

EZINE special issue

# 2iB PARTNERS

Expanding your Business Universe

## X-Border M&A

**SEA | Negotiation | Documentation | Alternate Legal Recourse**

**&**

**a run up on some of our activities for the year**

**We build Super Firms of  
the Future through  
CoAggregation®**

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[www.2ibpartners.com](http://www.2ibpartners.com)

## Message from the Director:

2iB Partners continues to build its reputation and broaden international networks with MNCs, strategic buyers, listed companies, funds and networks in US, UK, China, India, Philippines, who have taken a strategic interest in the Southeast Asian market. We also understand that there are a significant number of small and medium enterprises (SMEs) in the region that are looking to scale up and regionalize in SEA or gain market access into China.

With regards to these 2 different channels of companies, we have the appropriate networks and expertise to assist them with their expansion plans whether through joint ventures, inorganic growth or general business consultancy. We see ourselves in a strategic position to assist these stakeholders in their internationalization and growth plans in or out of the region through Singapore. We also have a growing deal flow in the region and see a growing appetite for M&A deals in the region.



Dylan Tan  
Director

## Macroeconomic Outlook (Southeast Asia)

ASEAN is the 6th largest economy and GDP growth from 2016 has been approximately 5.3% annually. It also has the 3rd largest population of 600 million with a relatively young population with about half of which are under 30 years of age. This makes it a prime destination for relocation of labour intensive industries. ASEAN governments' commitment to investing in infrastructure also suggests long term investment opportunities which attracts and encourages Foreign Direct Investment (FDIs).

From a macroeconomic perspective, the ASEAN story is generally positive and is one of the fastest growing regions with projected 4.9% GDP growth this year compared to projected global growth of 3.5%. Fast growing Myanmar is also projected for a growth of 7.5% next year, though for this country, regulations may slow the advancement of certain sectors. The ASEAN growth is projected to outperform that of global growth rate for the foreseeable future with relative political stability and increased connectivity in terms of both investment and trade.

Global trade has also re-emerged and as a result, Asia, that is the most export dependent has benefited substantially. Indicators suggest that domestic demand is also improving post slow down. This could suggest investment opportunities in the medium to long term.

According to data, 10% of FDI into ASEAN in 2016 is from China and this is poised to increase due to One Belt One Road (OBOR) activities which will greatly enhance connectivity. Japan is also a great contributor of FDIs into ASEAN and is actively pushing outbound capital and M&A deals. 19% of M&A deals in ASEAN is inbound from China with the US coming in 2nd. The number one sector is undoubtedly manufacturing with services slowly gaining popularity. Opportunities of new technologies and digital innovation has been reiterated at the ASEAN Plus Three (China, Japan and Korea) summit in Manila.

The ASEAN Economic Community (AEC) blueprint which aims for tax collaboration by 2025 and reduction in trade transaction cost by 2020 also point to significant improvements in opportunities.

### Singapore

As of the time of this article (November 2017), although exports have improved, it is a very long hike. Singapore is still sitting on period of very weak labour haul. Wage growth is very low and job creation has been negative. The opinion is that the economy still needs to go through a slow transition period with no quick fix.

However, Singapore continues to rank no. 1 in most areas of doing business and its conduct. Many investments continue to be routed through Singapore in view of its political stability, financial and accounting transparency as well as lifestyle quality.

### Malaysia

GDP growth has come down to 5-5.5%. However, the negatives mainly come from government policies being completely focused onto supporting household sector and maintaining consumption growth. The repercussions of this is that savings rate is down, current account surplus moved from 14% of GDP to 1.6% in 5 years. That being said, for the first time, metrics have improved slightly, external debt coverage stabilizing, liquidity conditions have improved, non-oil exports have increased.

As a whole, Malaysia is in a better place than 5 years ago, this is largely attributable to change in balance of payments and growth of non-oil and non-gas trade surplus. The general elections are due in 2018. However, despite a viable political alternative, the foreign investment policy is not expected to vary widely.

## **Indonesia**

2010-2012 saw growth at 6.5-7% and now this is at 5%. One positive point is that the Jokowi administration has focused on structural reforms on improving the ease of doing business. World Bank released report and Indonesia jumped up 19 spots in ease of doing business. There is a focus on long term development from a structural perspective rather than short term gains which has historically lead to currency runs. This can be seen as a positive development but the inclination towards populist measures and lack of transparency remain,

Therefore, major look out will be the elections which are due in 2019. The Indonesia story is one that we remain highly cautious yet optimistic.

## **Thailand**

Thailand is in a state of stagnation. GDP is largely driven by external sector (tourism) and government spending. – there has been a big gain in Chinese tourists.

Private investment and investor confidence is weak. Outbound investment by Thai companies particularly in the Mekong region has been greater than investment within the country. This could point and infer certain dynamics in the country.

Economy is at 3-4 % growth with not much inflation, large current account surplus, lots of money and overvalued currency.

## **Philippines**

The Philippines have had long history of obstacles and continuously subject to crisis. They have faced periods of very weak growth and highly volatile currency markets. However, during, 2008-2009, the Business process outsourcing (BPO) industry took off. Similar to India in 2003, it came as positive surprise with regards to internal GDP growth. The boom had a tremendous impact in growth. What this also means is that the government now has finances to invest in infrastructure. In addition, private investment is also growing.

The Philippines has had a tendency of very strong business cycle fluctuations. Credit is also growing very rapidly which is cause for concern. A good sign would be tax reforms which will give the government the finances to invest in infrastructure.

Therefore, overall, the medium to long term looks positive but would suggest caution in the short term.

- Data from FocusEconomics and World Economic Outlook.



## Why M&A?

- Saturated local markets - new territories
- Bigger international name - visibility
- Doubling top line - multiplication
- International market access - developing markets
- Clearing past mistakes - new look & feel
- Pool global resources - outsourcing
- Reboot respective businesses or combine products
- Poof IPOs

*So should I enter the market first or  
study its regulations first?*

# X-border M&A – the angles

## Introduction:

This commentary deals with various angles regarding negotiations, documentation and some alternative legal recourse to cross-border M&A. It does not specifically address sellers, buyers or third parties. This summary also deals with international and experiential case studies, analysis and recommendations.

## I. Why M&A? – The Strategy

The basic idea is growth and size and some of the reasons are:

- Saturated local markets – new territories
- Bigger international name – visibility
- Doubling top line, financial objectives – multiplication
- International market access – developing markets
- Innovation and clearing past mistakes – new look & feel
- Pool global resources in talent and assets – outsourcing, HC
- Reboot respective businesses or combine products / services

Saturated local markets lead businesses to find new territories and can also cause companies to change their business model. When the market is saturated with the product or service, competition increases and therefore costs. Costs include local expansion, achieving economies of scale to tackle thinner margins of profit, marketing and visibility. One method of breaking up market saturation is to design products with a limited usable life. But this is not a lasting solution and in many cases even become counter-productive for companies, including affecting their reputation. A saturated market by definition produces no new demand, therefore, new territories become a necessity to expand.

New territories also bring in new costs of marketing, investment and other expenses. Internationalization also brings in additional considerations such as ability to visit a different geography, long distance management, remote quality control or cultural issues. However, M&As provide for effective models for revenue building, international name, pooling of global resources and increasing profits.

