upon and the capital contributions are used to acquire investments, the NAV of those investments may potentially enhance the borrowing base. The increasing emphasis and interest in environmental and social responsibility has also led to the securing of a revolving facility with its borrowings' interest rate pegged to the sustainability performance of the PE fund in a world first.[29]

One consideration that may arise in a subscription debt facility is that of the confidentiality of the partners in the PE fund: if the fund is structured as a limited partnership, perfection of security over the unfunded capital commitments of the fund would, under Singapore law, require notices to be delivered to each limited partner and evidence of the delivery would invariably be required by the financiers. Therefore, where confidentiality is paramount, NAV debt facilities may be the more suitable option.

Bonds

In larger financing transactions, mezzanine debt may be replaced or refinanced by high-yield bonds. As the minimum size of a high-yield bond issue usually falls within the higher region to create sufficient liquidity within the issue, the use of this method of financing has been restricted to higher-valued buyouts. Bond issuance for the purposes of funding an acquisition is relatively less prevalent because of the fluctuating and changing nature of the bond market (which may be insufficient to satisfy certainty of funding requirements) and is commonly utilised as a post-acquisition or refinancing option. However, where the market is favourable, bond issuances, which are traditionally less restrictive than debt financing, have been seen as a viable alternative.

In the Singapore market, apart from situations where institutional acquirers or strategic investors utilise bond issuances as a method to raise financing to fund acquisition war chests,

29 'S'pore PE fund first globally to secure financing tied to sustainability' (14 October 2019): www.straitstimes.com/business/invest/spore-pe-fund-first-globally-to-secure-financing-tied-to-sustainability.

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bond issuances have also been used in the context of going-private transactions where the target company is known in the market and has existing bond issuances or other debt that has to be refinanced, whether as a result of maturity or as a result of change-of-control triggers.

Composite financing structures

In recent years, certain take-private deals involving a larger quantum of acquisition debt have been structured with a composite of various financing sources, coupled with the flexibility to incur additional debt that may then be brought within the existing acquisition financing structure. A typical composite structure involves a senior facility coupled with either one or more other facilities (mezzanine or otherwise), bond issuances and the ability to either increase borrowing limits or bring new facilities into the existing structure. In such structures, security sharing, subordination and inter-creditor terms are pertinent issues that form the subject of fairly involved negotiations. As a practical measure, the target group's existing financiers may also be invited to participate in the composite structure to, among other things, manage the risk of those existing lenders triggering prepayment or default provisions as a result of the acquisition.

Financial assistance

With the 2015 amendments to the Companies Act, issues that arise from the restriction on target companies providing financial assistance in connection with the acquisition of their own shares, which traditionally represented roadblocks in acquisition financing as 'whitewash' procedures needed to be carried out before these companies can start to provide upstream security and income, have been significantly alleviated due to (1) the abolition of the restriction as regards private companies (which are not subsidiaries of a Singapore public company), and (2) the introduction of a relatively simple whitewash procedure. As such, traditional challenges in structuring deals for PE investors, such as processing time and cost, may be addressed to some extent.

On the private company front, restrictions on a private company (which is not a subsidiary of a Singapore public company) providing financial assistance in connection with the acquisition of its own shares were lifted, easing debt pushdowns and the provision of security by targets and their subsidiaries that have been successfully taken private as these companies no longer have to undergo whitewash procedures to provide financial assistance in the acquisition of their shares. With this relaxation, financiers have endeavoured to obtain security and guarantees at the target level promptly upon the completion of the acquisition or within shorter clean-up periods. This, however, remains restricted to deals where the target company is a private company (which is not a subsidiary of a public company) and is subject to the acquirer's appraisal of the target group's assets.

As for Singapore public companies and their subsidiaries, while financial assistance restrictions continue to apply to, and remain live and key issues in, acquisition deals, alleviating these concerns is a relatively new whitewash procedure to allow transactions that would otherwise be unlawful financial assistance; Section 76(9BA) of the Companies Act was introduced as part of the 2015 amendments to the Companies Act as an alternative to the conventional whitewash procedures. Adapted from Section 260A(1)(a) of the Australian Corporations Act 2001, Section 76(9BA) of the Companies Act allows financial assistance to be provided if, among other requirements, the following are fulfilled:

a the provision of financial assistance does not materially prejudice the company's or its shareholders' interest, or the company's ability to pay its creditors; and

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b the company's board of directors resolves that the company should provide financial assistance and that the terms for doing so are fair and reasonable to the company.

