

THE PRIVATE EQUITY  
REVIEW

SIXTH EDITION

**Editor**  
Stephen L Ritchie

THE LAWREVIEWS

# THE PRIVATE EQUITY REVIEW

The Private Equity Review

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Stephen L Ritchie

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# PREFACE

The sixth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2016 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of Brexit, a new United States administration and continued challenges in developing economies such as Brazil. Nevertheless, 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. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal making 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.

While no one can predict exactly how private equity will fare in 2017, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this sixth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, 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 2017

# SINGAPORE

*Andrew Ang, Christy Lim and Quak Fi Ling<sup>1</sup>*

## I OVERVIEW

### i Deal activity

In 2016, Singapore remained the leading dealmaker in Southeast Asia,<sup>2</sup> driven by significant outbound acquisitions by the country's sovereign wealth funds and corporates. According to a report by corporate finance adviser Duff & Phelps, Singapore recorded an increase in total M&A deal volume in 2016 with 684 deals compared with 591 deals in 2015, but deal value declined from US\$101.2 billion in 2015 to US\$82.7 billion in 2016.<sup>3</sup> Significant acquisitions include acquisition by a consortium comprising Temasek Holdings Pte Ltd (Temasek), DBS Bank and other investors of a minority stake in Postal Savings Bank of China valued at US\$7 billion,<sup>4</sup> acquisition by sovereign wealth fund GIC Private Limited (GIC) and other investors of Asciano Ltd for US\$6.8 billion<sup>5</sup> and CMA CGM's S\$3.4 billion acquisition of Neptune Orient Lines Limited.

The real estate sector accounted for 30 per cent in value terms, overtaking the technology sector as the biggest contributor.<sup>6</sup> Notable deals include GIC acquiring P3 Logistic Parks for €2.4 billion<sup>7</sup> and sovereign wealth fund Qatar Investment Authority acquiring BlackRock Inc's Asia Square Tower 1 for US\$2.5 billion.<sup>8</sup>

Private equity (PE) and venture capital investments in Singapore in 2016 have also been active, reaching the highest transacted values and deal volumes in the past five years.<sup>9</sup> Such investments are predominantly minority stake investments rather than big buyouts. Technology is the top contributing sector, led by investments such as Softbank Group Corp

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1 Andrew Ang, Christy Lim and Quak Fi Ling are partners at WongPartnership LLP.

2 'M&A growth helps make Singapore the deals capital of region' (14 December 2016): [www.straitstimes.com/business/companies-markets/ma-growth-helps-make-singapore-the-deals-capital-of-region](http://www.straitstimes.com/business/companies-markets/ma-growth-helps-make-singapore-the-deals-capital-of-region).

3 Duff & Phelps's Transaction Trail, Annual Issue 2016.

4 'Singapore's Temasek & DBS, UBS, IFC, JPMorgan, others pick 17% in China's Postal Savings Bank for \$7b' (9 December 2015): [www.dealstreetasia.com/stories/chinas-postal-savings-bank-raises-7b-after-divesting-17-to-10-investors-22755/](http://www.dealstreetasia.com/stories/chinas-postal-savings-bank-raises-7b-after-divesting-17-to-10-investors-22755/).

5 'Australia's Asciano bows to \$6.8 billion break-up bid' (15 March 2016): [www.reuters.com/article/us-asciano-m-a-idUSKCN0WH064](http://www.reuters.com/article/us-asciano-m-a-idUSKCN0WH064).

6 Duff & Phelps's Transaction Trail, Annual Issue 2016.

7 'GIC acquires pan-European logistics firm P3 for 2.4b euros' (7 November 2016): [www.businesstimes.com.sg/government-economy/gic-acquires-pan-european-logistics-firm-p3-for-24b-euros](http://www.businesstimes.com.sg/government-economy/gic-acquires-pan-european-logistics-firm-p3-for-24b-euros).

8 'Qatari Fund Buys \$2.5 billion Singapore Tower from BlackRock' (6 June 2016): [www.bloomberg.com/news/articles/2016-06-06/qatar-state-fund-buys-singapore-office-tower-for-s-3-4-billion](http://www.bloomberg.com/news/articles/2016-06-06/qatar-state-fund-buys-singapore-office-tower-for-s-3-4-billion).