International market access can be achieved by setting up joint ventures, partnerships, appointing distributors or agents, incorporating a company, merging with or acquiring another company. With cross border M&A and internationalization, a company is billed as an international name. Internationalization brings in reputation, including perception of higher compliance, permanence and quality. Listed international companies even more so. It helps build diversity within the company, fosters innovation and talent access amongst others. Other intangibles include social responsibility, country reputation and leadership.

Internationalization also offers a unique opportunity of starting over as well as innovating. It provides opportunities to a company to reboot its business, a clean slate, new look and feel, new branding exercises, gender inclusivity, cultural diversification, combine products as well as create newer and more effective business models.

One of the major advantages of international M&A is resources. The company will be exposed to resources far different from what its country of origin offers. In many cases, it will lead to innovation as well. Resources may be tangible and intangible. Hard assets, currency, property, plant and machinery can be useful hedges and offer positive arbitrage. Intangibles include elements such as talent, intellectual property and overseas opportunities. These resources can be managed to bring in high efficiencies in cost and management through managed and shared services.

During vision and strategy, it is important to determine the reason for an M&A – vis-à-vis the seller i.e., personal, financial and external reasons; and investment for future returns vis-à-vis the buyer. buyer – strategic (good for business continuity) vs. financial (good for exits). Determine the team that will be involved in the transaction as well as the effect of laws and business in cases of cross-border related events. An internal due diligence and legal audit would help in sanitization and preparation for the M&A.

## So, should I enter the market first or study its regulations first?

What this means is after one has decided on the M&A strategy, it is necessary to study the local regulations in depth. Some companies may decide to dive in first and solve the problems on the go. These strategies are generally adopted by small companies or entities that look for short term benefits such as quick financial gains. However, these strategies can prove to be highly expensive or even a wrong decision in the long term. Some regulations in international jurisdictions may have limits on foreign direct investment depending on their balance of payment and Forex reserve issues. Particularly in countries like China and India. Understanding and anticipating the regulatory climate and framework is necessary to follow the country's culture and hence negotiate with better clarity.

From a regulations point of view, it is highly recommended to study the regulatory climate and engage with locals to anticipate the fate of foreign investment into that country. Engaging locals, potential target company personnel or independent consultants are necessary to negotiate and deal with regulatory authorities as well as target acquisitions.

## Roll-up Acquisitions and Poof IPOs

Acquisitions are not merely conducted between an acquirer and a target company. A holding company may, as its main objective, adopt an acquisitive approach to build up its business and financials. Berkshire Hathaway, Danaher, Broadcom and WPP are some examples.

Roll-up acquisitions are quite the reverse of what acquisitive companies do. They are a result of financial re-engineering where an acquirer or promoter focuses on acquiring and rolling up many smaller unglamorous companies in a certain business line to a holding company. The holding company is meant to make an IPO. This is also known as Poof-IPO which was quite popular in the 90s. It derives its name from the sudden ability of small companies to, "poof", make the IPO. Hence poof IPO. Poof IPOs and roll-ups are direct descendants of the leveraged buyout (LBO) and merger craze that has swept the United States since the mid-1980s.

However, acquisitive companies that focus on integration and value creation of the business and not purely on financial considerations can be very successful.

## Negotiation Considerations

Local laws, customs, traditions and values have an affect on valuation and pricing. Harmonizing of terms, jargon and communication is necessary. Deal structuring may also involve preference on net valuation of business or individual income. Uncertainty and misinterpretation should be minimized. The initial negotiations should also to the best extent possible, be recorded or documented.

## Why M&As go wrong

- Assumption Asymmetry by Acquirer in the Evaluation Process
  - Over-optimistic assumptions in Revenue, Cross-selling and Cost-synergies - leading to bidders overpay
- Having a “take” mentality
- Equal contributions by acquirer and target for mutual development
- Lack of emphasis on post M&A integration
- Leadership roles, CQ, change management, synchronization
- Shareholder issues
- Mutual understanding between old and new stakeholders, alignment of vision
- Employee issues
- Departure, redundancies, synchronization
- i-contact
- Ego, relationships and diplomacy

...and many more



## II. Why M&As go wrong – NEGOTIATIONS: Internal and external

Acquisitions that are rushed can result in problems and challenges after closing in a transaction. Some of the reasons why M&As go wrong are:

### 1. Assumption Asymmetry:

Leaders and owners may over value a target by making assumptions including over-valuation, over-optimistic assumptions in revenue, cross-selling and cost synergies by the target may create expectations higher than the real value of the business or company. These may be contrary to what a due diligence or post-integration may reveal. If the former address the asymmetry, it will address some issues. But if it occurs post-integration, then it would be too late.

Most legal issues center around disclosures and reps and warranties during and after DD. But some interesting legal questions are whether a buyer should provide his assumptions to the seller or can a party can be held legally responsible if the facts do not match the assumptions. This is what leads to moral hazards where a party to the transaction has not entered into the contract in good faith, has provided misleading information about its assets, liabilities or credit capacity, or attempts to earn a profit in a questionable manner. While such legal considerations may be covered in the NDA (and the Overture Documentation – discussed later) signed in the initial stage, actual control over assumptions and facts and enforceability thereto may become sticky issues.

The Parties need to have honest approaches during negotiations in their expectations, disclosures, representations and warranties on both sides to make a successful M&A.

### 2. Having a “take” mentality:

M&A is a bi-lateral proposition. Both parties need to be honest and should share equally in the responsibility of making the M&A work. M&A to merely increase share price or increase of income and status of acquirer’s management or professionals can create hurdles and challenges. Such approach reduces shareholder wealth largely over a period of time.

Post-integration, the acquirer should take care to ensure it contributes to the target company and not merely exhaust the latter’s resources.

