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Singapore

PRIVATE EQUITY

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This country-specific Q&A provides an overview of private equity laws and regulations applicable in Singapore.

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SINGAPORE
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1. What proportion of transactions have involved a financial sponsor as a buyer or seller in the jurisdiction over the last 24 months?

A fairly sizeable proportion of M&A transactions recorded in Singapore over the last 24 months involved the participation of a private equity firm, and private equity firms have continued to participate actively in significant public and private M&A transactions across various sectors. Duff and Phelps (now a Kroll business) reported that between December 2020 and November 2021, Singapore recorded a total of 828 M&A deals (valued at US$198.9 billion) and 303 private equity / venture capital investments (amounting to approximately US$16.5 billion).

2. What are the main differences in M&A transaction terms between acquiring a business from a trade seller and financial sponsor backed company in your jurisdiction?

As financial sponsors are usually not involved in the day-to-day operations of the business of the target, it is common for financial sponsors to provide only limited fundamental warranties (such as warranties as to title, capacity and authority) and not business warranties (which may be separately provided by the target's management). Trade sellers would typically be expected to give both fundamental and business warranties.

A buyer is also less likely to request post-completion restrictive covenants (such as non-compete or non-solicitation clauses) from a financial sponsor, but may insist on the same from a trade seller.

3. On an acquisition of shares, what is the process for effecting the transfer of the shares and are transfer taxes payable?

The typical process for effecting a transfer of shares is as follows:

1. for a transfer of shares in a Singapore private company or unlisted Singapore public company:

a. the seller and the buyer will execute a share transfer form, and deliver the same to the company secretary;

b. upon receiving the duly stamped and fully executed share transfer form, as well as the seller's original share certificates in respect of the sale shares:

i. in the case of a Singapore private company, the company secretary will lodge the share transfer with the Accounting and Corporate Regulatory of Singapore (ACRA) and update the electronic register of members maintained by the ACRA. The share transfer will only be effective when the electronic register of members has been updated; and
ii. in the case of an unlisted Singapore public company, the company secretary will update the relevant physical registers of the company to reflect the share transfer and the new transferee as the holder of the sale shares. The company secretary may also lodge the share transfer with the ACRA, but such lodgment is not compulsory for the share transfer to be effective; and

c. the company secretary will issue new share certificates in respect of the sale shares to the buyer; and

2. for an off-market transfer of scripless shares in a Singapore company listed on the Singapore stock exchange, parties may give instructions to their relevant brokers to procure the sale and purchase of the sale shares on the relevant completion date as a 'married deal', or execute a request for the transfer of securities in the prescribed form issued by The Central Depository (Pte) Limited (CDP) and submit the executed form to the CDP.

In the absence of any applicable exemption or relief,

stamp duty is generally payable on a transfer of shares at a rate of 0.2% of the higher of: (A) the value; and (B) the purchase price, of the shares being transferred. Stamp duty is not payable where there is no document executed for the transfer of scripless shares. Unless otherwise agreed between the parties, the buyer has the obligation to pay the stamp duty.

4. How do financial sponsors provide comfort to sellers where the purchasing entity is a special purpose vehicle?

Financial sponsors may provide equity commitment letters and/or bank commitment letters to sellers as evidence that the relevant funds will be available for completion. In some instances, sellers have also requested that a parent guarantee be provided by an entity of substance to guarantee the obligations of the special purpose acquisition vehicle.

In the context of public acquisitions which are regulated by the Singapore Code on Take-Overs and Mergers, where an offer is for cash or involves an element of cash, a financial adviser must provide a confirmation that the offeror has sufficient resources available to satisfy full acceptance of the offer.

5. How prevalent is the use of locked box pricing mechanisms in your jurisdiction and in what circumstances are these ordinarily seen?

A locked-box pricing mechanism is not uncommon in Singapore, but is generally less common than purchase price adjustment mechanisms (for debt and/or working capital). A locked-box pricing mechanism is more often seen in auction processes and in transactions where the sellers are financial sponsors.

6. What are the typical methods and constructs of how risk is allocated between a buyer and seller?

Risk is typically allocated between a seller and a buyer in the sale and purchase agreement by using conditions precedent, representations and warranties, indemnities, pre-completion and post-completion undertakings, termination rights, earn outs and adjustments to the purchase price.