9 Duff & Phelps's Transaction Trail, Annual Issue 2016.

and other investors' investment in GrabTaxi Holdings Pte Ltd valued at US\$750 million.<sup>10</sup> Other notable PE investments include acquisition by GIC, Bain Capital Partners LLC and Advent International of a minority stake in Singapore-headquartered QuEST Global Engineering Pvt Ltd for US\$350 million<sup>11</sup> and Baring Private Equity Asia's S\$450 million acquisition of Singapore listed Interplex Holdings Ltd.<sup>12</sup>

In terms of exits by PE investors and sovereign wealth funds, notable examples include Temasek's proposed sale of a 21 per cent stake in Intouch Holdings and its 7.39 per cent stake in Bharti Telecom for a total consideration of S\$2.47 billion to Singtel<sup>13</sup> and EQT's sale of its 49 per cent stake in Econ Healthcare back to its founders.<sup>14</sup>

## ii Operation of the market

In the Singapore market, the main exit routes adopted by PE sponsors are through a trade sale of the target company or a public flotation of the target company's shares, which is often accompanied by a secondary offering of vendor shares held by PE sponsors.

When there is volatility in the capital markets and uncertainty over timing for a successful listing, PE sponsors who would have preferred an exit via public flotation may turn to a sale process instead. A 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 differ, a standard sale by way of controlled auction would generally involve four 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 who 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 who 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 who 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.

10 'Grab's record \$750m funding turns up the heat on Uber' (20 September 2016): [www.dealstreetasia.com/stories/grabs-record-750m-funding-turns-up-the-heat-on-uber-53782/](http://www.dealstreetasia.com/stories/grabs-record-750m-funding-turns-up-the-heat-on-uber-53782/).

11 'Bain Capital, GIC & Advent buy minority stake in QuEST Global for \$350m' (19 February 2016): [www.dealstreetasia.com/stories/bain-capital-gic-advent-pick-minority-stake-in-quest-for-350m-31293/](http://www.dealstreetasia.com/stories/bain-capital-gic-advent-pick-minority-stake-in-quest-for-350m-31293/).

12 'Baring Private Equity Asia to acquire Singapore-listed Interplex Industries for \$331m' (18 March 2016): [www.dealstreetasia.com/stories/baring-private-equity-asia-to-acquire-interplay-holdings-for-s450m-34646/](http://www.dealstreetasia.com/stories/baring-private-equity-asia-to-acquire-interplay-holdings-for-s450m-34646/).

13 'Statement: Singtel to acquire shares in Intouch Holdings and Bharti Telecom from Temasek' (18 August 2016): [www.temasek.com.sg/mediacentre/medialetters?detailid=25215](http://www.temasek.com.sg/mediacentre/medialetters?detailid=25215).

14 'Swedish PE firm EQT sells entire 49% stake in Singapore's Econ Healthcare' (22 July 2016): [www.dealstreetasia.com/stories/swedish-firm-eqt-sells-entire-49-stake-in-singapores-econ-healthcare-48293/](http://www.dealstreetasia.com/stories/swedish-firm-eqt-sells-entire-49-stake-in-singapores-econ-healthcare-48293/).

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). Increasingly, demand for warranty and indemnity insurance comes into play to mitigate deal risk for PE firms. 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 which 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 hold 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. The PE sponsor may also set aside a portion of its shareholding in the bidding vehicle to establish a share incentive scheme where such 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 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 the management leaves the employment of the target company. Such moratorium or restrictions would usually be at least for a period that coincides with the anticipated period of time that the 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 in order 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 vary depending on the objectives of a PE sponsor, whether it is to acquire a minority interest, a majority interest or 100 per cent control of the target company. 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 Singapore Code on Take-overs and Mergers



(the Take-over Code) or a scheme of arrangement (SOA) subject to both the Take-over Code and the Companies Act (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 strict timeline 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 announcement) and the target company is then obliged to respond with an offeree document (within 14 days after 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 Securities Industry Council of Singapore (SIC), the offer will either lapse as a result of such conditions not being satisfied, or close successfully.