### 3. Lack of emphasis on post M&A integration:

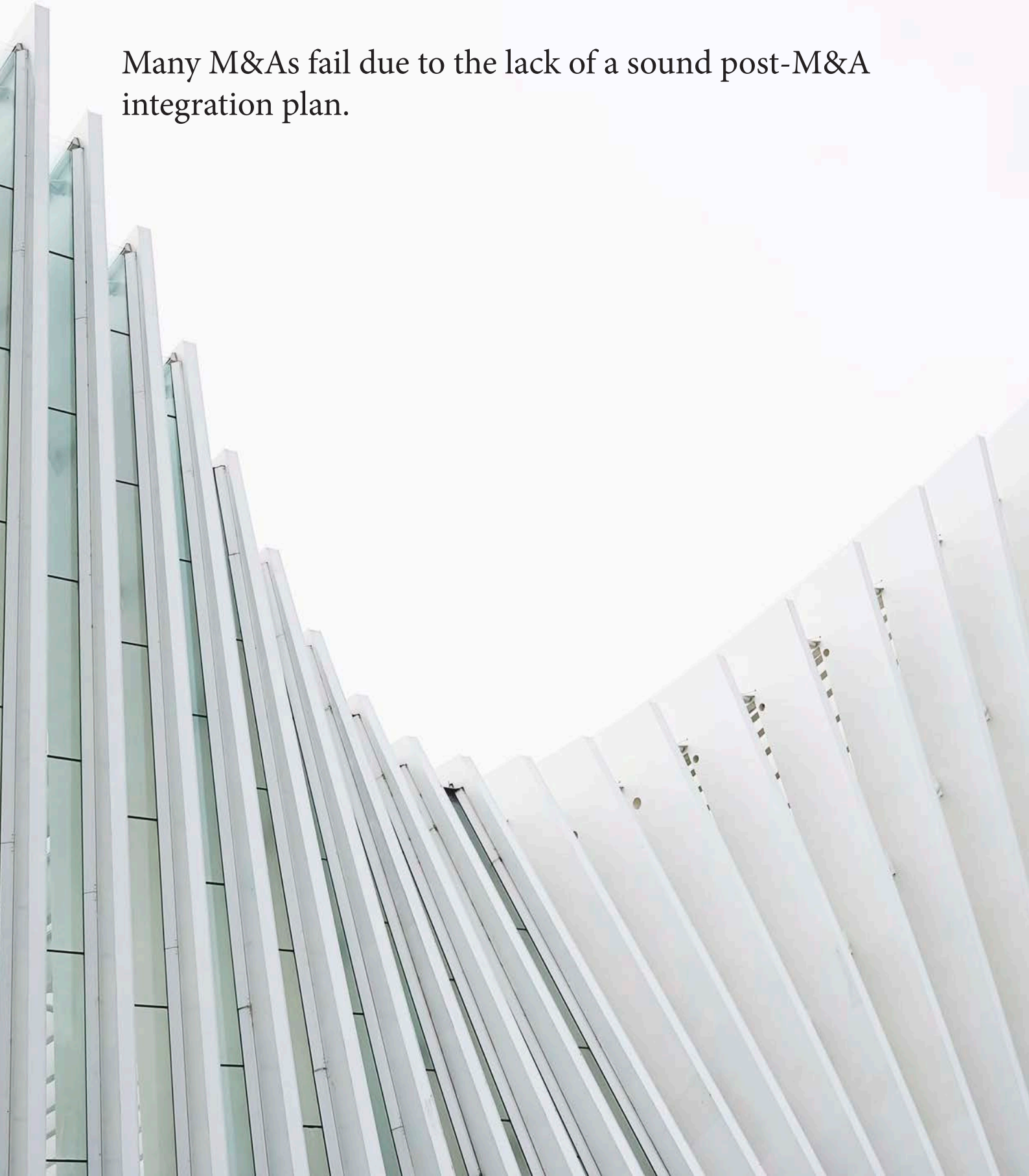
Acquisitions do not end with Closing. It is a continuing process of business building. As part of post-integration will be corporate policies, new HC related contracts, replace as opposed to displace employees, active management alignment and participation. These documents should have corporate sanctions for non-compliance. However, deep consideration should be given to local laws.

Many acquirers slack off once Closing has taken place and leave it to the rank and file to take care of integration. Lack of emphasis or poorly executed steps on post M&A integration will not reap dividends, but create issues that gradually builds up to sure failure. Post M&A integration between the acquirer and target includes not only bringing harmony and coordination, but efficiencies in management, change and cultural integration, application of corporate psychology, adaptation to common vision and equitable distribution of resources. The original leaders and teams of the two companies need to continue work closely together to implement the vision and strategies.

### 4. Shareholder issues:

There are two stages. Before and after an M&A. Existing and new shareholders’ expectations need to be

Many M&As fail due to the lack of a sound post-M&A integration plan.



brought in alignment to the objective of the M&A in both stages. Some issues would include buying out existing shareholders, reclassification, exchange or combination of shares. The expectations may also need sensitive alignment amongst cross-border shareholders.

## 5. Employee issues:

Analogous to shareholder issues are employee treatment. In an ideal scenario, no employees are displaced, but are successfully reallocated. However, where employees have to be let go despite efforts, clear negotiation objectives need to be in place before the M&A takes place. In addition to this, there will be matters relating to key employee or key management personnel. Negotiations need to cover retention of such persons to ensure successful transition in the acquirer-target combine.

The legal consideration from the seller point of view is whether there has been any effect on the contracts entered into between the main business owner / founder – in particular if there are earn-outs.

## 6. i-contact:

When there is no i-contact – both in terms of seeing eye to eye and discarding egos, the M&A may be doomed at the start; or if it were to sound legalese, mortuus ab initio. In most M&A discussions, getting the parties to agree is a daunting task. There will be differences in terms of valuations, revenues or profits, or potential growth. When the captains of the business come to an understanding, the professionals or advisers will come in with their own set of needs and wants to potentially scuttle the deal. The M&A negotiations should be devoid of emotional baggage. In negotiations, it is not enough to merely have the leaders discuss. The leader should develop a good team that can work in parallel. Personal relationships and persuasive skills between the teams should be balanced. A good legal “team” need not necessarily play bad cop all the time and can assist in diplomacy and righting wrong assumptions

In addition to the foregoing, consideration should be given to media attention. The higher the media attention during the negotiations, the larger the variation in price. Smaller deals create more value than bigger deals where expectations are high. Another consideration during negotiations is that even if the M&A goes through despite the above, it can lead to litigation.

## **The Legal Strategy**

**Merger** - 2 companies combine to become one with some legal variations where one company loses its identity, or share the identity or create a new one.

**Acquisition** - Purchasing of shares or assets of another entity.

**Regulations** - The solution and problem. Successful combinations of M&A and/or technology.

## **Internationally speaking**

**Vision + Mission : Strategy + Tactics**

### **III. The Legal Strategy –inception of an M&A idea**

A merger means 2 companies combine to become one with some legal variations where one company loses its identity, or share the identity or create a new one. An acquisition means purchasing of stocks or assets of another entity, in whole or part, business, property or combinations of them. However, in this case, the acquiring entity is the dominant one.

It is critical during the inception of an M&A idea to have the right vision and mission, strategy and tactics in place. This sets the tone of negotiations. The right leader who can build the right team is a pre-requisite. If the reason by the leader to conduct a M&A is purely reputation and headlines and topline gains, then the M&A deal is mortuus ab initio. Leadership is vital in closing an M&A deal. Many leaders will look for a successor who will carry out their vision. Much like some parents who want their progeny to fulfil what they couldn't. A leader should look for someone who shares her or his passion and rational thought (the why). The vision and its execution will happen by itself. If the goal has not been reached or achieved, it is because a better version or an even better version is to come. The legal strategy apart from deciding on documentation involving hire and retention of leaders and teams of both sides from idea through integration as they will all be part of the same team post-M&A.

On acquisition, counter-party leaders and the team who are valuable can also be contracted to continue with the company. Your yesterday's adversary will be your tomorrow's friend.

Price is what you pay. Value is what you get – as attributed to Warren Buffet who states in 2008 that he learnt that from Benjamin Graham). In tech terms, it is called WYSIWYG – what you see is what you get. In legalese, it is purchasing on an “as is where is basis”. The question is whether the true value is really a discounted present value of future cash flows or will the product be relevant or required 5 or 10 or 50 years from now. Negotiations should ideally be based on the value placed by the acquirer and not the price. The legal challenge is pinning down future projections in the documentation.



“Price is what you pay. Value is what you get”

*-Benjamin Graham, mentor of Warren Buffet*



## Case Studies

### 1. Case Study – Comfort DelGro



Comfort Cabs, one of the largest local taxi operators, is the result of a merger between Comfort Group and DelGro Corporation. It successfully captured a large market in the public transport sector. However, with the advent of Uber and Grab, its profitability is highly threatened.

