Global Private M&A Guide - Limited External Content - Indonesia

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

In Indonesia, regulatory non-compliance is very common and access to public information is limited. Many Indonesian companies do not maintain adequate records from a legal perspective, or indeed books of account from a financial perspective. Often, information sought in a pre-acquisition review cannot be found readily or simply does not exist. For example, many companies do not maintain share registers, although this is required by law. These would often mean additional costs for rectification post-closing.

In some jurisdictions, asking the seller to clean up before closing is the norm. Although there has been development towards this best practice, this is not necessarily the case for every situation in Indonesia. Coming up with an appropriate solution requires detailed due diligence and a deep understanding of the local practice and practical risks involved. Seeking protection via a reduction in the purchase price or a holdback of the purchase price is possible.

Legal documentation for an asset acquisition tends to be more complicated than documentation for a share acquisition since the former involves the transfer of different categories of property. Different categories of property will often require different transfer documentation.

**Pricing and payment**

Mandatory use of Rupiah

All domestic transactions should be in Indonesian Rupiah, unless those transactions are done in specific business sectors and for specific purposes and/or areas as stipulated by Bank Indonesia. Rupiah is not readily obtained offshore. As such, transactions in Rupiah usually require the buyer to have expensive swaps, or alternatively the transaction documents can have an exchange rate mechanism.

Foreign exchange control

Bank Indonesia has the authority to require information and data in respect of any flow of foreign exchange and has introduced regulations requiring the reporting of transactions over a certain value and limiting the remittance of foreign currency, unless there is an underlying transaction justifying the remittance of the foreign currency abroad.

Subject to stipulation by the government, Bank Indonesia sets out references for foreign exchange conversion mechanism (e.g., JISDOR). In transactions, the parties may agree on the mechanism applicable to their transaction.

**Signing/closing**

Share sale

Considering the current licensing system in Indonesia which focuses more on post audits (known as the online single submission (OSS) system), prior government approval is usually no longer required for a direct transfer (i.e., onshore acquisition) of shares in an Indonesian company to a foreign buyer. However, prior approval for certain transactions is still required, e.g., for companies under the supervision of Bank Indonesia or the Indonesia Financial Services Authoritiy, Otoritas Jasa Keuangan, (OJK).

Between the signing and the closing of acquisitions, mergers, consolidations or separations of an Indonesian limited liability company (perseroan terbatas), the parties will be required to fulfill certain procedures as stipulated under Law No. 40 of 2007 on Limited Liability Company, as amended (Company Law), e.g., announcement of transaction plan in at least one newspaper, announcement of transaction plan to employees, settlement with creditors, conducting an extraordinary general meeting of shareholders to approve the transaction. For simpler transactions such as minority shares transfer, signing and closing can be conducted simultaneously.

Where the Indonesian company is owned by a special purpose vehicle (SPV) outside Indonesia, it is quite common for the deal to be transacted as a transfer of shares in the SPV. Apart from Indonesian merger control filing (which may apply if the statutory thresholds and definition are met), a transfer of shares in an SPV outside Indonesia is not subject to Indonesian government approval, and simultaneous signing and closing is also possible.

Asset sale

Unless the foreign buyer already has existing entities with the requisite business scope in Indonesia to acquire the assets, there will normally be a gap between signing and closing.

## Approvals/registrations

**Foreign investment restrictions**

Indonesia has a mandatory foreign investment screening procedure targeted at foreign direct investments in all sectors. Screening is required post-closing, except for a minority of sectors (e.g. in the financial services and payment services sectors) where the screening is suspensory (which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed). For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Under Indonesia's merger control regime, post-closing filing is mandatory when certain thresholds are met, but parties may also file pre-closing on a voluntary basis. Once the notification is received, the competition authority enters a substantive review period for a maximum of 90 working days post-closing. For further information, see the more detailed section on "Antitrust/merger control".

**Language**

Transaction documents are required to be made in a bilingual format (or any other format the parties choose so long as there is a corresponding version in Indonesian language). The stipulation on the use of English language and/or foreign language, as well as the ability to choose English as the governing language, applies only when there is a foreign party (interpreted as a non-Indonesian entity or a non-Indonesian citizen) involved in the transaction documents.