A seller would strongly resist provisions which would affect the certainty of the transaction (such as conditions precedent or termination rights) or give rise to significant post-completion liabilities (such as onerous post-completion undertakings or indemnities). A buyer would insist on conditions precedent and/or termination rights in respect of critical issues which would affect the buyer's willingness to complete the transaction, and would also require the seller to indemnify the buyer for losses incurred in respect of any known issues uncovered in the course of due diligence.

Parties would also heavily negotiate provisions which limit the seller's liability, such as the time limitation period for claims to be made against the seller, the minimum claim amount and the maximum amount of the seller's liability in respect of the transaction.

7. How prevalent is the use of W&I insurance in your transactions?

There has been increasing recognition of the value of W&I insurance for Singapore M&A transactions, especially in transactions where the seller does not wish for any part of the transaction proceeds to be retained by the buyer or held in escrow as security for W&I claims and paid post-completion. Other factors which parties may take into account when considering the use of W&I insurance include the jurisdiction(s) in which the material assets or business of the target are located and the deal size.

8. How active have financial sponsors been in acquiring publicly listed companies?

Financial sponsors have been relatively active in Singapore's public market deals, especially in the privatisation of listed companies. Financial sponsors typically form a consortium with existing majority shareholders in such take-private transactions. Recent examples of financial sponsors acquiring publicly listed companies include (a) the unconditional mandatory general offer of APAC Realty Limited by NHPEA Ace Realty Company Limited, an entity controlled by Morgan Stanley Private Equity Asia; (b) the privatisation of Singapore Press Holdings Limited by way of a scheme of arrangement by Cuscaden Peak Pte. Ltd., a consortium backed by entities linked to global investment company Temasek Holdings Limited; and (c) the voluntary conditional cash offer for Hwa Hong Corporation Limited by Sanjuro United, a consortium which shareholders include Ergonomix Ltd. (which is wholly owned by Dymon Asia Private Equity (S.E. Asia) II Ltd).

9. Outside of anti-trust and heavily

regulated sectors, are there any foreign investment controls or other governmental consents which are typically required to be made by financial sponsors?

Outside of anti-trust and heavily regulated sectors, there are no foreign investment controls or other governmental consents which are typically required to be obtained by financial sponsors in Singapore M&A transactions.

10. How is the risk of merger clearance normally dealt with where a financial sponsor is the acquirer?

The financial sponsor acquirer could do a preliminary analysis as to whether merger clearance would be required, and if so, merger clearance may be required as a condition precedent to completion.

11. Have you seen an increase in (A) the number of minority investments undertaken by financial sponsors and are they typically structured as equity investments with certain minority protections or as debt-like investments with rights to participate in the equity upside; and (B) 'continuation fund' transactions where a financial sponsor divests one or more portfolio companies to funds managed by the same sponsor?

There has been an increase in the number of minority investments undertaken by financial sponsors in Singapore. Such investments by financial sponsors typically take the form of preferred shares with minority protections (including veto rights for certain reserved matters, tag-along rights in the event of a transfer of shares by the majority shareholder and non-compete restrictions), or convertible or mezzanine debt.

'Continuation fund' transactions have also become increasingly common given that the COVID-19 pandemic and concerns over an impending global recession have affected investment horizons and exit potentials.

12. How are management incentive schemes typically structured?

Management incentive schemes are typically negotiated and the structures can vary widely depending on the commercial agreement and bargaining positions of the parties. The incentives include: (a) providing key management an opportunity to co-invest by rolling over existing target equity into new equity in, or by re-investing part of their sales proceeds into, the acquisition vehicle; (b) cash incentives; and (c) setting up employee share option schemes where share options may be granted to key management subject to certain key performance indicators being met.

Managers who are holding on to equity will usually be restricted from freely transferring their shares, and may be obliged to sell their shares to the company or other shareholders when they leave the company. It is also common for managers to be subject to good leaver and bad leaver provisions, especially in employee share option schemes, where the reason for a manager's departure from the target company may affect the vesting period and the price of the shares or share options.

13. Are there any specific tax rules which commonly feature in the structuring of management's incentive schemes?

There are no specific tax rules which commonly feature in the structuring of management incentive schemes. Subject to the relevant conditions being met, the company may be eligible for tax deductions when employees are provided with equity-based remuneration.

14. Are senior managers subject to non-competes and if so what is the general duration?

Senior managers are typically subject to non-compete restrictions. That said, under Singapore law, non-compete restrictions are *prima facie* void and unenforceable unless the employer can demonstrate that it has a legitimate interest to protect, and the non-compete restrictions are reasonable.

