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Private equity in Singapore: market and regulatory overview

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MARKET OVERVIEW

1. How do private equity funds typically obtain their funding?

The top three sources of Asian-based investment are:

- Corporate investors.
- Banks or investment banks.
- Insurance companies.

There has been an increase over the last 12 to 18 months in funding from North America and other university endowments funds. Other common means of obtaining funding comes from:

- Government agencies.
- Investment companies.
- Family offices.
- Private equity "fund of funds" managers.
- Wealth managers.
- Asset managers.
- Sovereign wealth funds.

2. What are the current major trends in the private equity market?

Although the pace of global private equity fund raising has slowed in the first quarter of 2015, the Asian private equity market remains positive. The close of the recent US$3.998 billion Baring Asia Private Equity Fund VI is a good example. Bain, the global management consulting firm, reported during 2014 that Asia-Pacific-focused funds had US$138 billion in unspent capital.

Investors continue to be wary of regional market volatility and political and regulatory uncertainties.

Asian consumers

The growing middle class across Southeast Asian jurisdictions, combined with pressures on commodity prices, has led to an increased focus on the consumer sector. Technology and media is another growing sector with high demand for mobile technology requiring increased investment in all aspects of the sector.

Synthetic fund structures

Secondary funds are increasingly using synthetic fund structures to give them economic exposure to existing asset portfolios. This approach reduces the need to transfer the underlying legal title and enables transactions to be effected much more quickly.

Co-sponsorship

Co-sponsorship transactions (where an institutional investor and a private equity fund are equal partners) are also on the rise, representing a more active form of investing. For example, in June 2014, Singapore-based investment fund Temasek co-sponsored the acquisition of 50% of Santander Group's custody business, led by Warburg Pincus.

Singapore as a jurisdiction for registration

Fund vehicles are increasingly being registered in Singapore, enabling closer proximity to their portfolio companies. Singapore is perceived as a springboard into the other Association of Southeast Asian Nations (ASEAN) countries, which increases its attractiveness as a fund base.

Minority investment

Although not appealing to all private equity funds, certain sectors and jurisdictions require minority-only investment. This has required funds to adjust their investment approach and heightens the importance of developing and maintaining good relationships with the majority investor.

3. What has been the level of private equity activity in recent years?

Fundraising

There has been a marked increase in the value of funds raised, together with an increase in deal value over the past year.

74% of Asian-based investors have been reported as anticipating committing at least as much capital if not more to private equity in the period September 2014 to September 2015 compared to the previous year.

Investment

The level of private equity investment in Singapore has developed steadily over recent years, as Singapore continues to function as a reliable hub for Southeast Asian deals.

Transactions

The volume of private equity-backed transactions in 2014 was significantly below that of the previous year, although deal size was typically larger.

Exits

Buyout-based exits in Asia-Pacific were valued at US$53 billion in 2014, representing an increase of 120% on 2013.

Asia-Pacific exits in aggregate exceeded US$105 billion, demonstrating that buyouts are on the rise in the region.

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REFORM

4. What recent reforms or proposals for reform affect private equity in your jurisdiction?

Amendments to the Singapore Companies Act

The recent changes to the Singapore Companies Act (expected to come into force in the second quarter of 2015) will do the following for private equity groups:

- Reduce the regulatory burden.
- Promote greater business flexibility, transparency and ways of raising capital income tax.

In the 2014 Budget, the Government announced that the following schemes will be extended for five years until 31 March 2019:

- Offshore Fund Incentive Scheme.
- Resident Fund Incentive Scheme.
- Enhanced-Tier Fund Incentive Scheme.

Enhancements to the Enhanced-Tier Fund Incentive Scheme were announced in the 2015 Budget. From 1 April 2015, the Enhanced-Tier Fund Incentive Scheme applies to special purpose vehicles (SPVs) held by master-feeder fund structures. Master and feeder funds and SPVs within a master-feeder fund structure can apply for the Enhanced-Tier Fund Incentive Scheme and can meet certain economic conditions on a collective basis. The Monetary Authority of Singapore will release further details during 2015.