A SOA generally involves a longer transaction timeline, due mainly to 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, a 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 need to apply to the High Court of Singapore for leave to convene a meeting of the shareholders to consider the scheme (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 after the relevant court order is lodged with the Accounting and Corporate Regulatory Authority (ACRA). Unless an objection is raised at the court hearing, a SOA is likely to take effect about 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). A 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, a SOA offers an 'all or nothing' result and may be the preferred route for PE sponsors who wish to acquire 100 per cent of the target company through a single transaction rather than to end up with a majority stake in a listed entity (which is still subject to listing rules and other compliance requirements). If the target company is not a Singapore-incorporated company, the provisions in the Companies Act relating to SOA and compulsory acquisition will not be applicable. In such cases, 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, 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 PE sponsor wishes to have the target company delisted from the SGX (and be no longer subject to listing rules and other compliance requirements) even if it will not be assured of acquiring 100 per cent of the target company after the close of the exit offer.

The framework for acquisition of private companies by PE sponsors is dependent on the requirements or restrictions in the constitution of the company (constitution) or the shareholders' agreements between existing shareholders. The presence of pre-emption rights, 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 sought or the timing upon which these processes are carried out.

Tax-related issues tend to drive the deal structure (in particular, 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 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 of 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 such 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 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 listing rules of the SGX as well as the principles and guidelines of the Code of Corporate Governance.

The Corporate Governance Council (Council) was established by the Monetary Authority of Singapore (MAS) to promote a high standard of corporate governance in listed companies in Singapore, so as to enhance Singapore's reputation as one of the foremost

financial and business hubs on a global scale and to boost the confidence of prospective and current investors. The Council acts as an adviser to the MAS, ACRA and the SGX regarding corporate governance issues and rules that apply to listed companies in Singapore. The Code of Corporate Governance includes guidelines that, *inter alia*, concern the element of independence of the board of directors where the definition of ‘independent director’ includes a director with no relationship with the company, its related corporations, its 10 per cent shareholders or its officers that could interfere or be perceived to interfere with his or her independent business judgement. These guidelines underpin the prevailing sentiment in the business community to continuously raise the standards of corporate governance. In a similar vein, the prohibition against the improper use of any information acquired by virtue of a person’s position as an officer or agent extends to cover the improper use of a person’s position as an officer or agent of the company, to gain an advantage for himself or herself or any other person, or to cause detriment to the company. Thus, any representative of a PE sponsor who sits on the board of a portfolio company should not neglect the interests of minority shareholders while discharging his or her duties towards his or her appointor, and should be especially careful not to be seen as abusing his or her position regardless of whether he or she has obtained information from the portfolio company.

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 (SFA) 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 MAS. As the disclosure regime seeks to flush out the ultimate controllers of those 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 insider-trading laws, if a party is in possession of price-sensitive information (PSI) in relation to a company that is not generally available, such a party is prohibited from trading (and from procuring another person to trade) in the company’s securities. A contravention of such 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 such 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.<sup>15</sup> A list of top M&A deals in Singapore in 2016 include:<sup>16</sup>

- a Temasek, DBS Bank and other investors acquiring a 16.9 per cent stake in Postal Savings Bank of China valued at US\$7 billion;
- b Tata Communications' sale of a 74 per cent stake in Tata Communications' data centre business in India and Singapore, worth approximately US\$640 million to ST Telemedia;
- c Easton Overseas Limited's offer for all issued shares and convertible bonds of China Merchants Holdings (Pacific) Limited, valued at S\$1.5 billion;
- d EFG BANK AG, Singapore Branch's acquisition of BSI Bank Limited's Singapore private banking business;
- e Temasek's S\$1.2 billion acquisition of SMRT Corporation Ltd;
- f Temasek's sale of a 21 per cent stake in Thailand's Intouch Holdings Public Company Limited and a 7.39 per cent stake in India's Bharti Telecom Limited, to Singapore Telecommunications Limited for an aggregate consideration of S\$2.47 billion; and
- g Qatar Investment Authority acquiring a 100 per cent stake in Asia Square Tower 1 valued at US\$2.5 billion.

