PRIVATISATION OF COMPANIES AND DELISTING OPTIONS

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Introduction

1. In recent times, parent companies have been contemplating privatisation options due to subdued valuations in the market. This shift seems to have prompted exploration of alternative strategies in response to prevailing market conditions, perhaps as a means to unlock latent value within the companies and/or to allow for greater flexibility and control.

2. Over the years, changes to listing rules and amendments to the Companies Act 1967 (the "**Companies Act**") have been implemented to fortify regulatory frameworks and safeguard shareholders' interests. These adjustments aim to close certain loopholes and enhance transparency in the delisting process.

3. Various delisting options have emerged as viable strategies for companies. These options include undergoing *inter alia*:- (1) a voluntary delisting; (2) a scheme of arrangement; (3) a voluntary offer coupled with a compulsory acquisition; and (4) a selective capital reduction.

4. One of the key considerations for companies contemplating privatisation include the offeror's stake and their privatisation goals, i.e. whether the offeror is contemplating a complete squeeze-out, or if the offeror only wishes to increase its stake and/or delist.

Voluntary Delisting

5. In a voluntary delisting, the Listed Company (the "**ListCo**") convenes a general meeting, of which the offeror and parties *acting in concert* with it must abstain from voting on the delisting resolution.

6. The delisting resolution must be approved by at least a 75% majority of the total number of issued shares present and voting, and a *fair and reasonable* exit alternative must be offered with cash being the default alterative.

7. The ListCo must also appoint an independent financial adviser to advise on the exit offer and opine that the exit offer is *fair and reasonable*.

8. The consent of the Singapore Exchange Limited ("**SGX**") is required.

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Advantages

9. If the requirements applicable to a voluntary delisting are met, the ListCo can be delisted and does not have to comply with the listing rules, notwithstanding that the ListCo may not have been completely privatised.

Disadvantages

10. The offeror and its *concert parties* have to abstain from voting in the general meeting.

11. This process does not ensure that the offeror will be able to acquire all the remaining shares of the minority shareholders.

12. The SGX's clearance is also required on the delisting circular to be circulated to the shareholders of the ListCo.

Scheme of Arrangement

13. For a scheme of arrangement, the ListCo needs to be incorporated in Singapore and to apply to the General Division of the High Court of Singapore to summon a meeting. Similarly, the offeror and its *concert parties* are to abstain from voting.

14. A scheme of arrangement requires the approval of a majority in the number of shareholders, such majority representing at least 75% in value of shares held by the shareholders present and voting at the meeting.

15. Once the scheme of arrangement is approved, all the shares of the ListCo, other than those held by the offeror, are either (i) cancelled and issued to the offeror, or (ii) transferred to the offeror in exchange for an offer price that is *fair and reasonable*.

16. A court sanction is needed for the offer and SGX clearance is required for the delisting.

17. A scheme of arrangement is used to achieve a squeeze-out following a court order and shareholder approval, and is thereafter binding on all shareholders.

Advantages

18. A scheme of arrangement is binding on all members and 100% ownership of the company is assured.

19. A lower threshold, i.e. a majority in the number of shareholders, such majority representing at least 75% in value of shares held by shareholders present and voting at the meeting, is required, as compared to the compulsory acquisition threshold.

Disadvantages

20. The offeror and its *concert parties* must abstain from voting.

21. Additional SGX clearance is required for the scheme meeting and the scheme document.

22. The scheme of arrangement can be voted down and the offeror will not be able to acquire any shares in the ListCo if this is the case.

23. Court sanction is required.

Voluntary Offer coupled with Compulsory Acquisition

24. The offeror may also launch a voluntary take-over bid with major shareholders providing irrevocable undertakings to accept the offer; the acceptance condition can be set at 90%, subject to clearance from the Securities Industry Council.

25. If the voluntary offer is accepted, within 4 months after the making of the offer, by holdings of not less than 90% of the offer shares not held by the transferee, the offeror may acquire the minority shareholding in the ListCo.

26. Thereafter, the offeror can apply for the ListCo to be delisted.

27. Section 215 was recently amended to incorporate a new subsection (9A). The effect of the new subsection (9A) is to increase the number of shares that are to be treated as held or acquired by the transferee of the shares for the purposes of section 215 and therefore does not count towards meeting the compulsory acquisition threshold.

28. Specifically, on and after 1 July 2023, shares held by the following persons are added to the number of shares that are to be treated as held or acquired by the transferee:-

    (a) a person who is accustomed or is under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of the transferee in respect of the transferor company;

    (b) the transferee's spouse, parent, brother, sister, son, adopted son, stepson, daughter, adopted daughter or stepdaughter;

    (c) a person whose directions, instructions or wishes the transferee is accustomed or is under an obligation whether formal or informal to act in accordance with, in respect of the transferor company;

    (d) a body corporate that is controlled by the transferee or a person mentioned in 28(a), 28(b) or 28(c) above.