### 2. Case Study – Uber



Uber as an app was envied by many when it came up. However, some of the problems they came up with are whether they were allowed to operate in a country without a licence for public hire taxis. Then there are problems within problems. In Australia, New South Wales allowed for Uber cars while Queensland did not. Local competitors and regulators could revoke the licence to operate such as in London.

In these cases, the question in the ComfortDelgro case is whether the company was prepared for disruption. M&A may not be the solution always for being bigger and better. One must be prepared for technology advances and disruption. In the Uber case, there was no preparation or consideration for the regulatory climate as mentioned earlier.

“What is a cynic? A man who knows the price of everything  
and the value of nothing.”

- Oscar Wilde, *Lady Windermere's Fan*, 1892, Act III



## The Legal Angle

- The solution & problem in both these cases are regulatory.
- Answer may not always lie in a merger, acquisition or technology, but a combination of all and a vision of the problems that lie ahead.
- While many companies decide to dive in first and solve the problems on the go, these may result only in short term benefits and prove highly expensive or even to be a wrong decision in the long term.
- Legal and tax considerations in different jurisdictions
- Involving international legal minds and not local lawyers you are comfortable with at the inception results in cost savings not cost overruns!

## IV. The Legal Angle

The solution and problem in a merger or acquisition is regulatory in nature. In all cross-border deals, there is no go-around to regulations. Laws are enacted to essentially protect life and property of its citizens. Therefore, it will always be the aspiration of law to protect them. Understanding this will focus the negotiations in a direction that eases M&A deals.

M&As require a successful combination of businesses, technologies, regulation handling and relationships. A clear vision and strategy must involve a legal approach as well as alternatives to legal problems. Relationships can be managed across cultures. Interchange the players in the M&A. Cultural negotiations should adopt a bottom up approach.

Pricing of the transaction will form part of deal structuring. Whether leveraged, unleveraged, debt, participating debt or JV. The deal structure should be clearly spelt out in that particular document. Focus should not only be on the seller's RNWs or WNI, but also on local compliance. Non-compliance can have an effect on the price of acquisition.

Many companies decide to dive in first and solve the problems on the go; or application of the words of Rear Admiral Grace Murray Hopper, a U.S. Naval officer and an early computer programmer in 1986 – it is easier to ask for forgiveness than permission. While quick fix non legal solutions may result in fast action and short-term benefits, it is a highly expensive and disastrous decision and will result in penalties, fines or even jail by law. This shotgun approach may work well for small companies which can wind up fast, but large and listed companies have much deeper roots to uproot. It is always advisable to be over- and self-regulated.

Pre- and post- M&A legal and tax considerations for different jurisdictions are an important angle and determines most M&A deals. What changes the equation will be matters relating to DTAA – double taxation avoidance agreements between relevant countries, DTAA, dividends, royalties, profits, capital gains, legal issues relating to anti-money laundering and anti-terrorism funding as well as international relations. These considerations need to be applied in detail.

Involving the proper international legal minds from inception results in cost savings not cost overruns. Good lawyers also bridge connections between the companies involved as well as the regulators. Different angles of approach, including bringing in legal at the right times, can produce time saving and higher chances of success.

### Alternative Legal Recourse

Avoiding litigation in any area of business is preferable. Court litigation requires plenty of time, effort on company representatives in court and is highly expensive. Simple transactions to be settled in court can start from USD 200,000 and grow exponentially.

Mediation works only if both parties have a good relationship and require a third party to adjudicate on a fair price. This is because mediation is voluntary. The only place where mediation works is if it has the sanction, implied or express, of the court in a country, which can be neutral.

Arbitration is equally expensive in the initial stages, but since the result can be much faster, it will save in long term costs. However, arbitration provides for a neutral venue as well.

Transaction Liability Insurance is available for Buyers covering legal liabilities and is an excellent alternative legal recourse. Where transaction liability insurance for sellers is available, it would form a probable win-win situation for both parties.

Another alternative legal recourse is to engage third parties who can either subrogate claims. For example, lit-



igation and recovery arms of banks and III party litigation funders. These maybe in-house or outsourced. third parties would Since the main or prominent part of their business is litigating on a regular basis, a premium of sorts can be negotiated. This will eliminate the M&A parties from expending too much time, effort and money and they can continue with their business.

A third alternative legal recourse is not so much a direct one, but to quantify the liability or have liquidated damages measured to the closest extent. For instance, convert a negative covenant to a positive on. Instead of vague consequences to breach of a contract, a fixed amount may be agreed between the parties on violation or breach. A party may be permitted to circumvent, compete or solicit provided they pay a fixed amount or fees for the same. Where the certainty of a claim exists, there will be better outcomes for both parties, for good or bad.

## X-Border Legal Due diligence

- Dreaded double D in more than one country
- Non-disclosure agreement – local laws
- The Report – WYSIWYG – Exit without acquiring – foreign law considerations
- Overture Documentation – NDA / NSA / NCA / NCirA
- Definitive Documentation – local investment, corporate laws and taxes
- Closing – pre and post; country-wise compliance

## Definitive Agreement SNP / Share subscription / Asset Purchase – contents

- consideration
- exchange ratios (listed deals)
- earn-outs
- special shareholder rights
- reps and warranties
- covenants
- no-shop / go-shop
- deal structuring (financing)
- break-up fees (forfeiture)
- indemnification
- liquidated damages
- closing

## Definitive Documentation

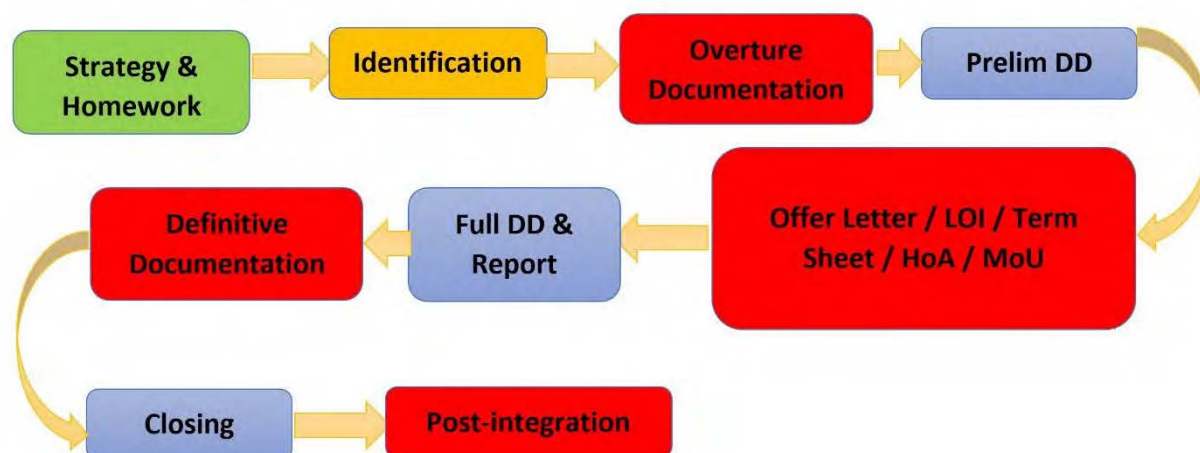
- Reorganization of debtors
- Outstanding shares, options, warrants and other securities
- Restated incorporation certs, articles / constitution
- Investor Rights agreement
- Voting Agreement
- Legal opinions
- Corporate approvals
- IP Assignments
- Consulting and employment agreements
- Earn-out Agreements
- Disclosure statements in case of listed companies
- Corporate housekeeping

Skipping cross-border legal DD is a case of **one step forward and two steps back.**

## V. X-Border Legal Due Diligence

Once the M&A strategy is clear, the parties will formulate a broad tactics for the deal.