#### 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 and other forms of financing being less common.<sup>17</sup> In most conventional financings, the basic lending structure mostly comprises debt, with equity investment by management and investors and other sources 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 provides 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 upfront. The certainty offered by debt financing is usually preferred in light of the requirement of confirmation of financial resources and (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 continued liquidity and availability of funds from traditional lending sources. Therefore, despite the varied forms of financing available, debt financing nonetheless remains dominant in the acquisition financing space.

The common debt-financing technique 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, and repayments of the debt are made by the target company through its own resources or future debt refinancing. Given the

15 'M&A growth helps make Singapore the deals capital of region' (14 December 2016): [www.straitstimes.com/business/companies-markets/ma-growth-helps-make-spore-the-deals-capital-of-region](http://www.straitstimes.com/business/companies-markets/ma-growth-helps-make-spore-the-deals-capital-of-region).

16 Duff & Phelps' Transaction Trail, Annual Issue 2016.

17 E.g. 'PitchBook 2017 PE Crystal Ball Report': ([pitchbook.com/news/reports/2017-pe-crystal-ball-report](http://pitchbook.com/news/reports/2017-pe-crystal-ball-report)).

involvement of the target company in the financing structure, financial assistance restrictions in Singapore present additional issues for leveraged buyout and other financing arrangements that are secured by assets of, or expected to be repaid from cash flow of, a 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.

### ***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 greater share of the entire debt package, the introduction of a mezzanine tranche is not uncommon and, if advanced, is typically provided by a financial institution or direct lending arms of funds. The mezzanine tranche may be subordinated in terms of priority of repayment and security would usually rank behind the senior tranche and may also be structurally subordinated. In return, mezzanine lenders and direct lenders expect a higher margin and incentives via equity kickers such as warrants (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, which in turn represents higher and more attractive returns to mezzanine lenders. The use of mezzanine tranches or mezzanine financing terms may be seen in acquisition deals where senior debt is not readily available from traditional lending sources or where the quantum of senior debt is insufficient for the purposes of the acquisition, hence, necessitating further alternatives in financing structures;

#### *Bonds*

In larger financing transactions, the mezzanine debt may be replaced or refinanced by high-yield bonds. The minimum size of a high-yield bond issue usually falls within the higher region in order to create sufficient liquidity within the issue, and the use of this method of financing has been restricted to the higher buyouts. In the Singapore market, save for situations where institutional acquirers or strategic investors utilise bond issuances as a method to raise financing to fund acquisition war chests, bond issuances have also been used in the context of going-private transactions where the target company has existing bond issuances, is known in the market and have existing bond issuances or other debt that needs to be refinanced whether as a result of maturity or as a result of change-of-control triggers. At the higher end of the fundraising chain, 2016 also saw the issuance by Astrea, a Temasek-linked fund, of S\$510 million worth of bonds backed by cash flows generated from its investments in private equity funds. While the proceeds of the issuance were expressed to be intended for the purposes of repaying existing shareholders loans, the subscription levels and the possibility of a similar retail issuance in the future suggest that there may be appetite in the market for private equity-linked debt issuances backed by significant sponsors that could then also be used to raise funding for acquisition war chests.<sup>18</sup>

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18 ‘Temasek’s unit issues \$510 mln private equity bonds in Singapore’ (21 June 2016): [www.reuters.com/article/temasek-holdings-privateequity-idUSL4N19E1DT](http://www.reuters.com/article/temasek-holdings-privateequity-idUSL4N19E1DT); ‘Singapore: New bonds by Temasek may give

Where the market is favourable, bond issuances have been seen as a strong option for the refinancing of acquisition debt given the generally favourable terms in comparison to debt financing. That said, the fluctuating and changing nature of the bond market means that, in the context of the actual financing of purchase consideration juxtaposed with the need of acquirers for certainty of funding in relation to such financing, bond issuances have not been as prevalent for the purposes of funding the actual acquisition but remain more common as a post-acquisition financing option (although discussions of post-financing structures would have typically commenced prior to or during the acquisition process).