    For the purposes of 28(d) above, a body corporate is controlled by a transferee or person mentioned in paragraphs 28(a), 28(b) or 28(c) if:-

    (i) the transferee or person (as the case may be) is entitled to exercise or control the exercise of not less than 50% of the voting power in the body corporate or such percentage of the voting power in the body corporate as may be prescribed, whichever is lower; or

(ii) the body corporate is, or a majority of its directors are, accustomed or under an obligation whether formal or informal to act in accordance with the directions, instructions or wishes of the transferee or the person (as the case may be).

29. The voluntary offer, unlike the other options, does not require the offeror and its *concert parties* to abstain from voting. Further, the offer does not have to be *fair and reasonable* and the requirement instead is for the offer price to be the highest price in the past 3 to 6 months (depending on the facts and circumstances of the offer).

30. There will also be no requirement for the offer to have any additional SGX or court clearance. The approval of the SGX will only be required for the delisting itself.

Advantages

31. There is no additional SGX or court clearance required for the offer. SGX approval is only required for the delisting.

32. The offer does not have to be *fair and reasonable* unless the offeror wishes to delist.

Disadvantages

33. There is no assurance of delisting even if there is insufficient public float and the process of compulsory acquisition may be cumbersome and protracted, i.e. there is no guarantee of 100% ownership.

34. Disgruntled minority shareholders could apply to the court to frustrate the compulsory acquisition on the basis that the offer terms are not *fair and reasonable.*

Selective Capital Reduction

35. The ListCo needs to be incorporated in Singapore in order to proceed by way of a selective capital reduction. A selective capital reduction requires the approval of at least 75% of all shares held by the shareholders present and voting at the general meeting pursuant to section 78G of the Companies Act.

36. This process involves a reduction in share capital and cancellation of the shares of the participating shareholders.

37. The payment is typically made by the target company through returning capital to the participating shareholders via the capital reduction process.

38. This process requires the offeror and its *concert parties* to abstain from the voting process and the offer price has to be *fair and reasonable*.

39. Court sanction is needed and SGX clearance is required for delisting.

Advantages

40. Following court and shareholder approval, a selective capital reduction will be binding on all members and 100% ownership of the ListCo is assured.

41. An even lower threshold, i.e. 75% of the total number of issued shares held by shareholders present and voting at the meeting, is sufficient. Further, class meetings are not required.

42. Proceeds of the capital reduction are typically paid by the target company instead of the offeror.

Disadvantages

43. The offeror and its *concert parties* have to abstain from voting.

44. Additional SGX clearance is required for the circular to shareholders.

45. The selective capital reduction could be voted down and the offeror will not be able to acquire any shares in the ListCo if this is the case.

46. Court sanction is required.

Practical Implications

47. It is important that parent companies and ListCos understand the available options and alternatives. Further, companies have to decide whether their goal is to achieve a complete squeeze-out or a voluntary delisting.

48. Based on the considerations mentioned above, in order to achieve a complete squeeze-out, the offeror should elect for a **scheme of arrangement** if there is no issue in meeting the "majority in number" requirement as the scheme of arrangement will thereafter be binding on all shareholders if the relevant approval thresholds are met.

49. The **selective capital reduction** process can be considered as well if the ListCo has sufficient funds for the capital reduction and anticipates that it may have issues meeting the "majority in number" requirement.

50. Following the changes to the Companies Act, it would be harder to proceed with a complete squeeze-out using the company acquisition provisions for both the general offer and voluntary delisting alternatives.

51. However, if parties are not confident of obtaining a *fair and reasonable* opinion by an independent financial adviser, the offeror may only be able to embark on a **general offer**.

52. A **voluntary delisting** would be the recommended approach if a complete squeeze-out is not required. If the required thresholds are met, the ListCo can be delisted and does not have to comply with the listing rules, notwithstanding that the ListCo has not been completely privatised.

Persons Acting in Concert

53. Employees and directors of the target company could be presumed as *concert parties* of the offeror – a ringfencing ruling from the Securities Industry Council may need to be obtained to establish that they are independent and able to vote.

54. Further, undertaking shareholders are often not treated as *concert parties* solely by reason of their irrevocable undertakings.

55. For the full definition of *acting in concert*, please refer to the Monetary Authority of Singapore's Code on Take-Overs and Mergers at https://www.mas.gov.sg/-/media/mas/resource/sic/the_singapore_code_on_take_overs_and_merger_24-january-2019.pdf.

Fair and Reasonable

56. The term *fair and reasonable* should be regarded as comprising two different concepts, i.e. the term *fair* and the other term, *reasonable*.

57. The term *fair* relates to an opinion on the value of the offer price or consideration compared against the value of the securities subject to the offer (the "**Offeree Securities**"). An offer is *fair* if the price offered is equal to or greater than the value of the Offeree Securities.

58. In considering whether an offer is *reasonable*, the independent financial adviser should consider other matters as well as the value of the Offeree Securities. Such matters include, but are not limited to, the existing voting rights in the offeree company held by the offeror and its *concert parties* and the market liquidity of the Offeree Securities.

