"Take privates" in Singapore

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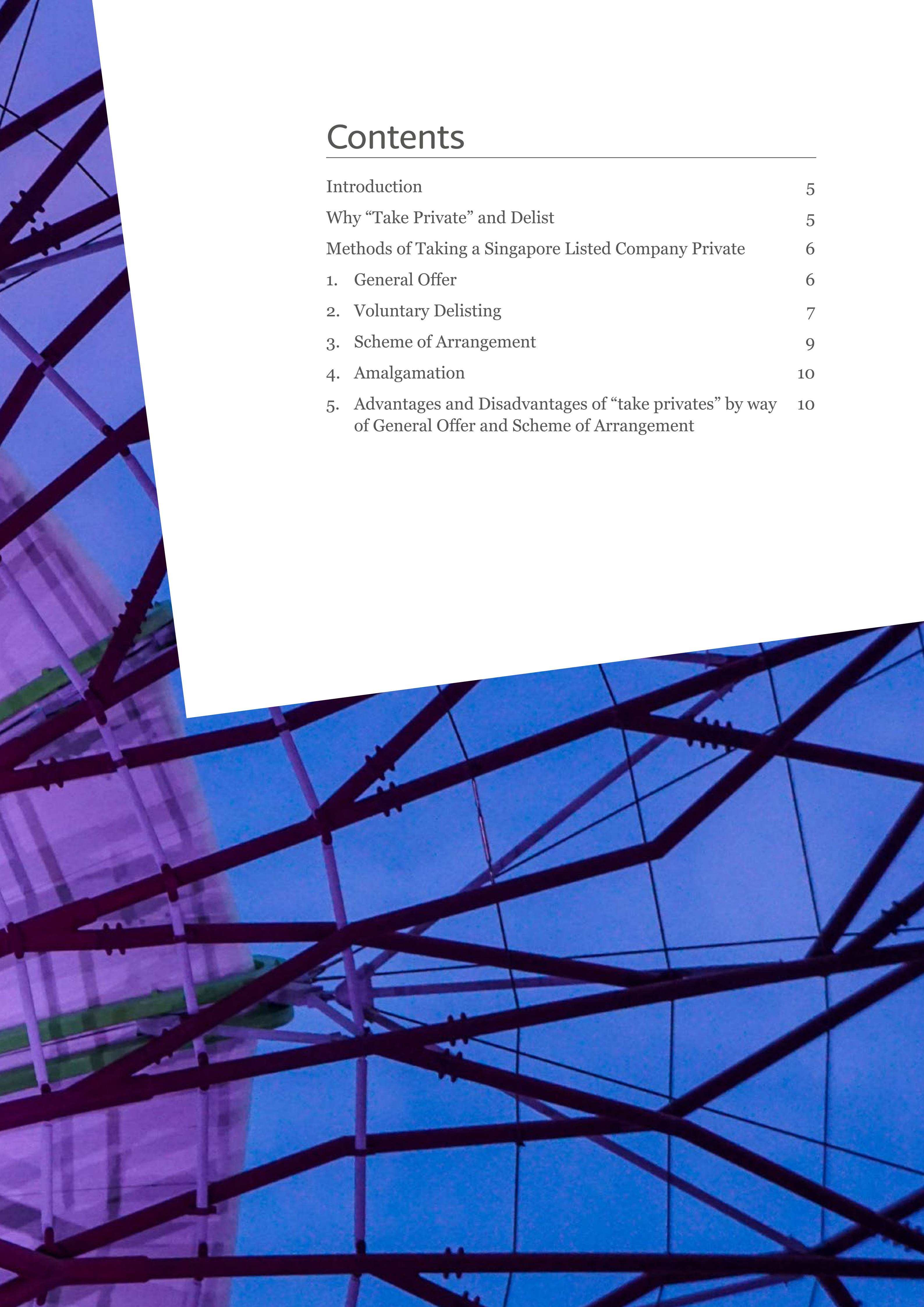
Contents