The deal process that is usually followed is:



### Identification

The general target criteria is determined by size, revenue growth, earnings, management profiles, geographic location and finance. Identification of more than one target will effectively manage merger premia. Some places for identifying targets are bankers, advisers, referrals, corporate finance advisers, third party professionals, internet searches, paid research sources or searching within filings in exchanges.

Once identification has taken place and contact with target established, there may be initial documents required for confidentiality, legal and communication reasons.

### Overture Documentation

In the first series of documentation, the parties will enter into Overture Documentation. These may include the following:

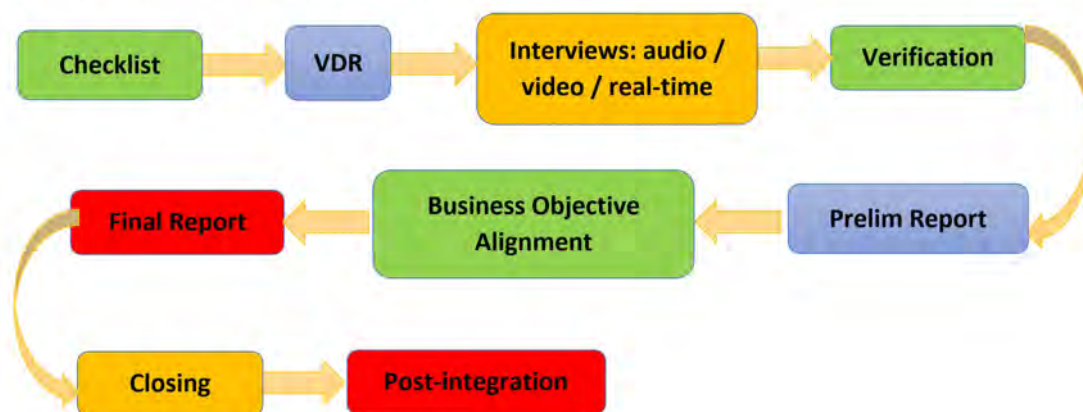
- i. LOI/MOU/OL/HOA - Letter of Intent, Memorandum of Understanding, Offer Letter, Heads of Agreement. These are just different references to the same document.
- ii. NDA – Non-Disclosure Agreement
- iii. NSA – Non-Solicitation Agreement
- iv. NCA – Non-Compete Agreement
- v. NCirA – Non-Circumvention Agreement

These contracts will relate to the Deal Team as well as employees and persons connected with the parties and will affect negotiation relative to price. They may be part of the same document or provided as separate ones.

### Legal Due Diligence

After the Overture Documentation, the dreaded double D kicks in. Due Diligence may take place in several stages – commercial, financial, technical and legal. The focus of this summary will be the legal aspects.

The DD process that is usually followed is:



DD focuses on a detailed and in-depth study on the corporate health of the target. The legal DD report not only helps to ensure each party are getting beyond WYSIWYG and handling toxic assets, but also provides opportunities of getting out of a deal that either party may have second thoughts about.

Some aggressive businesses want to enter into a deal as soon as possible and may gloss over or worse, skip legal DD but this is a case of one step back and two steps forward

While the process of M&A and DD is pretty much standardized in modern times, many technologies have developed that facilitate M&A. Technology is, however, meant to be a tool; a way to make lives more efficient and productive. CoAggregation places importance to technology within.

## Definitive Documentation

Definitive Agreement probably traces its origin to the United States. While it is not a specific term as much as a concept, many countries may refer to it within documents relating to exchanges present there. However, the term definitive agreement has spawned of other related documents that are germane to closing of a deal.

The definitive agreement is the sale and purchase / share subscription / Asset purchase agreements. The key aspects within this are: consideration, exchange ratios (if listed deals), earn outs, special shareholder rights, reps and warranties, covenants, no-shop/go-shop, deal structuring (financing), break-up fees (forfeiture), indemnification, liquidated damages, closing.

Definitive documentation, includes the definitive agreement, and related closing documents that provide for:

- i. Reorganization of debtors
- ii. Outstanding shares, options, warrants and other securities
- iii. Restated incorporation certificate and constitution (articles)
- iv. Agreement addressing investor rights
- v. Voting
- vi. Legal opinions
- vii. Corporate officer's certificate
- viii. IP assignment
- ix. Corporate Approvals
- x. Consulting and Employment
- xi. Earn Out
- xii. Disclosure statements in the case of listed companies
- xiii. Corporate housekeeping

Definitive documentation should focus on facts rather than future speculation. An important aspect of LDD is the position of the in-house counsel vs. the external counsel. The in-house counsel has the advantage (without the disadvantage of hourly billing) of interacting and closely working in real time, deep and fast interaction with the internal departments of management, commercial, technical, accounting, finance, sales and technical teams giving the in house counsel a wholistic view of the objective of M&As.

However, they are sometimes constrained by their reporting hierarchy which may hinder them to have a strong check and balance. Concerns raised by these internal departments can be addressed by the in-house counsel. Though external counsel have excellent work delivery and objectivity and can better value add can be achieved is innovative solutions derived from experience in other sectors.

SMEs and larger companies must institute a legal department. Listed companies may be legally required to have one.

## 1. Case Study – Facebook acquisition of Oculus



Legal DD is not a complete solution in itself. While legal DD takes time, many acquirers expect that a deal be completed in days. Facebook, Inc., which acquired Oculus VR LLC, was sued over intellectual property misappropriation and violation by ZeniMax Media, Inc. This case not only hinged on IP violations, but NDA as well. The legal DD was allegedly conducted over a weekend. This is 2 steps forward and 4 steps back.



In another interesting reverse case, Waymo LLC, part of the Alphabet Inc. group which in turn owns Google Inc, is a demerger case. It is a spin-off from Alphabet. Interestingly, Waymo's fine print leads it to google's pages. Waymo has filed a suit against Uber for IP violations in driverless car technology. This covers aspects of ring fencing liabilities.

## 2. Case Study – Amazon acquisition of Whole Foods



A creative approach to stymie acquisitions. Legal DD is not a complete solution in itself. In this case, Amazon made a move to brick and mortar businesses. What makes the case interesting is alternate legal strategies. Existing retailers are using fine print in their leases where they have rights. This rights may be – influence who are their neighbours in malls, operating hours or control over inventory, guarantees that malls or landlords do not alter the property that affects sales without prior written approval which may be withheld, prohibition of storage facilities or pickup facilities and exclusivity of product sales. Local regulatory bodies may sometime comprise of members who will protect their turf.