59. Under this approach, an offer can be *fair and reasonable*, *not fair but reasonable*, *not fair and not reasonable* or *fair but not reasonable*. While the opinion *fair but not reasonable* is not ruled out, an offer would normally be considered *reasonable* if it is assessed to be *fair*. Hence, an opinion that an offer is *fair but not reasonable* should not be given unless there are strong and exceptional grounds.

Key Takeaways

60. Careful planning and execution are paramount to achieving the desired outcomes following privatisation.

61. Delisting a company may trigger shareholder discontent, particularly if the offered price does not reflect the company's true value. The delisting process itself can be intricate, involving legal, financial, and regulatory complexities. Companies desirous of delisting must weigh these factors against the potential benefits.

62. Due to the evolving nature of delisting rules and regulations, it is crucial to seek guidance from a solicitor well-versed in the relevant frameworks to navigate the process effectively. Engaging such a solicitor can also provide invaluable guidance on how to maintain transparency throughout the privatisation and/or delisting process. The solicitor can help

ensure that shareholders are informed at every stage appropriately, whilst ensuring regulatory compliance and adherence to corporate governance principles.

Contact Us

63. For further information on privatisation and delisting options, please contact our Lun Chee Leong and Liane Lim.

64. Chee Leong is a senior partner and deputy head in the Corporate Department of Lee & Lee. His main area of practice are corporate finance and capital market, takeovers, merger and acquisitions, real estate investment trust and business trusts, regulatory and trust services advisory work. Chee Leong advises regularly on corporate governance, regulatory and listing compliance issues and serves as company secretary to mainboard and Catalist listed entities, including Dasin Retail Trust, Isetan (Singapore) Limited, Yoma Strategic Holdings Ltd and Old Chang Kee Ltd.

65. Liane is a partner in the Corporate Department of Lee & Lee. Her key area of practice includes advising on public and private mergers and acquisitions. In addition, she also advises on (i) private equity issues, corporate restructuring, and joint ventures; (ii) standard debt transactions, including debt restructuring, loan agreements, guarantees and standard security documents; (iii) equity capital market transactions; (iv) general regulatory issues under the Securities and Futures Act and the rules of the Singapore Exchange Securities Trading Limited; and (v) other general corporate and commercial matters.

66. Liane has been named in the 2017 ranking by the Singapore Business Review of "Singapore's most promising legal luminaries aged 40 and under", where the 20 lawyers in the list were selected from hundreds of nominees from various specialisations based on thought leadership, influence, and showing promise of favourable development/future success in the legal field. For more information on the listing, please visit this link.

67. Chee Leong and Liane exhibit a proven track record of advising clients on complex transactions, including privatisation and delisting initiatives. Some of their high profile past transactions include the following:-

    (1) representing Blackstone (a consortium member) as Singapore counsel in the privatisation of Soilbuild Business Space REIT by way of a scheme of arrangement;

    (2) representing Lippo-linked Gentle Care Pte. Ltd. in the successful mandatory conditional cash offer for Healthway Medical Corporation Limited;

    (3) representing Blackstone (a bidder) as Singapore counsel in the bid for Global Logistic Properties Limited;

    (4) representing Biosensors International Ltd in the S$1.14 billion privatisation by an amalgamation with its controlling shareholder, the first takeover by amalgamation with a primary listing in Singapore;

    (5) representing Golden Star Group Limited in the mandatory offer for Novo Group Ltd., a company with dual primary listings in Singapore and Hong Kong;

(6) representing Wheelock Properties (Singapore) Limited in a joint venture with Ong Beng Seng in the S$1.76 billion mandatory general offer for the shares of Hotel Properties Ltd;

(7) representing certain Eu family members in the voluntary conditional cash offer for Eu Yan Sang International Ltd by Righteous Crane Holding Pte. Ltd. (a consortium between Tower Capital TCM Holdings L.P., Temasek Holdings (Private) Limited and Eu family members); and

(8) representing Wheelock Properties (Singapore) Limited in its selective capital reduction exercise to completely privatize the company.

68. Some of their recent transactions include *inter alia*:-

(1) representing the offeror in the successful voluntary delisting and compulsory acquisition of Memories Group Limited (article from The Business Times:- https://www.businesstimes.com.sg/companies-markets/memories-group-proposes-delist-s0047-share);

(2) representing certain Eu family members in their participation with Japan's Mitsui & Co and Rohto Pharmaceutical in their acquisition of Eu Yan Sang International Ltd (article on the acquisition from The Straits Times:- https://www.straitstimes.com/business/companies-markets/eu-yan-sang-to-be-acquired-by-japan-s-mitsui-rohto-pharmaceutical-for-800m); and

(3) representing Isetan (Singapore) Ltd in the proposed privatisation by its Japan parent company, Isetan Mitsukoshi Holdings Ltd., through a scheme of arrangement at a consideration of S$7.20 per share.

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