In the 2015 Budget, it was announced that a 5% concessionary tax rate will be given to approved venture capital fund management companies on their specified income. The approval window will be from 1 April 2015 to 31 March 2020. The Pioneer Service incentive for venture capital fund management companies was withdrawn on 1 April 2015. A review date of 31 March 2020 will be legislated for the tax exemption scheme under section 13H of the Income Tax Act (Chapter 134) for approved venture capital funds.

Goods and services tax

In the 2014 Budget, the Government announced that the existing goods and services tax (GST) concession (that allows qualifying funds that are managed by prescribed fund managers in Singapore to claim input GST incurred on prescribed expenses) was extended for a further five years until 31 March 2019.

The Inland Revenue Authority of Singapore (IRAS) recently published the Second Edition of the e-Tax Guide "GST: Guide for the Fund Management Industry" on 18 March 2015, covering revisions to the GST treatment of services provided or received by fund managers in the fund management industry.

Foreign Account Tax Compliance Act (FATCA)

On 18 March 2015, the following came into force:

- The Singapore-US Foreign Account Tax Compliance Act (FATCA) Model 1 Intergovernmental Agreement (IGA).
- The Income Tax (International Tax Compliance Agreements) (United States of America) Regulations 2015 (the Regulations).

Under the IGA and the Regulations, reporting Singaporean financial institutions (RSFIs) must fulfil their reporting obligations arising under FATCA through the IRAS instead of reporting directly to the US Internal Revenue Service (US IRS). The information reported to the IRAS is in turn shared with the US IRS. Non-reporting Singapore-based financial institutions (NRSFIs) are generally not required to report such information to the IRAS.

RSFIs must register themselves with the US IRS to avoid FATCA-related withholding tax. NRSFIs can also be subject to US IRS registration requirements.

TAX INCENTIVE SCHEMES

5. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

Incentive schemes

There are no tax incentives or other schemes specifically aimed at encouraging investment in unlisted companies. However, the income tax system is designed to encourage private equity investment activities.

GST

In the 2014 Budget, the Government extended the existing GST concession for qualifying funds managed by prescribed fund managers in Singapore, which will last until 2019 (*see Question 4*).

Single-tier corporate tax system

Corporate income tax paid by a resident company is final and there is no further tax on dividends.

Non-taxation of gains on disposal of equity investments

There is no capital gains tax. Provided that a company has held at least 20% of the ordinary shares in the target for a continuous period of 24 months immediately before disposal of the shares, the gains realised on the sale of its shares in that company are exempt from income tax, if certain conditions are met. Currently, this tax treatment applies to disposals of ordinary shares made during the period 1 June 2012 to 31 May 2017 inclusive.

Financial sector incentive scheme (FSI Scheme)

The FSI-Fund Management (FSI-FM) Award under the FSI Scheme (regulated by the Monetary Authority of Singapore (MAS)) has been extended to 31 December 2018. The FSI-FM Award provides for a 10% concessionary income tax rate for qualifying income derived by an approved fund management company that was granted an FSI-FM Award. New applicants for the FSI-FM Award are subject to MAS requirements.

Offshore fund incentive scheme

A foreign investment fund vehicle (an individual, company or trustee) can automatically qualify for tax exemption on specified income derived from designated investments if key conditions are met, including:

- The income arises from funds being managed by a Singapore fund management company holding a capital markets services (CMS) licence for fund management under the Securities and Futures Act (Chapter 289) (SFA) or that is exempted from holding such a licence.
- The fund is not wholly beneficially owned by Singaporeans.