Legal DD takes anywhere between weeks to months. For instance, where hard assets play a big role in oil and gas industry or in technology where intellectual property takes a large chunk of work. The most essential aspects of a legal DD process are – checklist, interviews, documentation, closing and from a business perspective, post-M&A integration. In-house counsel is always pressured into working in overdrive on DDs and such actions often result in many an oversight. There are also many technologies that facilitate DDs.

## Cultural Quotient (CQ)

Another important aspect of M&As these days is CQ – Cultural Quotient or Cultural Intelligence. Many exhibit this skill by default and others by design. However, it is indispensable in cross-border M&As and must be inculcated in both the leader and the team individually.

Ang, Van Dyne, & Livermore describe four CQ capabilities:

- Motivation (Drive)
- Cognition (Knowledge)
- Meta-cognition (Strategy)
- Behavior (Action)

CQ – Impact of an individual in a cross-border or borderless situation in business. Application of this soft skill contributes very highly to a cross-border M&A success.

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# Listed Company Acquisitions



## VI. Listed Company Acquisitions of Private Companies

Listed company (listco) acquisitions can be analogised to go-kart/F1 races. At the former, the cars are slower, rules laxer, atmosphere more relaxed fun even. The latter is serious with stringent rules and dangerous. These conditions are set with many moving parts. For a listco, intent, offers, actual acquisitions, timing, price and projections play big roles. All market regulations cover disclosures along with insider trading and market abuse. Strict compliance must be enforced during acquisitions.

Listed companies can also acquire another listed company. For instance, Comfort Delgro an SGX listed company, owns 75% of SBS Transit another SGX listed company.

Berkshire Hathaway, a listed entity, regularly acquires other listed company shares.

Acquisitions of foreign companies by a listco also brings about exciting opportunities of a new and foreign market. But along with this, there are additional considerations like compliances between 2 countries.

### 1. Case Study – Private

**Background:** Regulatory Interference; Listed company to acquire subsidiary of a listed company in a different country

In a case where a listed company tried to acquire a subsidiary of a listed company in a different country, some regulations interfered. These included financial assistance by the latter for the former to acquire the same.

- Apart from regulatory, many a time, acquisitions are announced with intent, which in theory raises market expectations and there the share price
- This can be a double-edged sword where continuous announcements of failed deals will bring negative expectations on the company and hence a failed share price.

### 2. Case Study – Private

**Background:** Small listed company acquiring multiple private companies

Apart from regulatory, many times acquisitions are announced with intent. This helps raise market expectations and therefore, the share price. But this can be a double-edged sword where continuous announcements of failed deals will bring negative expectations on the company and hence a failed share price.

- Following up on announcement of intent
- Announcement of deal completion or deal failure
- Dangerous to ignore
- Can lead to market manipulation
- Allows for potential shorting of stock
- Can attract regulatory penalties

## Post-acquisition

- Business integration (remodelling business models)
- Redundancies and Layoffs (Capture and reallocation of Human Capital in merged or acquired companies)
- Cultural Integration (CQ)
- Brand integration
- Change management
- Shareholder and employee expectation management
- Regulations (announcements, disclosures, statutory compliances, policies)

## **VII. Post-acquisition Issues**

The most important aspects of foreign acquisitions are post-integration M&A activities. Business integration (remodelling business models), regulations (announcements, disclosures, statutory compliances, policies), lay-offs (Capture and reallocation of HC in merged or acquired companies), cultural and brand integration (change management), shareholder and employee expectations amongst many other things.

**Post-integration is a big subject in itself and there are many cases on successful and unsuccessful ones. The CoAggregation® provides an alternative way to deal with post-integration. We will be publishing more articles on these on our website and social media so do follow us!**



## A new approach to M&A - the CoAggregation®

- Model evolved by 2iB Partners that combines M&A with organic growth.
- Obvious outcomes are traditional business transformation, innovation, market access, digitization, cost efficiencies re-investment (CER), vertical and lateral expansion.
- **For SMEs**, CoAggregation® enables companies in a given sector / industry to scale up and internationalize as well as innovate and future-proof against disruption.
- **For MNCs**, *Reverse* CoAggregation® envisages the restructuring of an organization into highly efficient, functional and decentralized business units that are highly focused on their core competencies.
- Creation of a semi-decentralized system that is not laden with bureaucratic inefficiencies but combines the best of scale and nimbleness.
- Infusing of right and relevant technology.
- Maximization of shareholder value.

## VIII. CoAggregation®

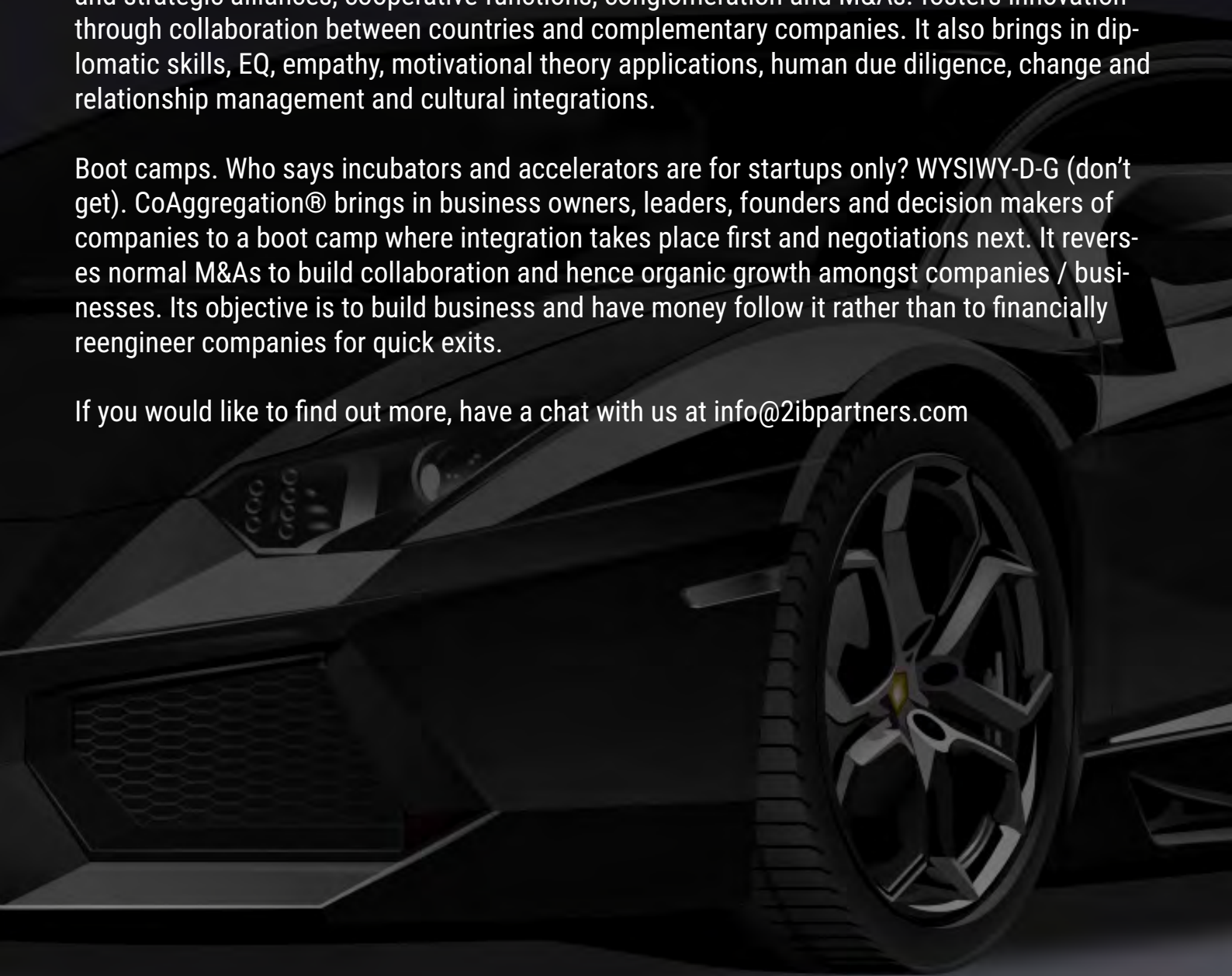
M&A is a tricky process. In this, the shortest distance between 2 points is through many points.