Introduction

The current trend for taking public companies private continues unabated. From 2016 to 2021, delistings outnumbered listings on the Singapore Exchange Securities Trading Limited (the "SGX"). From 2009 to 2019, 279 new companies listed on the SGX, while 302 companies were delisted. In 2018, money raised from 15 SGX initial public offerings amounted to S$710.6 million, while 19 companies departed, resulting in a net outflow of S$19.2 billion in market value. This trend emerges from an environment where companies on the SGX often trade at a discount to their book values, and cheap debt with which to acquire publicly traded shares is readily available.

In light of prevailing market uncertainty and the desire for public companies and their major shareholders to strategically reposition themselves for the long-term, we believe this trend will continue in 2022. However, the pace of this trend may slow slightly due to changes made to the voluntary delisting regime in 2019 designed to protect minority shareholders, which may make privatisations more difficult to structure. This note provides a brief overview of why, and how, listed companies are being taken private in Singapore.[1]

Why "Take Private" and Delist?

The increase in "take private" transactions in Singapore can be attributed to various factors, including the following:

(i) the global financial crisis of 2008 saw many Singapore listed companies trading below their 2007 peak prices, resulting in a narrowing of the spread between private company and listed company valuations. Major shareholders may seek to capitalise on the lower share price valuations and prevailing economic uncertainty by taking the company private, particularly considering the principal attraction of being a public company (namely, the ability to raise money through secondary share issues) is no longer available for many smaller cap companies. More recently, the COVID-19 pandemic and resulting global economic recession have had a similar effect on take-private transactions in Singapore. The SGX saw a wave of privatization offers in 2021, at a rate of more than one offer per month;

(ii) SGX-listed companies whose shares are thinly traded may seek to delist and re-list on another stock exchange (for example in Hong Kong) where there may be greater market demand and better brand recognition with the result that shares trade at higher multiples[2];

(iii) major shareholders (sovereign wealth funds, corporates and private equity funds, in particular) may want greater control over a listed company's long term corporate strategy. Taking a public company private shifts the focus from interim financial performance and maximising shareholder return in the short term to longer term objectives;

(iv) the majority shareholder/bidder may believe the target's product or market sector is about to experience favourable conditions, and seek to acquire the target before these conditions come into play;

(v) many corporate and private equity shareholders have built up sizeable cash reserves in recent years and are seeking to consolidate their investment portfolios. Using cash reserves and taking a company private is often seen as a sensible investment strategy; and

(vi) delisting a company reduces its legal, disclosure and compliance obligations, provides greater corporate governance flexibility and reduces its accounting and public relations costs[3]. Such obligations may be disproportionate to the benefits of remaining a public company, particularly where the shares are relatively illiquid. This was the case for Fragrance Group Limited ("FGL"), a company in the principal business of the development of residential, commercial, hotel and industrial properties. FGL was privatised in 2021, citing, inter alia, costs of compliance, low trading liquidity, and the absence of a need for fundraising through capital markets.[4]

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1 Note: This note excludes consideration of companies delisted due to their being liquidated or as a result of their having breached SGX rules.

2 Note: Delistings are typically suitable for listed companies that have shares concentrated in the hands of a few major shareholders. In Singapore, many of the delistings that have been announced are due to the illiquid nature of the shares.

3 Note: US listed companies or non-US companies with shares listed in the US can do away with the need to comply the Sarbanes-Oxley Act and other rigorous disclosure requirements imposed by the US Securities and Exchange Commission after going private.

4 Note: A voluntary unconditional cash offer was made by JK Global Treasures Pte Ltd for all the issued ordinary shares in the capital of FGL. The offer closed on 10 September 2021 and FGL was successfully delisted from the SGX on 8 October 2021.