### *Composite financing structures*

In recent years certain take-private deals involving a larger quantum of acquisition debt have seen principals structure the acquisition debt with a composite of various financing sources, coupled with the flexibility for incurrence of additional debt that may then be brought within the existing financing structure comprising the acquisition debt. A typical structure would involve a senior facility coupled with either one or more other facilities (mezzanine or otherwise), bond issuances and the ability to either increase borrowing limits in such other facilities or to bring in new facilities into the existing structure. Consequently, security sharing, subordination and intercreditor terms are issues that merit consideration and form the subject of fairly involved negotiations. As a practical measure, existing financiers to the target group may also be invited to participate in the composite structure in order to, amongst others, manage the risk of the lenders in these facilities triggering prepayment or default provisions as a result of the acquisition.

Notwithstanding these alternative financing structures, the continued liquidity in the lending market means that there is no clear upsurge in these other alternative financing sources as traditional debt financing continues to prevail.

### *Security structures*

Financiers typically look to the assets of the target group in seeking to maximise its collateral pool. Whether it is able to enhance its security package is fundamentally premised on the twin key factors of the availability of the asset pool of the target group and (depending on the locality and the asset in question) the feasibility of taking such securities, bearing in mind the legal prohibitions and restrictions applicable in each relevant jurisdiction (including financial assistance issues). If the financiers consider the security package insufficient, they may at times require additional safeguards such as the provision of corporate or individual guarantees or support arrangements from parties related to the acquirer.

Notwithstanding the relaxation of the financial assistance prohibitions in Singapore, security or guarantees from the target group are generally expected to not be in place on or prior to funding and the completion of the acquisition as the acquirer would typically not have control over the target group at that stage and financial assistance restrictions may still apply to the extent that the target company remains a public company or a subsidiary of a public company. As such, depending on the security matrix, clean-up periods may still feature in financing documentation, although the timing for the provision of security

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retail investors access to PE' (9 June 2016): [www.dealstreetasia.com/stories/singaporetemase-bonds-facilitate-retail-investor-access-to-private-equity-43702/](http://www.dealstreetasia.com/stories/singaporetemase-bonds-facilitate-retail-investor-access-to-private-equity-43702/).

and guarantees by the target group has generally been shortened due to the absence of the need to conduct 'whitewash' procedures to lift financial assistance restrictions (assuming the target is taken private or was already a private company). Where security or guarantees are expected to be provided shortly after the completion of the acquisition, the form of the security documents would also have been negotiated and, if possible, agreed prior to the completion of the acquisition. The feasibility of this approach would depend on the visibility of the acquirer on the assets of the target group and the restrictions (legal, contractual or otherwise) and encumbrances thereon. To the extent that such visibility is not forthcoming, the provision of security and guarantees by the target group needs to be assessed and clean up periods adjusted accordingly.

### ***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), such 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 (e.g., 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 such circumstances.

### ***Financial assistance***

In 2015, amendments to the Companies Act took effect resulting in the abolishment of financial assistance restrictions on private companies that are not subsidiaries of a public company. The relaxation on the prohibitions against financial assistance for private companies has eased the provision of security by targets and their subsidiaries that have successfully been taken private after completion of the acquisition. Private companies or companies that are taken private no longer need to undergo 'whitewash' procedures in order to provide financial assistance (e.g., by way of a debt pushdown or by providing security and guarantees).

With the abolishment, 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. These, however, remain restricted to deals where the target company is a private company (which is not a subsidiary of a public company) and are subject to the acquirer's visibility of the target group's assets.

The amendments to the Companies Act also introduced a new 'whitewash' procedure to allow a public company or its subsidiary to provide financial assistance. Adapted from Section 260A(1)(a) of the Australian Corporations Act 2001, the new 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 shareholder's interest, or the company's ability to pay its creditors; and
- b* the company's board of directors resolve that the company should provide financial assistance and that the terms for doing so are fair and reasonable to the company.

Australian case law has yet to provide definitive guidance on when PE investors and their financiers may rely on this exception, especially in the context of leveraged buyouts where the issue of financial assistance is most pertinent<sup>19</sup>.

It has been suggested (in line with the approach taken by some Australian authorities) 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;
  - the nature of the transaction, in particular, whether it involves any actual or contingent depletion of the company’s assets;
  - an assessment of all the interlocking elements of the transaction; and
  - an assessment of where the net balance of financial advantage lies;
- 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 cashflow and balance sheet;
- c* the opinion of the directors or any independent experts on the impact of the transaction; and
- d* any actual loss suffered by the company as a result of the transaction.