CoAggregation® is collaborative M&A with organic growth; a co-ownership between complementary businesses with skin in the game for its participants. Its aim is help companies scale up and internationalize and then to build super firms for the future. The super firm is an all-inclusive entity that makes disruptors out of being potential disrptees. The CoAggregation® addresses exit issues, moral hazards, cost efficiency, innovation and legacy.

The CoAggregation® is a new process that we have devised. It provides for ease of conducting deals that are otherwise obstructed by – ego, valuation issues, information asymmetry, human capital redundancy and of course, legal. CoAggregation is built on the 4 pillars of collaboration, consolidation, CER and cooperative functions. It combines the best practices of joint ventures and strategic alliances, cooperative functions, conglomeration and M&As. fosters innovation through collaboration between countries and complementary companies. It also brings in diplomatic skills, EQ, empathy, motivational theory applications, human due diligence, change and relationship management and cultural integrations.

Boot camps. Who says incubators and accelerators are for startups only? WYSIWY-D-G (don't get). CoAggregation® brings in business owners, leaders, founders and decision makers of companies to a boot camp where integration takes place first and negotiations next. It reverses normal M&As to build collaboration and hence organic growth amongst companies / businesses. Its objective is to build business and have money follow it rather than to financially reengineer companies for quick exits.

If you would like to find out more, have a chat with us at [info@2ibpartners.com](mailto:info@2ibpartners.com)



“CoAggregations are like courtships  
- the best part of the relationship”





## Run-up of the year

This year has been an exciting one for us at 2iB Partners. We formed part of a repertoire of experts hailing from MNCs, conglomerates, mainstream banks, advisory firms and funds with substantial AUM to speak at a conference addressing a room with 100 billion dollars worth of network.

We have also further consolidated networks of strategic buyers, funds, sell side companies and deal brokers into a streamlined deal flow network. On a small scale, we have also kicked off our masterclasses and workshops in a bid to educate companies on the potholes of M&A, build our reputation and also deal flow.

2iB Partners believe in forming the right partnerships and forming the right ecosystem to achieve the right positive outcome. As such, we are also in talks with parties for key partnerships. This ecosystem will further boost our reach and ability to deliver results in the most effective manner.

Stay tuned to our updates and enjoy the pictures!



Speaking at the Southeast Asia Merger & Acquisition and Corporate Investment Conference, 2017. With our China partners, celebrating a successful event







Very thankful to our friends from Addiction Advertising!



“Thoroughly enjoyed the class. Mr. Yang Yen Thaw was engaging and thorough on the subject. Lively class and got to know good contacts.”

*- Joyce Kingsley  
Director of SI Samy Trading Co. Pte Ltd*

“Interesting, Informative and professional presentation”

*-Rebecca Kool  
Group General Counsel, OMH Ltd*

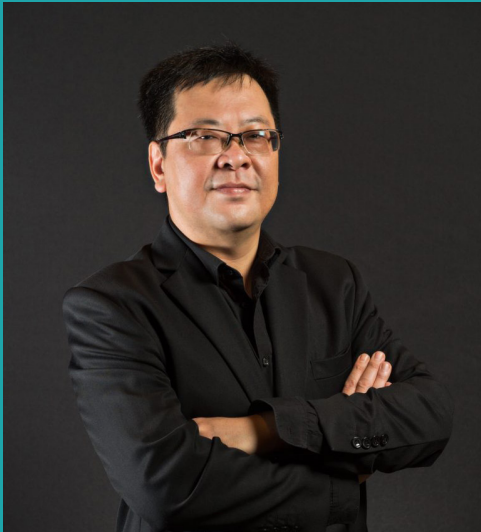




A commentary on the panel discussion on Accelerating Innovation: Partnerships & Regulations on the topic "Fintech in Healthcare". The panelists are Yang Yen Thaw, Managing Director of 2iB Partners, Astrid S. Tuminez, Regional Director, Corporate, External, and Legal Affairs at Microsoft Southeast Asia, Wayne Chia from Asia P3 Hub and Azmul Haque, Managing Director of Collyer Law.



# Meet the team



## Yang Yen Thaw

Managing Director

Yang Yen Thaw brings with him a rich experience in terms of his legal training and management experience. A lawyer by training for over 24 years, he is an innovative thinker and brings with him a valuable network of tech experts and outsourcing service providers. He loves collaborations and has co-founded the idea of CoAggregation.

He has listed company and private equity experience and served as an Executive Director and General Counsel to a listed UK plc. His management experience comes from being a Partner in one of the largest Singapore law firms representing an international law firm as well as head of its corporate technology practice, Head of South Asia Practice in a unique China-Singapore joint law venture, Partner in a PE/VC focused law firm. Prior to all these, founded his own law firm which he ran for 12 years. In 2000, he devised and implemented YLRM – Yang Legal Risk Management, an internal legal compliance program for companies that in the present era is being implemented by digitization by the industry.

Yen Thaw has assisted international SMEs in difficult environments in a wide range of businesses covering investments, technology, infrastructure; marketing; hospitality – hotel and tourism, healthcare; media and entertainment to consumer oriented products. He has also worked on international M&As, RTOs and roll-up combinations in countries including Australia, China, France, India, Japan, New Zealand, UK, USA and most South East Asian countries. He studies cultures and technology with a passion. He has delivered key note speeches and has been panel moderator on investment and doing cross-border business in China, Taiwan, Singapore, Malaysia, Thailand and India on behalf of various organizations such as the Indian Embassy in China, the Singapore Business Federation (SBF), UK private wealth organization etc.



## Richard Eu

Advisor

Richard Eu was appointed to the board as Chairman of Eu Yan Sang International (“EYSI”) board on 1st of October 2017. He leads the board in providing governance oversight, deliberating the Group’s strategic choices and providing independent counsel and advice to the Group Chief Executive Officer (“CEO”). Richard joined the business in 1989 and was appointed Group CEO of EYSI in 2002. He has been instrumental in transforming it into one of Asia’s largest Traditional Chinese Medicine (“TCM”) groups today. EYSI was listed on SGX from 2000 to 2016.

EYSI is a company that specializes in traditional Chinese medicine since 1879. It currently runs more than 300 retail outlets in Hong Kong, Macau, China, Malaysia, Singapore, and Australia, plus two factories in Hong Kong and Malaysia. The group also operates over 30 TCM clinics in Malaysia, Singapore and Hong Kong.