Methods of Taking a Singapore Listed Company Private

In “take private” transactions, a financial buyer or consortium typically acquires a listed company, often in conjunction with a management team comprising existing directors of the target (a management buy-out) or a new management team (a management buy-in). The acquisition is often highly leveraged, with the debt being secured on the assets and cashflow of the target company and the equity being provided by the buyer and the management team. The bidder is often a majority shareholder, typically acquiring the shares of minority shareholders, thereby reducing the company’s shareholder base sufficiently to permit the company to terminate its status as a public company. We use the term “majority shareholder” throughout this note.

In Singapore, a listed company may be taken private in one of several ways: (i) general offer; (ii) voluntary delisting; (iii) scheme of arrangement; or (iv) amalgamation (the latter two being limited to Singapore-incorporated companies only).

1. General Offer

(a) Overview

The defining feature of a general offer is that, unlike a voluntary delisting or scheme of arrangement, it does not require the cooperation of the target company. Instead, a takeover bid is launched by a majority shareholder by making an offer to the general body of shareholders, with a view to obtaining overall voting control of the company. Although a general offer can be declared unconditional upon receiving acceptances in respect of 50% of the shares to which the offer relates, for the reasons set out below, the offer should generally be conditional on the acquirer receiving at least 90% acceptances[5]. Indeed, where debt finance is being provided, the lender will generally require that the bidder not declare the offer unconditional as to acceptances below 90% without their prior consent.

Perhaps surprisingly, in recent times a significant number of general offers have been wholly unconditional at the time the offer was made, either because the majority shareholder already held over 50% of the entire issued share capital at this stage, or had received a sufficient number of irrevocable undertakings from existing shareholders prior to making the offer.

(b) Compulsory Acquisition

In practice, a general offer made by a majority shareholder is often coupled with the compulsory acquisition procedure under Section 215 of the Companies Act (Cap.50) (the “Act”). This is because a voluntary takeover offer (unlike a scheme of arrangement) does not ensure the majority shareholder acquires all the shares in the company. It is inconvenient to deal with minority shareholders even where the majority shareholder has a sufficient shareholding to pass special resolutions (for example, due to leakage of cash upon declaring a dividend and general administrative problems), and therefore the compulsory acquisition (or “squeeze out”) procedure is usually employed.

Under Section 215 of the Act, if the general offer is accepted within four months of being made by the holders of not less than 90% of the shares in relation to which the offer relates (excluding treasury shares and shares already held by the majority shareholder), the minority shareholding in the company may be compulsorily acquired.

Once the 90% threshold has been reached, the majority shareholder has two months within which it can serve a notice obliging the minority shareholders who have not accepted the offer to sell their shares. Once the notice has been given, the majority shareholder is bound to acquire, and the dissenting shareholder is bound to sell, the shares on the same terms applicable to the offer.

(c) Compulsory Delisting

Rule 1303 of the Listing Manual of the SGX (the “Listing Manual”) prescribes that upon the majority shareholder acquiring in excess of 90% of the company, the company will no longer meet its free-float requirement. The SGX may therefore suspend trading and direct that the company be delisted unless immediate action is taken to ensure that at least 10% of the company’s shares are held in public hands.

Due to the 90% threshold requirement, the compulsory delisting procedure is often coupled with

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5 Note: Examples of significant problems arising due to acceptance levels being set at less than 90% include the attempted privatisations of Fitness First and PizzaExpress in the UK, during which dissenting shareholders acquired additional shares to frustrate the acquisition, resulting in the bidder failing to reach the 90% threshold.

the compulsory acquisition procedure under Section 215 of the Act.

(d) Issues to consider

When deciding which route to take in order to delist a public company, a key consideration will be the likely reaction of the target company. If the cooperation of the target company is not expected, a general offer should be considered. Likewise, where it is likely that the offer will spark a competitive bid situation, the flexibility of the general offer structure allows the majority shareholder to respond swiftly to counter any rival bid.