A financial penalty may be payable to the Comptroller of Income Tax by an investor in the fund if he is not a qualifying investor. A qualifying investor is:

- An individual investor.
- A bona fide non-resident and non-individual investor that does not have a permanent establishment or carry on a business in Singapore, or that carries out operations in Singapore through a permanent establishment but does not use funds from these operations to invest in the fund.
- A designated person.
- An investor that (either alone or together with his associates) does not beneficially own more than 30% of the value of the fund (where the fund has fewer than ten investors) or more than

50% of the value of the fund (where the fund has ten or more investors).

Resident fund incentive scheme

The MAS can approve an application by a Singapore-incorporated resident fund for tax exemption on specified income derived from designated investments, provided that the conditions listed under the Offshore Fund Incentive Scheme are met. The fund must also comply with conditions imposed by the MAS, including the following:

- Its investment strategy must remain the same from the approval date.
- It must use a Singapore-based fund administrator.
- It must incur at least SG$200,000 of expenses in each financial year.

A financial penalty is payable to the Comptroller of Income Tax by an investor in the fund who (either alone or together with his associates) beneficially owns either more than:

- 30% of the value of the fund (where the fund has fewer than ten investors).
- 50% of the value of the fund (where the fund has ten or more investors).

Enhanced-tier fund incentive scheme

There are no restrictions on investors under the Enhanced-Tier Fund Incentive Scheme and other types of fund vehicles are allowed to be used, such as limited partnerships (LPs). Fund vehicles that have been approved by the MAS enjoy a tax exemption on specified income from designated investments. A fund must meet conditions imposed by the MAS, including:

- A minimum fund size of SG$50 million (committed capital for private equity funds).
- Managed or advised by a fund management company holding a CMS licence or that is exempted from holding such a licence.
- Singapore-based fund administrator if the fund is a Singapore-incorporated resident company with its tax residency in Singapore.
- At least three investment professionals in fund management roles, each earning more than SG$3,500 per month.
- At least SG$200,000 local business spending in each basis period.
- Investment strategy remaining unchanged from the date approval is given.
- Not enjoying other tax incentive schemes.

Master and feeder funds and SPVs within a master-feeder fund structure can apply for this scheme and meet the economic conditions on a collective basis.

FUND STRUCTURING

6. What legal structure(s) are most commonly used as a vehicle for private equity funds in your jurisdiction?

Cayman Islands exempted LPs have historically been the preferred legal structure for private equity funds managed in Singapore. Singapore has its own Limited Partnerships Act (Chapter 163B), which governs the establishment of Singapore LPs, but familiarity with the Cayman structure has meant private equity funds have used the Cayman legal structure, even though both are modelled on Delaware law.

It is fairly common for a master-feeder structure to be put in place, under which a Cayman LP acts as the pooling vehicle that owns a Singapore-incorporated master fund. This trend is generally because of Singapore's network of double taxation treaties. Companies incorporated in Singapore can therefore benefit from employing a master-feeder structure that allows a fund to enjoy the flexibility of an LP and the tax efficiencies of a Singapore master fund.

Certain private equity funds can be structured as stand-alone companies incorporated either under:

- Cayman's Exempted Limited Partnership Law (2001 revision).
- Singapore's Limited Partnerships Act (Chapter 163B).

7. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

Limited partnerships (LPs)

LPs are tax transparent for the purpose of taxation on income.

Companies

Companies are subject to tax on income either:

- Accruing in, or derived from, Singapore.
- Foreign and received (or deemed to have been received) in Singapore (unless exempted under a tax incentive scheme or foreign-sourced income exemption scheme).

8. What (if any) structures commonly used for private equity funds in other jurisdictions are regarded in your jurisdiction as being tax inefficient (whether by not being recognised as tax transparent or otherwise)? What alternative structures are typically used in these circumstances?

No commonly used structures are regarded as being tax inefficient, besides the Cayman Islands master-feeder structure (*see Question 6*).

INVESTMENT OBJECTIVES

9. What are the most common investment objectives of private equity funds?

The average life of a private equity fund can be anywhere between five and ten years.

Investors may not have to inject their committed capital all at once. The fund can draw down the commitments over a certain period, typically ranging from two to five years. The fund can also build in a right to make additional capital calls.