## Employment

**Share sale**

Employees have the right to choose not to continue their employment with their company due to the acquisition of the company where the acquisition results in changes to the employment terms that are detrimental to the employees. As such, a discussion with the target company's human resources department on how employees may be dealt with to ensure a smooth transaction is needed. Typically in an acquisition transaction that results in changes to the employment terms that are detrimental to employees, the employees will be asked to elect before closing whether they will exercise their rights to be terminated post-closing so that the manpower position is known, or key employees must agree to continue working, or a certain percentage of staff at certain levels within the target company must elect not to be terminated.

**Asset sale**

Under Indonesian law, there is no automatic transfer of employment from seller to buyer in an asset sale. If employees of the seller will be moved to buyer in an asset sale, then the employees' consent is required. If an employee does not agree to be moved, the employee will remain employed by the current employer (i.e., the seller) until the employment relationship terminates for other reasons.

There are two main options available to move employees, being:  (i) transfer; or (ii) termination and rehire. The main difference between the two options is that in respect of the "termination and rehire" option, the seller needs to pay a termination payment to the impacted employees; while in respect of the "transfer" method the impacted employees are not entitled to a termination payment, however, their years of service must be recognized by the new employer (i.e., the buyer).

## Tax

**Share sale**

Generally, unlisted shares sold by non-resident taxpayers are subject to a 5% final withholding tax (20% of estimated net income of 25% of the sale price). Non-resident taxpayers may be protected from tax by the provisions of any applicable tax treaties subject to fulfilment of certain administrative requirements stipulated under Indonesian local regulations.

Listed shares sold on the exchange by both non-resident and resident taxpayers are subject to a withholding tax of 0.1% of the transaction amount (and an additional 0.5% for founder shares of the share value at prescribed times if the tax for the founder shares has not been previously paid on an initial public offering).

**Asset sale**

Sellers are required to pay an income tax of 2.5% on the transfer of land and/or buildings, which is a final tax. Generally, buyers are required to pay a 5% duty on the transfer of land and buildings.

Gains, based on the difference between the sale proceeds and book value, on assets sold by an entity are subject to corporate income tax at the rate of 22% for fiscal year 2022 onwards.

In general, VAT of 11% (or 12% from 1 January 2025) is also chargeable on assets that are classified as taxable goods sold to an entity/individuals and is incurred by the buyer provided that the seller is a registered taxable entrepreneur.

If a company has obtained special duty-exemption facilities on certain imports (commonly known as a master list), the transfer of assets within a certain period will result in the initial exemption from duty being revoked and the duty becoming payable, unless approval is obtained and the buyer itself has a master list covering the assets to be purchased.

**Stamp duty**

The nominal amount of stamp duty is IDR 10,000 and is affixed by a duty stamp at the time of signing documents.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

Indonesia's legal system is based on the European civil law system. This distinction from many other jurisdictions in the region, together with ongoing regulatory changes, requires careful consideration of the issues that arise in M&A. Most transactions in Indonesia are share deals, because asset deals are quite onerous to complete since there are no transfer of undertaking rules, or facilities to transfer across licenses from one legal entity to the other.

Increasingly, sellers are using auction processes with the aim of maximizing price. Not all auction processes are successful, as often the price expectations of buyers and sellers are not aligned. Sometimes, the process is aborted altogether. In other instances, the process continues as exclusive negotiations with one bidder. Where an auction process is used, this process is generally governed by one or more process letters issued by the seller or its financial advisers governing the rules of the sale process. Generally, those process letters would provide for two or more rounds of bidding, with generally the first round being a non-binding bid based on limited financial information of the target and the second and subsequent rounds being based on in-depth due diligence by the buyer and with such bids being binding on the buyer.

A key element of Indonesian transactions is that many transactions are not full buy-outs. Typically, a joint venture is created, because of foreign ownership restrictions but also because sometimes the (family) sellers want to retain a stake in the company they built (often a controlling stake). Given that a relatively high number of companies are listed in Indonesia, we also see a relatively large number of deals with a public element.

Mergers are possible, but not very common, in Indonesia. In a merger, by operation of law, all assets and liabilities of the disappearing company are assumed under universal title by the surviving company. As a result of the completion of the merger, the disappearing company is dissolved.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

There are two main types of company that can be established in Indonesia: private companies and public companies. There are substantial differences in the laws and regulations as they apply to public versus private companies. Further, there are foreign investment restrictions that mean that foreign investors can only invest in foreign investment status companies. For further information, please see the more detailed “Foreign investments restrictions” section below.