It is worth noting that a general offer does not ensure the bidder acquires all the shares in the company. If the 90% acceptance threshold is not reached, the bidder cannot exercise the compulsory acquisition procedure.

Finally, under Section 215 of the Act, a dissenting shareholder may apply to the Court to frustrate the process by claiming that the acquisition is not fair and reasonable. If it can be shown that the acquisition is not bone fide, the Court may declare the offer non-binding or specify terms upon which the offer must be made. These factors make the compulsory acquisition procedure potentially protracted and uncertain. Independent legal advice should be obtained at the outset of any proposed "take private" transaction.

2. Voluntary Delisting

(a) Overview

Rule 1307 of the Listing Manual provides that a publicly listed company may be voluntarily delisted, provided the delisting is approved by more than 75% of shareholders present and voting. The offeror and its concert parties are required to abstain from voting on the resolution.

(b) Exit offer

Following the approval of the delisting, an exit offer must be made to the shareholders. This will normally be in cash and sometimes include a cash alternative and is independent of the delisting; this means the company will be delisted if the delisting is approved, regardless of whether the shareholders accept the exit offer.

In order to protect the interests of the minority shareholders, the exit offer must be "fair and reasonable" and the board must take into account the interests of all shareholders as a whole when making its recommendation. The company must appoint an independent financial adviser to opine on the fairness and reasonableness of the exit offer, which must be clear and unequivocal.

In recent years, exit offers in Singapore have generally offered a premium on the closing share price prior to the announcement date. The premium reflects an element of compensation for accepting the cash offer and a perception that the shares are being undervalued by the market. For example, in the Pan Ocean deal in 2021, the target's shares were trading at S$8 when an exit offer of S$8.70 (an 8.75% premium) was made.[6] Similarly, in Koufu's delisting in March 2022, Koufu's shares were trading at S$0.665 when the exit offer of S$0.77 (a 15.8% premium) was made. However, given the low trading prices that many companies are experiencing in relation to their shares, such offers are sometimes below the net asset value of the company. This may provoke negative reactions from shareholders who regard the net asset value of the company as the correct benchmark against which any offer should be measured. As such, the exit offer should be carefully considered in order to avoid angering shareholders who may deem the offer to be inappropriately low. There has been an increase in shareholder activism in Singapore, especially with the spate of take-private deals. For example, CapitaLand[7] initially offered shareholders S$2.22 per share, which they were then forced to increase to S$2.35 per share in response to shareholders at CapitaLand's AGM pushing for a higher price, backed up by arguments that the privatisation would harm transparency.

(c) Issues to consider

Previously, as potential acquirers who are already majority shareholders are not precluded from voting, a voluntary delisting is generally the preferred route taken by existing majority shareholders seeking

6 Note: Harim Holdings Co., Ltd., and its concert parties, acquired shares in Pan Ocean Co., Ltd in the voluntary delisting of the company, with a 94.6% shareholder approval rate for the delisting resolution during such extraordinary general meeting of the company. This was, however, not strictly a privatisation exercise as the company intended to maintain its primary listing on the Korea Exchange (KRX).

7 Note: CapitaLand Ltd., Southeast Asia'a largest property developer by market value, took CapitaMalls Asia Ltd. Private in June 2014 by means of a general recommended offer. The take-up of the offer was around 97%, with the remaining shares being compulsorily acquired.

to privatise a company. However, with the latest amendments requiring offerors and their concert parties to abstain from voting on the delisting resolution, this is no longer the case and voluntary delistings are no longer as attractive as they used to be.

In a general offer, there is no guarantee that the bidder will acquire 100% of the shares in the target. Instead, once the delisting is approved by 75% of the shareholders, the exit offer essentially acts as a threat to the minority shareholders to accept the exit offer or risk remaining a shareholder of illiquid shares in an unlisted company.

If the post-delisting objectives of the acquirer cannot be achieved with the existence of minority shareholders, a scheme of arrangement (discussed below) may be the preferred route to privatisation.