FUND REGULATION AND LICENSING

10. Do a private equity fund's promoter, principals and manager require authorisation or other licences?

Fund management is a regulated activity for which a capital markets services licence is required under the Securities and Futures Act (Chapter 289). Companies carrying out fund management activities must be Licensed Fund Management Companies, unless one of the available exemptions applies and is approved by the Monetary Authority of Singapore (MAS).

Registered fund management company (RFMC) exemption

An RFMC must:

- Only provide fund management services to qualified investors.
- Have a minimum base capital of SG$250,000.
- Serve no more than 30 investors (up to 15 can be funds, including feeder funds).
- Not have total assets under its management exceeding SG$250 million.

Immovable assets (real estate and infrastructure) exemption

A company does not need to be registered with, or licensed by, the MAS if:

- It manages a fund that invests solely in immovable assets or in securities issued by investment holding companies whose sole purpose is to invest into real estate development projects or real estate properties.
- Where the fund is offered only to accredited or institutional investors.

A qualified investor can be either:

- Accredited investors, that are either:
  - individuals whose net personal assets exceed SG$2 million, or whose income in the preceding 12 months is not less than SG$300,000; or
  - corporations with net assets exceeding SG$10 million.
- Institutional investors, that are either:
  - Singapore-licensed banks and other financial institutions; or
  - governmental authorities and statutory boards in Singapore.
- A fund, where the fund's units are offered only to:
  - accredited investors;
  - institutional investors;
  - investors in an equivalent class under the laws of the country or territory where the offer is made.

11. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?

Regulation

Since July 2013, closed-ended funds can be deemed and regulated as restricted collective investment schemes where certain criteria are satisfied. If a fund is deemed to be a collective investment scheme then it is under various obligations, such as the requirement to:

- Submit a notification and annual declaration to the Monetary Authority of Singapore (MAS).
- Provide an information memorandum that complies with specific disclosure requirements.

To be marketed in Singapore, a private equity fund must be either:

- Approved as an authorised or recognised scheme and register its prospectus with MAS (a mandatory requirement for retail schemes).
- Exempt from authorisation and prospectus registration requirements.

Exemptions

Fund managers usually do not want to create a prospectus, so they try to fall within a "safe harbour". An example of this is targeting high-net-worth individuals and institutional investors as opposed to the general public. Some of the available "safe harbour" exemptions to lodging a prospectus with MAS are:

- Where offers are made only to institutional investors as detailed in the Securities and Futures Act (Chapter 289), for example, insurance companies and pension fund managers.
- Where the offers are made only to accredited investors (high-net-worth individuals and corporations with certain high-net-worth).
- The "private placement exemption", where the offer is made to no more than 50 prospective investors in any 12-month period.

The exemptions come with various resale and publicity restrictions.

12. Are there any restrictions on investors in private equity funds?

Investors must be at least 18 years old.

Under certain licensing exemptions, private equity funds can only offer investments to a limited class of investors.

13. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

There are no statutory minimum or maximum investment periods, amounts or transfers of investments in private equity funds.

Additional conditions on transfers or withdrawal of interests in the fund may apply to certain classes of investors.

INVESTOR PROTECTION

14. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

Limited partnerships (LPs)

Private equity funds structured as LPs are governed by a partnership agreement that sets out important terms, such as:

- Investment restrictions.
- Appointment of advisory committee members.
- Voting thresholds.
- Key man clauses.
- Distribution waterfall.
- Removal of the general partner and the manager.
- Clawback or deferral provisions.

LPs are managed by the general partner, who appoints a fund management company as investment manager.

Companies

A fund structured as a Singapore-incorporated company is governed by its memorandum and articles of association.

The memorandum and articles of association must be lodged with the Accounting and Corporate Regulatory Authority and will then be publicly available. A private equity fund structured as a

company would usually also enter into a private shareholders' agreement setting out other, more confidential, terms of the fund.