A senior manager who is also a selling shareholder will generally be subject to a non-compete period of typically up to 2 to 3 years after: (a) completion; or (b) (in the case of a re-investing senior manager) the date on which he ceases to be a shareholder. It is also common for senior management to be subject to non-compete restrictions in their employment agreements for a period of typically up to 6 to 12 months after the date on which they cease to be employees.

15. How does a financial sponsor typically ensure it has control over material business decisions made by the portfolio company and what are the typical documents used to regulate the governance of the portfolio company?

A financial sponsor with a majority stake would generally control the board and the business decisions of the portfolio company. A financial sponsor with a minority stake would usually request: (a) veto rights over key decisions (including in respect of a material change of the target's business, adoption of annual budgets and business plans, and material acquisitions and disposals); (b) a right to appoint nominees onto the board of the portfolio company; and (c) fairly robust information rights.

The typical documents used to regulate the governance of the portfolio company would be the shareholders' agreement and the portfolio company's constitution.

16. Is it common to use management pooling vehicles where there are a large number of employee shareholders?

Management pooling vehicles are not uncommon where it is expected that there will be a large number of employee shareholders. Alternative structures include the company holding the shares provided to employee shareholders in a trust for the employees.

17. What are the most commonly used debt finance capital structures across small, medium and large financings?

Debt financing in Singapore usually takes the form of senior debt. For small and medium transactions (which are predominantly equity-funded), any debt financing required would typically be structured as a bilateral facility granted by a single lender.

For larger transactions, the debt financing may comprise a combination of senior and mezzanine debt (and in more complex transactions but less frequently, high-yield bonds) by a single lender or group of lenders, with senior debt being the predominant means of financing. Where a combination of senior and mezzanine debt is used, the mezzanine debt will rank behind the senior debt. If loan syndication is involved, the syndication process usually takes place after completion of the transaction due to reasons of confidentiality and timing. The arrangers of the syndicate may provide the buyer with a short-term bridging loan to allow the buyer to proceed with completion, and such bridging loan will then be subsequently refinanced and syndicated after completion.

18. Is financial assistance legislation applicable to debt financing arrangements? If so, how is that normally dealt with?

Financial assistance may arise in debt financing arrangements where the target group's assets are used to secure the acquisition debt obligations of the target group, and the target company is, or is a subsidiary of, a public company.

Under the Singapore Companies Act, a public company or a private company which holding company or ultimate holding company is a public company is generally prohibited from, whether directly or indirectly, giving financial assistance for the purpose of or in connection with the acquisition or proposed acquisition by any person of shares in either that company, its holding company, or its ultimate holding company.

That said, certain matters (as set out in the Singapore Companies Act) are carved out from such general prohibition against financial assistance. These matters include a distribution of a company's assets by way of dividends lawfully made and a payment made by the company pursuant to a capital reduction carried out in accordance with the Singapore Companies Act.

It is also common for a company to carry out 'whitewash' procedures in accordance with the Singapore Companies Act to facilitate debt financing arrangements.

19. For a typical financing, is there a standard form of credit agreement used which is then negotiated and typically how material is the level of negotiation?

While there is no standard or fixed form of credit agreement which is used in Singapore, parties frequently have reference to the forms of facilities agreements published by the Loan Market Association and the Asia Pacific Loan Market Association when negotiating financing documents. The level of negotiation required would depend on a variety of factors, including the parties involved, and the complexity and size of the transaction.

20. What have been the key areas of

negotiation between borrowers and lenders in the last two years?

A key trend emerging in recent years is that private equity investments are held for increasingly longer periods. This has led to increasing negotiations between borrowers and lenders around the flexibility to extend maturity dates, prepayment events and financial covenants in financing documents.

Another emerging trend is the emphasis on environment, social and governance (ESG) factors in private equity financing, where private equity investors now typically require portfolio companies to adopt and implement a set of formalised, pre-agreed ESG policies upon completion of an acquisition. Lenders are also increasingly factoring ESG metrics into their investment decisions, which has a downstream impact on negotiations between borrowers and lenders.

21. Have you seen an increase or use of private equity credit funds as sources of debt capital?

Debt funds continue to be involved in the private equity space, particularly in the financing of private leveraged buyouts through mezzanine debt, and in some instances, to provide debt capital solutions in liquidity events. That said, financial institutions continue to form the core of financiers of debt capital.

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