3. Scheme of Arrangement

(a) Overview

Section 210 of the Act provides that a company may be delisted by way of a Court approved process known as a scheme of arrangement, whereby either:

a. all the shares of the target other than those held by the offeror are cancelled in return for a cash payment (or other forms of consideration) by the offeror and the target will then issue further shares to the offeror (credited as fully paid up) in substitution for the shares cancelled ("Cancellation Scheme"); or

b. all the shares of the target other than those held by the offeror are transferred to the offeror in return for a cash payment (or other forms of consideration) by the offeror ("Transfer Scheme").

As a Cancellation Scheme involves a capital reduction, sections 78G to 78I of the Companies Act will need to be complied with, in addition to section 210.

Historically, the Cancellation Scheme held certain advantages in relation to stamp duties payable, at the expense of holding an extraordinary general meeting for the cancellation of the shares.

However, the advantage in relation to stamp duties payable has since 2002 been negated. As such, most take-overs via a Scheme are currently carried out using Transfer Schemes.

The defining feature of a scheme of arrangement is its binary nature; either the bidder acquires 100% of the shares in the company, or none at all. Because of this, a scheme is generally used where obtaining 100% of the company is crucial to the bidder's plans following the delisting.

The scheme must be approved by a majority in number of the shareholders present and voting, representing at least 75% in value of the shares voted. As in a general offer, the majority shareholders will be precluded from voting and the decision of whether or not to approve the scheme will be made by the minority shareholders alone. The scheme must then be approved by the High Court of Singapore.

The offer price in respect of a delisting pursuant to a scheme of arrangement must also be fair and reasonable.

A recent successful example of a scheme recently implemented would be the acquisition of Sunningdale Tech Ltd. by Sunrise Technology Investment Holding Pte. Ltd. in 2021. Sunrise Technology Investment Holding Pte. Ltd. offered a 42.6% premium over the volume-weighted average price of the Sunningdale shares for the previous year to the scheme shareholders.

(b) Issues to consider

Upon the approval of the requisite majority of shareholders and the High Court, the scheme will be binding on all shareholders. This provides comfort not only to the bidder, but also to any lenders, that 100% of the shares will be acquired, allowing the company to then give upstream guarantees and security without regard to the legal rights of minority shareholders.

The cancellation and issue of new shares or the transfer of shares (depending on the type of scheme) is a straightforward process, particularly when compared with the process for compulsory acquisition under the squeeze-out provisions of Section 215 of the Act. Similarly, a lower threshold of only 75% of shareholders is required, compared with 90%.

However, potential disadvantages of schemes of arrangement may include the fact that bidders may be unfamiliar with the process, compared to that of a general offer. Also, as the decision to approve the scheme is made solely by the minority shareholders, the scheme could be voted down with the effect that the majority shareholder cannot acquire any shares in the company at all.

The involvement of the Court is also a source of uncertainty as the Court will use its discretion in determining whether the scheme is fair and reasonable and may impose conditions or find that there are different classes of shareholders present and that certain shareholders should be treated as a separate class, despite the scheme already having received the approval of the shareholders.

4. Amalgamation

(a) Overview

Section 215A-J of the Act allows a Singapore company to merge with another company such that the acquirer survives, or alternatively both companies merge to form an entirely new entity. The listed company will be delisted and will cease to exist as a separate legal entity, with all of its assets, liabilities, property, rights, obligations and privileges being transferred to the amalgamated entity.

(b) Issues to consider

In order for the amalgamation to complete, at least 75% of the shareholders of both merged companies must approve the agreement implementing the amalgamation. Majority shareholders wishing to privatise will not be permitted to vote, thereby increasing the execution risk of the deal. The board of directors of both companies must give a solvency statement confirming their belief that the new entity will remain solvent for at least the next 12 months.