INTERESTS IN PORTFOLIO COMPANIES

15. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

Most common form

Funds typically inject cash into their portfolio companies in return for convertible and redeemable preference shares (RPS) when a minority interest is taken.

Advantages of RPS include:

- Flexibility in carrying voting rights.
- Preferential rights on liquidation and to receive dividends.
- Redemption not being subject to rules on capital reduction or share buyback.

Disadvantages of RPS include:

- Being treated as a liability for accounting purposes.
- Ranking after creditors and other debt holders (including holders of convertible debt instruments) on liquidation.
- Redemption being contingent on the company having sufficient profits or capital.

Other forms

Convertible debt (such as loan notes or convertible bonds) is also common. The advantage of convertible debt over RPS is the greater repayment flexibility. Holding debt also avoids restrictions applicable to direct shareholdings in controlled sectors.

Restrictions

Under the Companies Act, any issue of shares by a private company requires shareholder approval, and any issue of a new class of shares affecting the rights of any existing class requires the approval of the affected class of shareholders.

Taxes

Singapore does not impose a tax on capital gains. However, gains derived from the disposal of shares may sometimes be treated as income in nature and subject to income tax.

BUYOUTS

16. Is it common for buyouts of private companies to take place by auction? If so, which legislation and rules apply?

Auction sales of private companies are not common, although they do occur occasionally.

17. Are buyouts of listed companies (public-to-private transactions) common? If so, which legislation and rules apply?

"Take-private" transactions have been increasing for the last few years. By May 2014, take-private transactions reached SG$7.94 billion, an increase on SG$10 million for the same period in 2013.

The key legislation in this area is:

- Singapore Code on Takeovers and Mergers.
- Singapore Exchange Listing Manual.
- Securities and Futures Act.
- Companies Act.

There are various ways to make a public company private, which are:

- General offer where the co-operation of the target company is not necessary. This is usually coupled with the compulsory acquisition procedure under section 215 of the Companies Act and compulsory delisting under Rule 1303 of the Listing Manual.
- Voluntary delisting under Rule 1307 of the Listing Manual.
- Scheme of arrangement under section 210 of the Companies Act.
- Amalgamation under section 215 of the Companies Act.

Principal documentation

18. What are the principal documents produced in a buyout?

The principal documents produced in a buyout are the:

- Sale and purchase agreement.
- Investment agreement.
- Service agreements for key management personnel.
- Finance documents (facility agreement and security documents).

Buyer protection

19. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

The common protections requested in a buyout of a private company include:

- Price adjustments and retention funds.
- Indemnification, representations and warranties around operations and tax.
- Irrevocable undertakings: non-compete and non-solicit undertakings from existing shareholders.
- Transaction liability insurance: warranty and indemnity insurance is increasingly used.
- Targeted internal rate of return (IRR) provisions are seen in minority stake direct investment deals. Failure to meet the targeted IRR can trigger the following:
  - option to redeem any redeemable preference shares (RPS);
  - rights to exercise put options;
  - other provisions, such as mandatory trade sale provisions.

Common protections sought in a buyout of a listed company include break fee provisions and irrevocable undertakings.

Break fee provision

A break fee must be a genuine pre-estimate of loss, not a penalty, and must be minimal, meaning no more than 1% of the value of the target based on the offer price. Securities Industry Committee (SIC) approval is required where a break fee is proposed.

Irrevocable undertakings

These are often obtained from key shareholders to secure votes in favour of the offer, for example, as part of a general offer.

20. What non-contractual duties do the portfolio company managers owe and to whom?

Common law duties (non-exhaustive list)

Under the common law, company directors must:

- Act in good faith and in the company's interests.
- Avoid conflicts of interest with the company.
- Use their powers for the purpose for which the powers are conferred.
- Exercise reasonable skill, care and diligence in the performance of their duties.