Although the ‘no material prejudice’ whitewash method has been used (albeit sparingly) in Singapore since its introduction, it remains to be seen, however, whether such regime will gain traction or whether target companies will still seek to utilise the conventional ‘whitewash’ methods for the purposes of the provision of security and the incurrence of debt in relation to its acquisition. Until greater clarity is achieved on the applicability of the new whitewash method along with guidance on the adoption of this method, financial assistance remains a live and key issue in acquisition deals involving public companies and their subsidiaries.

### ***Exit strategies in the financing context***

Recent years have seen PE investors holding on to acquisitions for a longer period and financing strategies, options and terms have generally evolved in line with the longer exit strategies. In particular, given the restrictive terms of debt financing, there has been a greater volume of amend-and-extend transactions for existing debt facilities and refinancing of debt facilities with less restrictive financing options such as bond issuances.<sup>20</sup> This greater volume could also be a result of the impending maturity of existing debt financings consummated during the spate of acquisitions in the early part of this decade. 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 and to allow the PE investor to achieve a partial exit or return from the investment or, in the case where the target group has 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.

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19 IBA Corporate and M&A Law Committee 2013, ‘Australia: Financial Assistance’ (2013).

20 Ernst & Young ‘Credit Markets 2015-16’: ([www.ey.com/Publication/vwLUAssets/EY-Credit-Markets-2015-2016/%24FILE/EY-Credit-Markets-2015-2016.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Credit-Markets-2015-2016/%24FILE/EY-Credit-Markets-2015-2016.pdf)).



### iii Key terms of recent control transactions

A PE sponsor whose objective is to privatise a listed company (i.e., an 'all or nothing' outcome) but does not wish to do so by way of a SOA (because of the protracted timeline and process) may do so by way of a general offer that is conditional upon a higher minimum acceptance threshold of 90 per cent. By pegging the minimum acceptance condition to the compulsory acquisition threshold under Section 215(1) of the Companies Act, the PE sponsor either privatises the target company or walks away if the acceptance condition is not met.

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 which 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. Due to the potential lengthy process of merger control filings, takeovers of listed companies have to be structured as a 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 Takeover Code).

In making an exit, a PE sponsor that is seeking to exit in line with its investment time frame would likely 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 such 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 such 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. Besides that, the offer price may also be adjusted for dividends declared or paid during the offer period. Post-completion audits and consequentially 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 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

Generally, the oversight of regulatory bodies such as the SIC and the SGX is relevant when the target company is listed on the SGX. The MAS is also relevant with regard to the regulation of fund management companies.

### i Companies Act

The last round of significant amendments to the Companies Act was passed in 2014 and the amendments came into effect in two phases. The first tranche of amendments came into effect on 1 July 2015 and one of the key amendments relates to financial assistance as mentioned above.

The second tranche of amendments came into effect on 3 January 2016 and some of the key amendments that may impact M&A activities are:

- a* the extension of the right to issue shares with different voting rights (previously only allowed for private companies) to public companies to give them greater flexibility in capital management. The SGX is currently reviewing the issue of whether to allow SGX listed companies to adopt a dual class share structure and to issue non-voting shares and shares with multiple votes;
- b* the compulsory acquisition mechanism under the Companies Act that allows the bidding vehicle a means to squeeze out not only the holders of shares, but also the holders of options and convertibles; and
- c* the amalgamation provisions under the Companies Act no longer require the board of directors of each amalgamating company to provide a 12-month forward-looking solvency statement of the amalgamated company. This will address the difficulty and reluctance of directors of two amalgamating companies to provide a 12-month forward looking solvency statement when the board of the amalgamated company may adopt a different business strategy moving forward. With this change, more companies may be prepared to consider amalgamation as an alternative M&A structure.