Section 76(9BA), therefore, serves as a relatively simpler alternative to traditional whitewash procedures, which are subject to challenges and limitations, such as the imposition of personal liability for solvency statements, extended timelines and shareholder approval.

The target company must be prepared to show an absence of material prejudice if it wishes to provide financial assistance to the acquirer.[30] Whether or not financial assistance is given depends on where the net balance of the financial advantage lies as determined on an assessment of all its interlocking elements[31] and this would also include an examination of the commercial realities of the transaction.[32] The elements of 'financial assistance' and 'material prejudice' are thus linked:[33] financial assistance to the acquirer is effected by transferring net value to the acquirer, which may (as suggested by Australian authorities) *ipso facto* be prejudicial to the company whose shares are being acquired, its shareholders or its creditors. Australian authorities suggest that the following non-exhaustive assessments may be taken into consideration in determining the question of whether material prejudice exists:

a a qualitative assessment of the impact of the transaction, taking into account:
- the purpose of the transaction; and
- the nature of the transaction; in particular, whether it involves any actual or contingent depletion of the company's assets;

b a quantitative assessment (based on the company's financial statements, etc.) of the impact of the transaction on the company's assets, future profitability, future cash flow and balance sheet;

c the opinion of the directors or any independent experts on the impact of the transaction; and

d the consequences of the transaction on the interests of the company, its shareholders or its creditors after the giving of the financial assistance.[34]

The disjunctive reference in the statutory provision to 'the company or its shareholders' necessarily involves a consideration of the company's position independent of that of the shareholders, but in scenarios where the interests of the company and its shareholders are not aligned, Australian case law suggests that little heed is paid to the interests of the shareholders when determining if material prejudice exists. That said, shareholder interest is not completely ignored; dicta from a recent Australian case suggests that a dilution of shareholder equity would constitute material prejudice to shareholders even if the company's assets remain unchanged. As for creditors' interests, it is suggested that a likelihood that the company's ability to pay its creditors will be reduced, even if the company remains solvent, would be materially prejudicial.[35]

30 *Slea Pty Ltd v. Connective Services Pty Ltd* [2018] VSCA 180 at [72]; upheld on appeal in *Connective Services Pty Ltd v. Slea Pty ltd* [2019] HCA 33.

31 *Charterhouse Investment Trust Ltd v. Tempest Diesels Ltd* [1986] BCLC 1, 10; followed in *Intraco Limited v. Multi-Pak Singapore Pte Ltd* [1994] SGCA 143; *Slea Pty Ltd v. Connective Services Pty Ltd* [2018] VSCA 180.

32 *DuluxGroup*, *In the matter of DuluxGroup Ltd* [2019] FCA 961 at [50].

33 *Kinarra Pty Ltd and Another v. On Q Group Ltd* (2008) 216 FLR 89 at [28].

34 id., at [26].

35 ibid.

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Institutions in Singapore have initially taken a cautious approach in relying on Section 76(9BA) during its infant stages, pending greater clarity and guidance on the precise meaning of 'material prejudice'. However, in recent years, the no-material-prejudice whitewash method has gained traction and is increasingly used in Singapore acquisition financings as acquirers seek to take advantage of this relatively succinct procedure, bearing in mind the time and cost savings as compared to traditional whitewash methods.

Exit strategies in the financing context

While the exuberant PE exit environment in preceding years appears to have stabilised in terms of volume, the changing geopolitical landscape has spurred PE investors to take greater pre-emptive steps to prepare for the likelihood of exiting their investments within a short time frame or in an unplanned scenario.[36] This change can, in greater part, be attributed to geopolitical uncertainty, macroeconomic volatility and technological advances, all of which will have an impact in formulating exit decisions by PE investors.