Statutory duties

The statutory duties of company directors include:

- Acting honestly and using reasonable diligence in the discharge of their duties.
- Disclosing certain information to the company, including:
  - information necessary to maintain the register of directors' shareholdings;
  - changes to interests in shares, debentures, participatory interests, rights, options and contracts.

21. What terms of employment are typically imposed on management by the private equity investor in an MBO?

Notice periods/gardening leave

A suitable notice period is imposed on the management by the private equity investor in an MBO. An individual can be put on garden leave during their notice period.

Restrictive covenants

Restrictive covenants can include the following clauses:

- Non-compete.
- Non-solicitation.
- Confidentiality.

Any non-compete or non-solicitation period must be reasonable to be enforceable. Therefore, it must only be limited in time, business activity and geographical scope to the extent that is necessary to protect the employer's legitimate business interests.

22. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections more likely to be given in the shareholders' agreement or company governance documents?

Measures that allow a private equity fund a degree of control are usually contained in the shareholders' agreement, but can also be written into the company's memorandum and articles of association. Examples include:

- Reserved matters.
- Board or committee appointment rights.
- Quorum requirements.

DEBT FINANCING

23. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

Sizeable buyout transactions are rare and, consequently, private equity transactions have not used leverage (where debt is secured by the assets of the target group) to the same extent as other jurisdictions in Asia. However, where the deal size dictates, leverage is still an important mechanic. KKR's US$1.1 billion acquisition of Singapore container company Goodpack Limited was reported to comprise debt in excess of six times earnings before interest, taxes, depreciation, and amortisation (EBITDA).

Larger transactions occasionally use a combination of senior and mezzanine debt, and high-yield bonds. Mezzanine debt holders are exposed to greater credit risk and consequently expect a higher margin. Mezzanine debt holders can sometimes convert their debt into equity or subscribe for shares in either the acquiring entity or the target at defined times. High-yield bonds are only viable for larger transactions, as a significant quantum of such bonds is necessary to generate liquidity and justify the significant costs and time commitment required to put a public offer of bonds into effect.

The structure of leveraged buyouts commonly includes an element of financial assistance where the assets of the target group are used to support the acquisition debt obligations of the group, which requires a statutory whitewash procedure (*see Question 25*) to be completed.

Lender protection

24. What forms of protection do debt providers typically use to protect their investments?

Security

Lenders take security in many forms to protect their investments. These usually include a combination of:

- Security over the shares in the bidding company, the target and its group companies.
- Debentures taking both fixed and floating charges over tangible and intangible assets.
- Assignments of contractual rights.

These are usually combined with other terms in the financing to protect against structural subordination or other actions by the target group that would be disadvantageous to the financiers. Lenders often use several layers of these protections, particularly where there is a need to secure both offshore and onshore components, as is typical in the kinds of multi-jurisdictional deals that arise out of Singapore.

Where a whitewash is needed (*see Question 25*) or there are other logistical issues involved in getting the required security in place, lenders can agree to a time frame in which the security will be effected and perfected after the acquisition has been completed.

Contractual and structural mechanisms

Lenders seek to minimise uncertainty and conflict in the event of an insolvent liquidation. They can structure the transaction to subordinate particular debt claims (for example where some of the "equity" in the deal is technically being provided by way of loan), or agree in contract to a hierarchy of payments, such as where

mezzanine debt is deployed (*see Question 23*). This is usually set out in an inter-creditor agreement.

Structural

When an acquisition has been financed by a combination of senior and mezzanine debt, it is usual to take advantage of the separate legal personality of each company and insert a new holding company into the acquisition structure. The senior debt is secured lower down in the structure (ideally at operating company level), while mezzanine and high-yield bonds are usually lent to holding companies that do not themselves own assets other than shares in their subsidiaries. This ensures that the senior debt has priority recourse to the assets and cash flow of the group.