In 2016, further amendments to the Companies Act were being proposed. One aspect relates to the updating of Singapore's corporate insolvency laws and enhancing of debt restructuring framework to meet modern day business needs and another aspect relates to company administration to reduce the regulatory burden and improve the ease of doing business, as well as enhancing the transparency of business entities.<sup>21</sup> One of the key proposed amendments relates to the requirement for companies (other than SGX listed companies and Singapore financial institutions) and limited liability partnerships incorporated or registered in Singapore to obtain and maintain information on their beneficial owners and controllers. This disclosure regime (which has already been adopted in the UK) seeks to ensure that Singapore's business transparency regime meets the international standards set by the Financial Action Task Force and the Global Forum on Transparency and Exchange of Information for Tax Purposes. It remains to be seen whether this will affect the attractiveness of Singapore as a jurisdiction for incorporation of companies.

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21 'Companies (Amendment) Bill 2017' (21 December 2016): [www.acra.gov.sg/CA\\_2017/](http://www.acra.gov.sg/CA_2017/).

## ii Take-over Code

The Take-over Code was amended on 25 March 2016. Some of the key amendments that may impact M&A activities include:

- a* introducing a deadline for a potential competing offeror to clarify its intentions ('put up or shut up') by either announcing a firm intention to make an offer or making a 'no intention to bid' statement;
- b* introducing an auction procedure for the resolution of competitive situations;
- c* requiring prompt announcement of any material changes to information previously published in connection with the offer or material new information which would have been required to be disclosed in any previous document published during an offer period, had it been known at the time; and
- d* clarifying that when considering an offer, an offeree board may consider the feasibility of soliciting a competing offer or running a sale process as well as the availability of management projections and forecasts that can be shared with the independent adviser for the purpose of the latter's advice on the offer.

These amendments provide greater certainty on the applicable procedures and timelines in the event of competing offers and for those offeree company boards who desire to take a more active role in safeguarding shareholders' interests.

## iii SFA

The Securities and Futures (Amendment) Bill 2016 was passed in Parliament on 9 January 2017. The Bill seeks to introduce a range of amendments to the SFA in relation to, among other things, over-the-counter (OTC) derivatives regulation, enhancing regulatory safeguards for retail investors, enhancing the credibility and transparency of the capital markets and strengthening the enforcement regime against market misconduct.

Some of the key amendments that are more relevant to M&A activities include:

- a* the clarification that the prohibition in Section 199 of the SFA (in relation to the making of statements or dissemination of information that is false or misleading in a material particular manner) applies regardless of the effect on price. This allows the MAS to take enforcement action against material false or misleading disclosure that may wrongly influence persons to trade in the market, whether or not it has a significant price effect;<sup>22</sup>
- b* the introduction of a statutory definition of 'persons who commonly invest' (as referred to in Sections 215(b)(i) and 216 of the SFA) that will be used as the reference point in insider trading cases to assess whether a particular piece of information is generally available and is likely to have a material price impact by influencing the behaviour of common investors. The new statutory definition will strengthen the MAS's ability to pursue insider trading cases without having to meet an unrealistically high standard for 'persons who commonly invest', and the MAS will issue guidelines on the interpretation of the statutory definition.<sup>23</sup>

22 Monetary Authority of Singapore, 'Response to Feedback Received – Proposed Amendments to the Securities and Futures Act (Part XII & Section 324)' (November 2016).

23 'Securities and Futures (Amendment) Bill 2016' – Second Reading Speech by Mr Ong Ye Kung, Minister for Education (Higher Education and Skills) and Second Minister for Defence, on behalf of Mr Tharman

It is important that parties to an M&A transaction are well aware of Singapore's insider-trading and market misconduct laws, given the potential civil and criminal liabilities that may follow for breach of such laws.

From the perspective of access to financing for PEs, it may be noteworthy that the US has introduced guidance on leveraged transactions since March 2013 and that the European Central Bank has also recently in November 2016 launched a public consultation on similar guidance.<sup>24</sup> Given that the guidance at present is restricted to the US and possibly European banks going forward, there is no visibility as to whether this will translate to similar guidance in Singapore to reflect international practices, and if so, whether this would have an impact on the ease of access to the traditional financing source of bank lending in Singapore. To the extent that financial institutions are already within the parameters proposed by any guidance, impact, if any, on access to financing may be minimal.