Perhaps because of the personal liability that comes with the solvency statement which, it should be noted, is forward-looking and for the amalgamated entity on a consolidated basis, amalgamations are not common in Singapore. The use of amalgamation as a take-private method is typically used to facilitate internal restructurings.

5. Advantages and disadvantages of "take privates" by way of general offers and Schemes of Arrangement.

The table below provides a snapshot of the main advantages and disadvantages associated with both a general offer and a scheme of arrangement (the two options open to international companies).

Advantages and disadvantages		
	Offer	Scheme of Arrangement
Acquiring 100% of target	• Bidder must receive acceptances in excess of 90% of the target shares to which the offer relates in order to effect compulsory squeeze-out • Bidder may end up with less than 100% of target • Target shares purchased by bidder during the course of an offer count towards the 90% threshold • Shareholder inertia is detrimental	• Scheme must be approved by a majority in number, representing not less than 75% in value, of the shareholders present and voting • Scheme must be sanctioned by the court • Bidder will either acquire 100%, or none, of the target shares • Target shares owned by bidder are disenfranchised and cannot be voted on the scheme • Organised shareholder opposition is detrimental. However, shareholder inertia may be useful where there is no real opposition as only those voting will count • 25% of votes in any class may block the bid

Advantages and disadvantages		
	Offer	Scheme of Arrangement
Financial assistance and security over target and subsidiaries	• Delays and risks associated with the financial assistance whitewash procedure leave lenders exposed and create uncertainty for the company	• Financial assistance is not prohibited if in pursuance of a scheme. • Security is likely to be obtained within three days of filing the scheme, which is beneficial to lenders • Subsidiaries will still need to go through the financial assistance whitewash procedure where applicable
Timing	• Generally quicker to complete the deal, but can take longer to obtain 100% of the target • Bidder may obtain control of the company as soon as an offer is declared wholly unconditional, which may be 21 days following the date on which the offer document is posted. However, the bidder is ultimately seeking 90% control in order to effect a compulsory squeeze-out of outstanding minority shareholders • To effect the squeeze-out, a bidder must have acceptances in excess of 90% within four months of the date on which the offer document is posted	• Bidder only gets control of the company when the court-sanctioned scheme is filed with ACRA. This gives any competing bidders more time to intervene and frustrate the offer • Nevertheless, the Bidder is still likely to obtain 100% control of the company more quickly in a scheme than in an offer
Control	• Bidder controls the process and can maintain or revise its offer in light of competing bids	• The target company and its directors (or in the case of an MBO, the independent committee) controls the process, with the risk that the company may withdraw the scheme at any time before it becomes effective, particularly if a higher competing bid is made
Flexibility	• An offer can be quickly revised up to 46 days after posting the offer document • May be used in both recommended and hostile bid situations	• Ability to revise the proposed scheme is limited once the court has given its approval. A meeting of the shareholders and the court's prior consent is required to amend the terms of any scheme, making this method particularly vulnerable to competing offers • Must be recommended


STRAITS
TRADING
HSBC
Maybank

Advantages and disadvantages		
	Offer	Scheme of Arrangement
Objections	• Objections of minority shareholders are only ascertained after the lender has advanced the funds	• No shareholder objections can be raised after the court has approved the scheme. As such, any objections are dealt with before the lender advances the funds
Stamp duty	• No stamp duties payable for transfer of scripless shares held in CDP (save for CDP transfer fees) for Singapore-incorporated companies • Stamp duty fees of 0.2% on an *ad valorem* basis as a percentage of the sales consideration or the value of the shares would be payable for the transfer of scrip shares of Singapore-incorporated companies or foreign entities with its registers located in Singapore • Transaction costs are generally lower than under a scheme	• Stamp duty fees of 0.2% on an *ad valorem* basis as a percentage of the sales consideration or the value of the shares should be payable for Singapore-incorporated companies or foreign entities with its registers located in Singapore • However, transaction costs are generally higher than under an offer due to court involvement

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