Contractual

Financing arrangements can contain covenants to deal with any material prior contractual arrangements (or encumbrances over assets) of the target company and to ensure whitewash procedures are followed to legalise any financial assistance, where necessary. Covenants can also restrict the:

- Payment of dividends.
- Redemption of shares.
- Return of capital to shareholders without the consent of the debt providers.

Covenants can also ensure that the business is managed appropriately to protect the interests of the financiers during the life of the financing.

Financial assistance

25. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give security to lenders? Are there exemptions and, if so, which are most commonly used in the context of private equity transactions?

Rules

A company is currently prohibited from providing financial assistance for the acquisition of its shares or the shares of its holding company. Financial assistance includes, but is not limited to, the:

- Giving of a guarantee or security.
- Release of an obligation or debt.

For a company to give financial assistance for the acquisition of its shares or those of its holding company, it must go through a whitewash procedure, meaning:

- The amount of financial assistance cannot be more than 10% of the company's paid-up capital and reserves.
- A board resolution must be passed resolving that the giving of the assistance is in the best interests of the company.
- A directors' solvency statement must be made.
- A unanimous members' resolution in favour of the assistance must be passed.

Changes

The Companies Act is being amended to partially abolish the existing financial assistance regime. The changes will be implemented in two phases. Phase 1 will be effective 1 July 2015, and Phase 2 will be effective in the first quarter of 2016. The prohibition on giving financial assistance will no longer apply to private companies from 1 July 2015. The amended Act will also render the whitewash procedure redundant from 1 July 2015.

Public companies will be permitted to provide financial assistance for the acquisition of their own shares provided that doing so would not materially prejudice:

- The interests of the company.
- The interests of its shareholders.
- The company's ability to pay its creditors.

The directors of the company must also deem the terms of the assistance fair and reasonable.

Insolvent liquidation

26. What is the order of priority on insolvent liquidation?

Priority on insolvent liquidation is determined by law, as follows:

- Secured debts (these actually sit outside of the liquidation process, as the secured creditors typically retain rights to deal with their securities first and foremost).
- Statutory preferential debts, which are:
  - costs and expenses of the winding up;
  - wages and salaries of employees, up to a maximum of five months' salary or SG$7,500 (whichever is less), with the remainder being an unsecured debt;
  - retrenchment benefits and ex gratia payments under the Companies Act, up to a maximum of SG$7,500, with the remainder being an unsecured debt;
  - compensation to an employee for injuries suffered in the course of employment under the Workplace Health and Safety Act;
  - holiday pay;
  - taxes;
  - gratuity and retrenchment benefits under the Employment Act.
- Unsecured debts.
- Subordinated debts.
- Equity.

Equity appreciation

27. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

A debt holder can enjoy equity appreciation via convertible debt instruments. These instruments usually have a trigger to convert to equity.

PORTFOLIO COMPANY MANAGEMENT

28. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

Management can be granted the following incentives:

- Equity securities in the company that can be subject to "ratchets" measured by key performance indicators.
- Cash bonuses payable on certain targets being met.

- Hybrid instruments, such as phantom share option schemes and equity trackers.

All of the above are usually subject to detailed clawback mechanisms so as to ensure that management are not over-incentivised to meet short-term performance objectives at the expense of longer term goals.

29. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

There are no specific tax reliefs or incentives available to portfolio company managers investing in their company. A number of Equity Remuneration Incentive Schemes were phased out between 2013 and 2014, but may continue to apply in respect of investments made or shares granted before 1 January 2014.

30. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

A company can only pay dividends to shareholders out of its distributable profits. Case law provides guidance on what constitutes a company's distributable profits, but generally to pay out dividends a company must be cash flow and balance sheet solvent.

A company cannot reduce its capital or otherwise return assets to its members (particularly if this prejudices creditors) except to the extent and in the manner specified by the Companies Act.

Payments of interest or principal for a debt are not restricted.

31. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

Singapore has robust anti-corruption and anti-bribery enforcement, and is often ranked among the least corrupt jurisdictions in the world. Corruption and bribery are criminal offences in Singapore. Sanctions depend on the severity of the crime, and can include either imprisonment or a fine, or both. Directors (that must be natural persons) that are found guilty of corruption or bribery will also be in breach of their fiduciary and statutory duties to the company, and can be liable for civil damages to the company or for disgorgement of any profits earned through the breach. Directors can also be disqualified from serving as directors if convicted of any one of these offences.

Anti-corruption and anti-bribery provisions can be included in investment documents to require compliance with:

- Local laws.
- US Foreign Corrupt Practices Act.
- UK Bribery Act 2010.

EXIT STRATEGIES

32. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?

Forms of exit

The forms of exit are:

- **Trade sale.** A trade sale is a sale of shares to a third party that is not a financial investor. Private equity sellers are reluctant to give warranties on the operation of the business, so a buyer can purchase warranty and indemnity insurance to cover any business-related warranties given by management.
- **Initial public offering (IPO).** The viability of a public listing in Singapore is dependent on the ability of the company to meet the Singapore Exchange listing criteria. The disadvantage of an IPO is that the private equity fund may be unable to dispose all of its shares at the time of the IPO and may be subject to a lock-up period (typically six to 12 months) for its retained stake, potentially exposing the fund to share price fluctuations and liquidity risk.
- **Secondary buyout.** This involves a sale of a fund's stake in the company to another financial investor. As with trade sales, the availability and source of warranty protection is an issue to be considered.

Advantages and disadvantages

See above, *Forms of exit*.

33. What forms of exit are typically used to end the private equity fund's investment in an unsuccessful/distressed company? What are the relative advantages and disadvantages of each?

Forms of exit

The forms of exit that are typically used to end a private equity fund's investment in an unsuccessful or distressed company include:

- Sale to a "white knight" investor. This represents the simplest exit route, although finding an investor willing to put money (even if a deep discount is offered) into a distressed company can be a challenge.
- Redemption of shares for cash. Shares held by the fund must be redeemable in the first place, and the company must have sufficient financing in place to finance the redemption.
- Voluntary winding up. The company must be solvent, and the winding up must be approved by special resolution of the members. The fund, as a shareholder, ranks after creditors in the order of priority when a distribution is made.
- Scheme of arrangement. Creditors agree through a court-sanctioned statutory scheme to reschedule their debts, while allowing the company to carry on as a going-concern. The company can bind a dissenting minority of creditors and members representing up to 25% in value and 50% in number.

Advantages and disadvantages

See above, *Forms of Exit*.

PRIVATE EQUITY/VENTURE CAPITAL ASSOCIATIONS

Singapore Venture Capital and Private Equity Association (SVCA)

W http://svca.org.sg

Status. Non-governmental organisation founded under the patronage of the Singapore Economic Development Board.

Membership. Exceeds 100 and continues to grow with the industry's development.

Principal activities. The SVCA strives to:

- Promote the professional development of the industry through awards, training, workshops and conferences.
- Facilitate interaction and collaboration among its members through regular networking events.
- Act as a platform for dialogue on regulatory and policy issues relating to venture capital and private equity through data research, feedback and consultation with members and regulatory authorities.
- Build connections to centres of venture capital and private equity activities in the region through active participation at regional and global venture capital and private equity initiatives.

Published guidelines. The SVCA publishes the annual Singapore Venture Capital and Private Equity Directory.

Information sources. Please see website above.

ONLINE RESOURCES

Singapore Exchange Securities Trading Limited

W www.sgx.com

Description. Singapore Exchange Securities Trading Limited is the main trading platform for Singapore listed companies.

Monetary Authority of Singapore (MAS) – Securities Industry Council (SIC)

W www.mas.gov.sg/sic

Description. The MAS oversees the SIC. The SIC has regulatory oversight of takeovers of public companies in Singapore.

Singapore Government Website

W http://statutes.agc.gov.sg

Description. This is a government website for online publication of legislation that is maintained by the Attorney General's Chambers.

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