Specifically in the financing context, debt financing terms that have seen increasing scrutiny and amendments include extension of maturity dates, pricing, financial covenants and prepayment events. These are usually renegotiated should more time be needed before exiting the investment, to allow the PE investor to achieve a partial exit or return from the investment or, in the case where the target group has tapped, or intends to tap, the bond market, to bring the debt financing terms in line with the bond terms (which are generally more favourable) as much as possible.

iii Key terms of recent control transactions

As more countries develop their own merger control regime and with potential targets having globalised businesses, antitrust and merger control issues are usually one of the first few important issues that PE investors have to consider when assessing the viability of a take-private transaction. The merger control analysis is heavily dependent on access to the target's data and a lengthy merger control review can present significant delays for the transaction timeline and challenges for certainty of transaction. Because of the potentially lengthy process of merger control filings, takeovers of listed companies have to be structured as an SOA or a pre-conditional general offer (where a formal offer is made only upon fulfilment or waiver of certain pre-conditions). A long execution period will in turn translate into higher financing cost because financial resources confirmation has to be provided at the time of announcement of the SOA and pre-conditional general offer (though this is not strictly required under the Take-over Code).

Another increasingly common issue is whether the transaction is subject to approval from Committee on Foreign Investment in the United States (CFIUS), an arm of the US government that reviews certain corporate transactions to determine if the transaction results in 'control' of a US business by a non-US entity and whether the transaction raises national security concerns. Though filing with CFIUS is a voluntary regime, CFIUS may unilaterally initiate a review of a transaction even after it has closed. If a contemplated transaction falls within CFIUS's review jurisdiction, parties would have to weigh the costs and benefits of filing a voluntary notice with CFIUS versus not filing one. The former approach results in higher

36 Ernst & Young, 'Global Corporate Divestment Study 2019': https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/divestment/2019/global_divestment_study_report.pdf.

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costs and delays but achieves the certainty that the transaction will be free from future CFIUS interference while the latter avoids the costs and delay but faces the risk that if CFIUS initiates a review in the future, the transaction may be blocked or that a consummated transaction be unwound.

In making an exit, a PE sponsor that is seeking to exit in line with its investment time frame would be likely to prioritise certainty of closing. If the sale is conducted by way of an auction, a bidder that is able to commit to a 'sign and close' would be expected to be a front runner in the process. In these circumstances, the only closing conditions that are likely to be acceptable would be those related to regulatory approvals (e.g., merger control) that are truly essential, and even then, only when it is fairly certain that the approvals would be forthcoming.

If a takeover offer is for a publicly listed company in Singapore, the offeror may decide to revise the offer price to encourage more acceptances, especially if the independent financial adviser of the target company has opined that the offer price is not fair. In addition, the offer price may also be adjusted for dividends declared or paid during the offer period. Post-completion audits and consequential purchase-price adjustments are more common in the sale of private companies, especially where there is a reasonable time gap between the evaluation of the deal consideration (which may be earlier than the date of signing of the purchase agreement) and completion of the transaction. A PE sponsor that is seeking to exit its investment and return the proceeds to its investors would be concerned about the certainty and finality of closing; it may not be too keen on post-completion purchase price adjustments, and thus may prefer a 'locked-box' approach to the purchase price. However, it may not be able to insist on such a preference if the purchaser is also in a fairly equal bargaining position, and this should not be a deal-breaking issue, especially if there is a potential upside adjustment for the PE sponsor (for instance, where the performance of the company is seasonal and the period in respect of which post-completion audit takes place falls during the months when the target company traditionally performs better).

IV REGULATORY DEVELOPMENTS

The main regulatory bodies that have oversight of M&A activities in Singapore are the SIC and the SGX where the deal involves SGX-listed companies. The MAS is also relevant as the industry regulator for fund management companies.

i SGX – voluntary delisting regime

On 11 July 2019, the Singapore Exchange Regulation (SGX RegCo) announced various amendments to the voluntary delisting regime for issuers listed on the SGX Securities Trading Ltd (SGX-ST), which took immediate effect.[37] These amendments followed the public consultation conducted by SGX RegCo in the fourth quarter of 2018,[38] and seek to provide minority shareholders with greater protection and better exit offers.[39]

37 'SGX RegCo requires exit offers to be fair and reasonable, shareholder vote to exclude offeror and concert parties' (11 July 2019): https://links.sgx.com/FileOpen/20190711_SGX_RegCo_requires_fair_and_reasonable_exit_offers_FINAL.ashx?App=Announcement&FileID=569923.