## V OUTLOOK

It is difficult to predict the outlook for local M&A activity in 2017 due to the macroeconomic uncertainties. Among other things, it would be hard to know the outcome of Brexit negotiations or the aftermath following the 2016 US presidential elections. 2016 has seen a fall in deal value as compared to 2015, and it may be the case that global M&A deal value could continue its decline in 2017. Nevertheless, we believe that Singapore, with its strategic location and established financial infrastructure, remains well poised to capitalise on any growth in the region.

Chinese investors' increasing appetite for outbound acquisitions will also continue to fuel M&A activities in the region. However, in an effort to slow a surge in capital fleeing offshore and stabilise a declining yuan, China has issued regulatory rules to tighten supervision on outbound investments and restrict outbound investments by centrally controlled state firms.<sup>25</sup> With certain overseas deals being subject to stricter review, it may slow down the pace of investment by Chinese investors.

On a more positive note, there are various successful technology start-ups that are headquartered in Singapore, with examples of Garena and Grab being highly valued and funded in the region.<sup>26</sup> As Singapore continues to develop itself as a technology hub, we may see a rise of more success stories in Singapore and further boosts in M&A activity in relation to the technology sector.

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Shanmugaratnam, Deputy Prime Minister and Minister in charge of the Monetary Authority of Singapore on 9 January 2017 (11 January 2017) [www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-Policy-Statements/Speeches/2017/Securities-and-Futures-Amendment-Bill-2016.aspx](http://www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-Policy-Statements/Speeches/2017/Securities-and-Futures-Amendment-Bill-2016.aspx).

24 'ECB launches public consultation on a draft guidance on leveraged transactions' (23 November 2016): [www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr161123.en.html](http://www.bankingsupervision.europa.eu/press/pr/date/2016/html/sr161123.en.html).

25 'China steps up capital controls, tightens investment rules for state firms' (18 January 2017): [www.businesstimes.com.sg/government-economy/china-steps-up-capital-controls-tightens-investment-rules-for-state-firms](http://www.businesstimes.com.sg/government-economy/china-steps-up-capital-controls-tightens-investment-rules-for-state-firms).

26 Duff & Phelps' Transaction Trail, Annual Issue 2016.

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Christy Lim is a partner in the firm's banking and finance practice.

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Christy is recognised as a leading lawyer in the banking and finance arena by *Chambers Global* and *Chambers Asia Pacific* since 2009. In the *Chambers* publications, she is recommended for being 'sharp and articulate', whose 'effective negotiating style' has earned her 'particular plaudits'. She is also recommended as 'someone you would always want to have on your side' and praised for her 'skills and proficiency', 'whose strong grasp of securities, acquisitions and debt restructurings makes her a lawyer of choice for a number of major private equity houses and investment banks'. Known for her ability to 'handle the counsel on the other side very well, so that a reasonable outcome can be struck', she earns praise

for her ability to ‘breeze through otherwise lengthy negotiations and appreciate commercial realities on transactions’. She is identified as a leading practitioner by *IFLR1000: Financial & Corporate* and as a ‘key player’ by *The Legal 500: Asia Pacific*. Christy is also recognised as a leading finance practitioner by *Best Lawyers*.

She graduated from the National University of Singapore and is admitted to the Singapore Bar.

## **QUAK FI LING**

*WongPartnership LLP*

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

Fi Ling acted for GMG Global Ltd in the preconditional offer by Halcyon Agri Corporation Limited; KKR Credit Advisors (US) LLC in its investment in JBF Industries Limited and JBF Global Pte Ltd (JBF Investment); and Keppel Infrastructure Trust (KIT) in relation to the combination of KIT and CitySpring Infrastructure Trust. She was also involved in the acquisition by Kohlberg Kravis Roberts & Co LP (KKR) of MMI Holdings Limited via a scheme of arrangement (MMI Scheme) and advising Morgan Stanley Asia (Singapore) Pte as financial adviser in KKR’s acquisition of Unisteel Technology International Limited.

The JBF Investment deal was awarded ‘Private Equity & Venture Capital Deal of the Year’ by Indian Business Law Journal 2015 and the MMI Scheme was recognised as the ‘Best Leveraged Financing’ deal by *FinanceAsia*.

Fi Ling graduated from the National University of Singapore and is admitted to the Singapore Bar.

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