Richard was named the Ernst & Young Entrepreneur of the Year 2011 (Singapore) and represented Singapore at the Ernst & Young World Entrepreneur of The Year 2012 award in Monte Carlo, Monaco. He was also recognized as the CEO of the year by the Singapore Corporate Awards 2010, for SGX-listed companies with a market capitalization of under S\$300 million. In 2016, he was lauded as the Brand Leader of the Year by InfluentialBrands. Richard holds a Bachelor of Law degree from the London University, UK and has worked in merchant banking, investment management, stock broking, computer distribution, and venture capital.

He actively participates in community projects and non-profit organizations. He serves as Chairman of the National Museum of Singapore and Singapore University of Social Sciences and is on the board of Thye Hua Kwan Moral Charities Limited. He also sits on the boards of other companies.



## Dylan Tan

Chief Operating Officer

Dylan Tan is a CoAggregator and a young achiever. At an early stage in life, he has experienced intensive exposure from startup to listing of a holding company incorporated in UK on Nasdaq in Stockholm and managing subsidiaries that covers Singapore, New Zealand, Australia, United States, Thailand, France and the United Kingdom. Apart from his mainstream finance skills, this wide range of experience in sales, strategy, marketing, public relations, legal, corporate secretarial, compliance and governance for a company from its inception to listing and beyond gives him a unique perspective of co-creating the CoAggregation model and aggregating companies under it.

His work involved overseeing global operations from Singapore and participation in acquisitions of several companies in various industries and sectors. He was a director in a hybrid private equity outfit where he wore several hats. He was part of this pioneer founding team that set up a UK plc that was listed on a European Nasdaq and helped in growing the listed company from 4 subsidiaries pre-IPO to 17 companies post-IPO. He was the main contact point for interfacing and liaising with the founders / owners of these international subsidiaries. He has been deeply involved with capital raising, IPOs and Mergers & Acquisitions, RTOs within the SME sector in cross-border jurisdictions. His experience. Dylan used to head up the Advisory department which includes deal sourcing, end to end deal negotiation and due-diligence.

Dylan has held directorial positions in SPVs of the European Nasdaq listed company. He has also successfully built up networks with HNIs, highly powered executives and businesses alike.

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# Our Partners & Professionals



## **Denise Morris Kipnis, MSOD**

Denise is a senior organization development professional specializing in transformational change and inclusion. She has led numerous change projects across various sectors and industries. Denise has served as both an internal and external resources in pursuit of organizational effectiveness. During the past 10 years, her projects have included implementing strategy initiatives, organization design, program development, culture and climate assessment and change, assessing and developing organization change capabilities, and managing diversity and inclusion, among others.

Her core competencies lie in uncovering gaps between strategic intention, culture, and system design; enrolling all levels of the organization in problem solving; and facilitating team and cross-department collaboration.

Denise has a Master of Science in Organization Development from Pepperdine University, a Bachelor of Arts in English from Stanford University, and project management certification from the U.C. Berkeley Extension. She is certified by the Center for Creative Leadership to conduct its assessments. She is a member of the Organization Development Network and is a former board member of its Pacific Northwest regional chapter. Denise is a member of the Organization Development Network of Singapore and the Asia Organization Development Network and served on its 2012 conference planning committee. She is also an Adjunct Lecturer for Rutgers Business School Asia Pacific's Mini-MBA™ program, delivering half-day workshops on managing change, systems thinking, and diversity and inclusion.



## **Joy-Paul Tharakan**

Joy-Paul Tharakan has more than 22 years of sales leadership and general management experience in the enterprise software & cloud services industry. He held the post of, among others, Managing Director, Asia (incl. Japan, Greater China and South East Asia), Microsoft (Business Solutions Division). His experience includes working for large matrix driven organizations, mid-sized businesses and entrepreneurial startups. His core customer community includes Business and IT decision makers across a diverse set of vertical industries

The contents of his work experience includes leading & achieving aggressive revenue goals, executive sponsorship of complex solutions, business planning, cross BU collaboration, P&L management and leading a mix of culturally diverse teams of country managers, sales and professional services teams. Within the various sales leadership roles, he has led a combination of direct & channel sales teams as well partnered closely with ISVs, consulting firms & Tier 1 & 2 SIs in the Enterprise & Mid-Market segments.

His past business portfolios includes start-up businesses with a few million dollars in revenue to company divisions with revenue goals in excess of 700 million USD





## **Pierian Service**

PIERIAN is a leading global business services company, providing a range of services and solutions. It's core expertise is in providing managed services for Finance and Accounting, HR & Payroll, and associated business support processes. They deliver significant operational efficiency whilst reducing the total cost of ownership by optimising business processes and systems. Pierian is fully conversant across a range of ERP/Finance & Accounting platforms. They also create bespoke solutions to suit specific requirements as well as setting up and transferring process and systems to clients.

Clients include some of the best-known global brands as well as start ups. Pierian helps them work smarter and achieve accelerated growth through process transformation, digital technology enablement, and creation and management of value-generating business services. They particularly address critical challenges in risk management, compliance, and regulatory and corporate governance.

Having commenced operations in 2003, Pierian has a strong team of over 350 skilled professionals serving clients in India, USA, APAC, South Africa, Middle East and UK. Pierian also has strong partnerships in India, US, South Africa, Middle East, and UK.



## **Alloy Networks through Titanium OU**

Alloy Networks is a division of Titanium OÜ, a company headquartered in Estonia. Titanium is a multi-disciplinary company with interests in Technology.

The team behind Alloy Networks has almost 30 years of experience in the business and technology space. We have domain expertise in multiple industries, allowing us to approach your hosting and application requirements from the perspective of the business owner.

They specialize in providing custom hosting and mail packages targeted at the security conscious enterprise. They also provide hosted contact center solutions. They have domain and technical expertise in hosting a variety of applications and stacks, including Groupware, Mail, Project Management, Software Support, Remote Control, LAMP, LEMP. Apart from custom solutions and applications that our customers require from time to time.

They are tech nerds with a business background. So their solutions are tailored towards business processes, and not only towards technical requirements.

They also provide services related to data storage applications, productivity applications, commerce applications, core/enterprise applications and niche applications.

They pride themselves in being a boutique hosting company, with an eye on detail. They do not provide commodity servers or services, which are better served by other hosting companies. They will go that extra mile to customize a hosting solution to fit client needs. They use extensive automation tools that allows them to keep their services highly available and secure. Apart from private clouds, They host some extremely high traffic e-commerce sites, and work with their clients as partners rather than service providers.

# List of Services

- **Ad-hoc Entrenchment (AHE) of partners & professionals**
  - Management
  - Human Resource
  - Business process outsourcing/re-engineering
  - Change Management
  - Tech
  - Digitization
  - Marketing & Public relations
  - Corporate Finance
  - Legal
  - M&A (Including cross-border)
- **Facilitating trade-sales/exits**
- **Matching buyer (acquirer) to seller (acquiree) and vice versa**
- **Facilitating investment into companies**
- **Matching investor with investee**
- **Preparing companies for liquidity event**
- **Market access & internationalization (Strategy & Implementation)**
- **Business Strategy**
- **Regulatory strategy**
- **Masterclasses & workshops on M&A**

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