38 SGX Consultation Paper, 'Proposed Amendments to Voluntary Delisting Regime – 9 November 2018': https://api2.sgx.com/sites/default/files/2018-11/Consultation%20Paper%20-%20Proposed%20Amendments%20to%20Voluntary%20Delisting%20Regime.pdf.

39 ibid.

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Under the previous voluntary delisting regime, an issuer could be voluntarily delisted from the SGX-ST if, inter alia, the voluntary delisting resolution (VDR) was approved by a majority of at least 75 per cent and not voted against by 10 per cent or more of the total number of issued shares (excluding treasury shares and subsidiary holdings) held by shareholders present and voting at the meeting. The company's directors and controlling shareholders were not required to abstain from voting on the VDR. In addition, the exit offer had to be reasonable and should normally be in cash.

Under the revised delisting regime, the offeror and parties acting in concert with it are required to abstain from voting on the VDR. Such change is aligned with the approaches in Hong Kong and Australia, where minority investors ultimately determine the voting outcome.[40] Arising from the feedback garnered in the public consultation, the right of a 10 per cent minority to block a VDR (10 per cent Block) has been removed, while the 75 per cent approval threshold is maintained. Further, to afford shareholders better exit value, an exit offer in conjunction with voluntary delisting must not only be reasonable but must also be fair,[41] and the issuer's independent financial adviser (IFA) must opine that the exit offer is fair and reasonable.[42] The SGX expects the bases for determining the fairness and the reasonableness of exit offers to be separately detailed by IFAs, to ensure that IFA opinions are well understood by investor.[43] Finally, the new regime also codifies the pre-existing practice by requiring the exit offer to include a cash alternative as the default alternative.[44]

The SGX has highlighted that offerors should not use other forms of privatisations to avoid complying with the new requirements. As such, where a general offer is made, the SGX will generally consider waiving the exit offer and shareholder vote requirements if the offer is fair and reasonable, and at the close of the offer, the offeror has received acceptances from at least 75 per cent of the independent shareholders.[45] If the free float is lost by the close of the offer and the waiver conditions are not met, the issuer will remain listed and SGX RegCo may suspend trading of its securities.[46] In the meantime, the issuer must fulfil its continuing obligations under the SGX Listing Rules.[47] In a scenario where the SGX does not permit the target company to be delisted and the free float is not restored, the offeror and the target company would arguably be left in limbo. The issuer will only be able to delist if a subsequent general offer that meets the waiver conditions is made, or if it enters into an SOA that complies with the SGX Listing Rules.[48]

The amendments to the regime are likely to raise the costs of privatisations generally, and may render voluntary delisting coupled with an exit offer a less attractive option for a PE sponsor acting in concert with the existing controlling shareholders of a company to privatise the company. That being said, the abolition of the 10 per cent Block has the balancing effect

40 'SGX makes key changes to delisting rules to protect independent and minority shareholders' (11 July 2019): www.straitstimes.com/business/companies-markets/sgx-makes-key-changes-to-delisting-rules-exit-offers-must-be-fair.

41 See footnote 37.

42 ibid.

43 ibid.

44 Rule 1309(1)(b) of the SGX Listing Rules.

45 See footnote 37.

46 ibid.

47 ibid.

48 ibid.

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of ensuring that the power accorded to minority shareholders is not unduly disproportionate. In appropriate cases, this may increase the viability of a VDR in conjunction with an exit offer as a privatisation option.

ii CG Code

On 6 August 2018, the MAS issued a new CG Code (along with a new Practice Guidance), which came into effect on 1 January 2019.[49] Consequential amendments were also made to the SGX Listing Rules, which took effect from the same date with the exception of certain provisions that will only come into force on 1 January 2022.[50]

The revised CG Code comprises principles (which are overarching and non-disputable statements that embody the fundamentals of good corporate governance with which companies must comply) and provisions (which are actionable steps to guide companies in complying with the substance of the principles). Compliance with the principles is mandatory under the amended SGX Listing Rules, and variations from the provisions are acceptable only insofar as the companies explicitly state and explain how their practices are consistent with the intent of the relevant principles. Some of the key changes are that the re-appointment of independent directors who have served beyond nine years will be subject to a two-tier vote to be approved by the majority of (1) all shareholders; and (2) all shareholders excluding shareholders who also serve as directors or the CEO (and their associates); a majority of the board (instead of 'at least half' as previously) should comprise independent directors where the chairman is not independent; and non-executive directors must make up a majority of the board. Certain core corporate governance practices stipulated in the revised CG Code are also contained in the SGX Listing Rules, rendering compliance with these requirements mandatory.

As part of the continuous endeavour to level up corporate governance standards and practices, strengthen investors' confidence and uphold Singapore's reputation as a trusted international financial centre, the MAS established the Corporate Governance Advisory Committee on 12 February 2019.[51] This permanent, industry-led body will identify current and potential risks to the quality of corporate governance in Singapore and monitor international trends, revise the Practice Guidance to clarify the GC Code and recommend updates to the CG Code.[52]

49 'MAS accepts recommendations from Corporate Governance Council and issues revised Code of Corporate Governance' (6 August 2018): www.mas.gov.sg/news/media-releases/2018/mas-accepts-recommendations-from-corporate-governance-council.

50 SGX-ST, 'Transitional Practice Note 3 – Transitional Arrangements Regarding Code of Corporate Governance 2018'. The first of the provisions that will come into force on 1 January 2022 requires at least one-third of the board to comprise independent directors. The second stipulates that the continued appointment of independent directors who have served beyond nine years must be approved in two separate resolutions, by the majority of (1) all shareholders; and (2) all shareholders excluding those who serve as directors or the CEO (and their associates).

51 'MAS Sets Up Corporate Governance Advisory Committee to Promote Good Corporate Governance' (12 February 2019): www.mas.gov.sg/news/media-releases/2019/mas-sets-up-corporate-governance-advisory-committee-to-promote-good-corporate-governance.

52 ibid.

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iii Take-over Code

In January 2019, the MAS revised the Take-over Code to clarify its application to companies with dual class share structures (DCS companies) and a primary listing on the SGX-ST. The revisions took effect on 25 January 2019 and were implemented on the advice of the SIC and following a public consultation.[53]

Prior to the revisions, a shareholder may be obliged to make a mandatory offer under the Take-over Code if his or her voting rights in a DCS company increase beyond the mandatory offer thresholds in the Take-over Code as a result of (1) a conversion of multiple vote (MV) shares into one vote (OV) shares; or (2) a reduction in the number of voting rights per MV share, which lowers the total number of voting rights in the DCS company.[54] The amendments to the Take-over Code clarify that the mandatory offer requirement will be waived where the shareholder in question is independent of the conversion or reduction event.[55] In addition, even if the shareholder is not independent as such, the mandatory offer requirement will be waived if he or she reduces his or her voting rights to below the mandatory offer threshold, or obtains the approval of independent shareholders to waive their right to a mandatory offer within a specified time.[56]

The amendments to the Take-over Code also seek to afford greater certainty for the market and safeguards for minority shareholders. They provide that, where an offeror makes an offer for a DCS company, the offer price for MV shares and OV shares should be the same if the traded prices are not available for all the classes of shares, and the different classes of shares differ only in terms of their voting rights.[57] The revised approach provides greater certainty to market participants and potential offerors.[58] It also serves as a safeguard for holders of OV shares by ensuring that they are likewise entitled to any premium paid to holders of MV shares.[59]

iv New structure for funds – Singapore variable capital companies

In a bid to strengthen Singapore's position as an international fund management and domiciliation centre, the MAS and the Accounting and Corporate Regulatory Authority of Singapore have introduced a new corporate structure for investment funds, the Singapore variable capital company (S-VCC), following public consultation in March 2017. The Variable Capital Companies Act 2018, which was passed by the Singapore Parliament on 1 October 2018, came into effect on 14 January 2020. The S-VCC corporate structure can be used for a wide range of investment funds and provides fund managers enhanced operational

53 'Code on Take Overs and Mergers revised to clarify application for dual class share companies' (24 January 2019): www.mas.gov.sg/news/media-releases/2019/code-on-take-overs-and-mergers-revised-to-clarify-application-for-dual-class-share-companies.

54 ibid.

55 ibid.

56 ibid.

57 Securities Industry Council, 'Consultation Conclusions on Revision of the Singapore Code on Take-over and Mergers' (24 January 2019): www.mas.gov.sg/-/media/MAS/resource/sic/press_releases/Consultation-response-paper-24-Jan-2019.pdf?la=en&hash=77B484E6E38CF75F5712B603A26C8F80873AFC7B.

58 ibid.

59 ibid.

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flexibility and cost savings. In terms of eligibility, the structure may currently only be adopted by funds managed by a licensed or registered fund manager, or an exempt fund manager that is otherwise regulated as a financial institution.[60]

The flexible corporate entity can be used by both open-ended and closed-ended investment funds, and by both traditional and alternative fund managers for strategies such as PE.[61] In addition, fund managers may incorporate new S-VCCs or re-domicile their existing investment funds with comparable structures by transferring their registration to Singapore.[62] Apart from being able to pay dividends using capital, an S-VCC may also issue and redeem shares without seeking shareholders' approval, affording investors the flexibility to enter into and exit from their investments in the fund when they wish to.[63] The S-VCC framework further allows for cost savings from the centralised fund management and domiciliation activities, and helps fund managers to structure their funds more efficiently.[64] An S-VCC may be established as a stand-alone structure, or an umbrella structure with multiple sub-funds that may have different investment objectives and investors, as well as assets and liabilities.[65]

While sub-funds have their own set of investors, they do not have separate legal personalities.[66] To safeguard against the risk that the assets and liabilities of one sub-fund could be commingled with those of another, assets and liabilities of each sub-fund are required to be segregated, such that the assets of one sub-fund may not be used to discharge the liabilities of another, or of the umbrella fund, including in the event of insolvency.[67] This enables sub-funds under the same S-VCC to pursue differing investment objectives while ensuring that investors in each sub-fund are shielded from liabilities in respect of other sub-funds.

To accelerate industry adoption of the S-VCC framework in Singapore, the MAS has rolled out a grant scheme, which is valid for three years, to help defray up to 70 per cent of the cost of incorporating or registering an S-VCC, capped at S$150,000 for each application, with a maximum of three S-VCCs per fund manager.[68]

Industry players have applauded the launch of the S-VCC framework for deepening the ecosystem and enhancing Singapore's role as Asia's gateway for fund managers and investors.[69] In the pilot programme conducted in the last quarter of 2019, the 18 participating fund managers incorporated or re-domiciled a total of 20 investment funds as S-VCCs through the initiative. These investment funds comprise VC, PE, hedge fund and environmental, social and governance (ESG) strategies.[70] As a whole, the S-VCC framework is poised to be

60 'Much-lauded Variable Capital Companies framework and grant scheme launched' (16 January 2020): www.businesstimes.com.sg/banking-finance/much-lauded-variable-capital-companies-framework-and-grant-scheme-launched.

61 'MAS and ACRA Launch Variable Capital Companies Framework' (15 January 2020): www.mas.gov.sg/news/media-releases/2020/mas-and-acra-launch-variable-capital-companies-framework.

62 ibid.

63 'MAS introduces new corporate structure to enhance fund ecosystem in Singapore' (10 September 2018): www.mas.gov.sg/news/media-releases/2018/mas-introduces-new-corporate-structure-to-enhance-fund-ecosystem-in-singapore.

64 See footnote 61.

65 See footnote 63.

66 'Variable Capital Companies Bill (2018)' – Second Reading Speech by Ms Indranee Rajah, Second Minister for Finance, on 1 October 2018: https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-19.

67 See footnote 63.

68 See footnote 60.

69 ibid.

70 ibid.

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a game-changer for Singapore's fund management industry, by offering a wider choice of investment fund vehicles in Singapore, which caters to the needs of global investment funds and investors.

V OUTLOOK

Persisting tensions between the United States and China, potential global conflicts, global regulatory scrutiny of Chinese investments and technology-led innovations that are disrupting all sectors present some of the key challenges to regional M&A activity in 2020.[71] The coronavirus outbreak at the beginning of 2020 adds to the uncertain economic outlook for this year. It also puts a brake on China's already slowing growth and China's sudden, virtual stoppage of economic activities is likely to involve adverse spill-over effects, which may cascade into a global economic impact.[72]

For Singapore, domestic deal activity remained strong in 2019 despite a decline in the local economy.[73] This has been attributed to the strong influx of capital from international institutions and continued investment activity by the city state's government-linked funds.[74] The political instability in Hong Kong has also strengthened Singapore's position as a safe haven for global investors.[75] While Singapore's economy will no doubt be impacted by the coronavirus, the government is confident that the local economy is diversified enough to mitigate uncertainty[76] and it is ready to put in place strong support measures for enterprises and workers to mitigate the fallout.[77] If past results shed any light on the future, the outbreak is likely to be followed by an eventual bounce back. As a whole, Singapore's performance on the economic stage in 2020 will depend on a blend of factors, not least its ability to optimise its crisis response.

Pending economic data on the virus' impact, the trends to date paint a generally optimistic landscape of PE/VC in the region. Ernst & Young reported that 67 per cent of Asia-Pacific executives are seizing upon the digital and technology imperative and enhancing their capabilities in such assets, including through corporate VC funds and external funds to invest in various new technologies.[78] According to Preqin, there is over US$250 billion of capital committed to PE in Asia,[79] and Reuters has reported that PE firm KKR is targeting

71 Ernst & Young, 'Global Capital Confidence Barometer', October 2019, 21st edition, Asia-Pacific highlights.

72 'Commentary: Novel coronavirus reveals old vulnerabilities in the global economy' (4 February 2020): www.channelnewsasia.com/news/commentary/wuhan-virus-global-economic-growth-markets-12386076.

73 Baker McKenzie, 'Global Transactions Forecast 2020 – Singapore'.

74 Herbert Smith Freehills, 'M&A in 2020: The New Normal'.

75 See footnote 2.

76 'Wuhan virus: Singapore's economy will be impacted, but is diversified enough to mitigate uncertainty, says Manpower Minister' (30 January 2020): www.channelnewsasia.com/news/singapore/wuhan-virus-singapore-economy-impacted-josephine-teo-12370742.

77 'Wuhan virus expected to impact Singapore's economy: Chan Chun Sing' (27 January 2020): www.channelnewsasia.com/news/business/wuhan-virus-singapore-economy-tourism-impact-concern-12357930.

78 'M&A appetite in Asia-Pacific remains strong; deal-making at the heart of business growth agendas in the region' (24 October 2019): www.ey.com/en_sg/news/2019/10/m-a-appetite-in-asia-pacific-remains-strong-deal-making-at-the-heart-of-business-growth-agendas-in-the-region.

79 'Asia-Pacific is primed for its next 11-digit leveraged buyout' (23 December 2019): www.businesstimes.com.sg/banking-finance/asia-pacific-is-primed-for-its-next-11-digit-leveraged-buyout.

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a record US$15 billion for a new Asia-focused buyout fund.[80] Closer to home, South East Asia continues to nurture promising and prominent unicorns that have disrupted their respective sectors, such as Singapore-based transport technology and mobile application company Grab and Indonesia-based Traveloka and Tokopedia.[81] In addition, within just three months, Temasek's Azalea Investment Management has closed its inaugural PE fund with US$650 million, surpassing its original target of US$400 million.[82] One developing trend that will impact investment decisions by PE funds is the incorporation of ESG initiatives as part of the investment process. With increasing awareness of ESG considerations and financial data indicating that ESG integration may lead to better returns, more PE firms have adopted ESG principles as part of their investment strategies.[83] Temasek, which is owned by the government of Singapore, has announced its intentions to be more aggressive in achieving its climate change goals as it puts ESG principles at the heart of its investment strategies.[84] It is also encouraging that Quadria Capital, a Singapore-based healthcare-focused PE sponsor, became the first PE fund in the world to secure 'sustainability improvement capital call facility' from ING.[85] The interest rate of such facility is pegged to the improvement of the sustainability impact of the investment portfolio.[86]

As the world's economy faces mounting uncertainty that is likely to curb overall appetite for dealmaking, Singapore's economy will have to persist in braving global headwinds in the coming year. It remains to be seen how the city state will navigate the macroeconomic vagaries, leverage its strategic position as South East Asia's choice investment hub and harness the power of digital technologies, to remain responsive to global trends and ride the wave.

80 'Exclusive: KKR's new Asia-focused fund targets record $15 billion in 2020 – sources' (7 November 2019): www.reuters.com/article/us-kkr-asia-fundraising/exclusive-kkrs-new-asia-focused-fund-targets-record-15-billion-in-2020-sources-idUSKBN1XH1RF.

81 See footnote 9.

82 'Temasek's Azalea closes inaugural PE fund-of-funds at $650m' (16 December 2019): www.dealstreetasia.com/stories/temasek-azalea-pe-fund-close-16688.

83 'The evolution of ESG investing in Asia' (15 November 2019): https://esg.theasset.com/ESG/39176/the-evolution-of-esg-investing-in-asia.

84 'Temasek may get "more aggressive" on green goals' (25 January 2020): www.straitstimes.com/business/economy/temasek-may-get-more-aggressive-on-green-goals.

85 'Singapore PE fund locks in financing tied to sustainability in world-first for private capital' (12 October 2019): www.businesstimes.com.sg/banking-finance/singapore-pe-fund-locks-in-financing-tied-to-sustainability-in-world-first-for.

86 ibid.

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Appendix 1

ABOUT THE AUTHORS

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Andrew Ang is the head of the firm's corporate and M&A practice, and is a partner in the private equity practice.

His main practice areas are local and cross-border M&A, corporate restructurings, joint ventures, privatisations and private equity investments.

Andrew has been involved in high-profile private equity transactions, having acted for Baring Private Equity Asia Pte Ltd in the sale of an approximately 73.8 per cent stake in Courts Asia to Nojima Asia Pacific Pte Ltd, and E-Shang Infinity Cayman Limited and InfinitySub Pte Ltd in the acquisition of shares in Sabana Investment Partners Pte Ltd and units of Sabana Shari'ah Compliant Industrial Real Estate Investment Trust. He also advised Ascendas Hospitality Trust in the combination with Ascott Residence Trust by way of a trust scheme of arrangement to form the largest hospitality trust in the Asia-Pacific region and the eighth biggest globally, with a total asset value of S$7.6 billion.

Andrew graduated from the University of Nottingham and is admitted as a barrister-at-law (Gray's Inn) and to the Singapore Bar.

Andrew is recognised as a leading corporate and M&A lawyer in *Chambers Global*, *Chambers Asia-Pacific*, *IFLR1000*, *The Legal 500*, *Asialaw Profiles* and *Asialaw Leading Lawyers* in Singapore. Andrew was recognised as 'Lawyer of the Year' for Private Equity Law in the 2018 edition of *Best Lawyers in Singapore* and is endorsed for corporate, M&A and private equity.

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Quak Fi Ling is a partner in the firm's corporate and M&A and private equity practices. Her main practice areas are public and private M&A, private equity investments and corporate and commercial transactions.

Fi Ling has acted for private equity firms in both public and private M&A transactions. The more recent public M&A transactions include acting for Yanlord Land Group Limited in relation to the mandatory general offer for United Engineers Limited, Baring Private Equity Asia Pte Ltd in the sale of an approximately 73.8 per cent stake in Courts Asia to Nojima Asia Pacific Pte Ltd and China Everbright Limited in the mandatory unconditional cash offer for Ying Li International Real Estate Limited.

In the private M&A space, she has acted for OUE Limited in the sale of Oakwood Premier OUE Singapore, its luxury serviced residences and hotel business to a joint venture between AMTD Group and hotel operator Dorsett Hospitality International, and KKR, as Singapore counsel, in its acquisition of Arnott's and certain of Campbell's International operations.

Fi Ling is recognised for her corporate and M&A expertise by *Chambers Asia-Pacific* and is also a recommended lawyer in *The Legal 500: Asia Pacific* for corporate and M&A in Singapore. She is recognised as a notable practitioner in M&A and private equity by *IFLR1000*.

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