## What are the different types of limited liability companies?

Limited liability companies are the only type of corporate entity in Indonesia.

## Is there a restriction on shareholder numbers?

For a limited liability company, generally, the minimum requirement is that there must be at least two shareholders. However, this requirement is excluded from the following companies:

State owned enterprises (persero) with all its shares owned by the state.

Regional owned companies.

Village owned companies.

Companies that manage stock exchange, clearing and guarantee institutions, storage and settlement institutions, and other institutions in accordance with the provisions and regulations in the capital market sector.

Micro and small businesses. Businesses that are categorized as micro and small businesses are as follows:

Micro businesses have: (i) less than 1 billion Rupiah of investment value (excluding land and building); or (ii) annual sales of no more than 2 billion Rupiah.

Small businesses have: (i) 1 billion – 5 billion Rupiah of investment value (excluding land and building); or (ii) annual sales of 2 billion – 15 billion Rupiah.

Businesses that fulfill this requirement can be established by one individual. The founder of micro and small businesses can only establish one company in a year.

## What are the key features of a share sale and purchase?

Under the Company Law, an acquisition is a lawful act executed by a legal entity in the form of a company or other entity, or by an individual, to take over all or a majority of a company's shares, whether existing or newly issued, which may cause a change in the control of the company. The Company Law does not state the meaning of “control” but it is reasonable to assume that the term refers to the capacity to determine, directly or indirectly, in any way, the management or policies of the company concerned.

Acquisitions instigated by the management of a company are treated differently and have more complex requirements than an acquisition between an existing shareholder and a proposed new shareholder.

Generally, all that is required to transfer legal title in the shares in an Indonesian private company is for a share transfer deed to be executed by the seller and buyer (under hand by way of an agreement or in notarial deed form) and then registered in the company's shareholders' register. The transfer is effective on the date of the share transfer deed. However, there are subsequent requirements to notify or make registrations with the MOLHR and other government agencies (including, in some circumstances, changes in licensing). If the transaction fulfills merger control filing requirement, the KPPU will consider the MOLHR approval/receipt as the effective date of the transaction when the filing deadline of 30 business days start counting.

For minority shares transfer, unlike acquisitions which require more procedures (e.g., announcement of acquisition plan in a newspaper, settlement with creditors), the only requirements are to transfer the legal title of the shares.

## What are the key features of an asset sale and purchase?

When a business is being transferred by way of an asset purchase, each individual asset must be transferred in accordance with the formalities applicable to that type of asset. For some assets, this will simply be a case of delivering the asset to the buyer, but in other cases, the formalities are more prescriptive, as is the case in real property or intellectual property transfers. It is therefore necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with.

In conducting an asset purchase in Indonesia, acquirers need to be aware theThe multitude of government agencies that may be involved in effecting the transfer of registrable assets.

Procedures for acquiring good title to land.

The often time-consuming efforts needed to:

Obtain consents and approvals (including those from banks, third parties and government agencies)

Establish the new investment company as the buyer

Obtain all general and industry-specific licenses for the business being acquired

Apply for expatriate work plans and permits

Transfer over employees and deal with statutory benefits that they may be entitled to on the transfer.

While these matters are not insurmountable, they do make closing an asset acquisition much more difficult and time-consuming than a transaction involving shares. In many respects, the business in an asset sale needs to either cease operating until all licenses are obtained or otherwise operate without licenses in its name (this is a consequence of licenses not being transferable in Indonesia).

In contrast, share acquisitions generally require far fewer consents and approvals and are less problematic.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

This really depends on the parties themselves, but we wouldn't say it is customary to prepare a letter of intent or term sheet. Parties often move to full documentation directly. Where such letter of intent or term sheet is prepared, it depends on the terms of those agreements whether and to what extent they are binding on the parties. Generally, we see parties electing to award a binding effect to provisions on timing, governing law and costs, but not to the other (more substantive) provisions. Indonesian law does not specifically regulate whether a letter of intent or term sheet is binding on both parties, but there have been Supreme Court cases providing that term sheets must be interpreted in good faith even though they were expressed to be non-binding.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** Exclusivity provisions are commonly included in letters of intent or term sheets.

**Break fee:** Break fees are rarely seen, certainly not in a term sheet.

**Confidentiality:** It is more common to draft a confidentiality agreement as a separate document.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

It is common to negotiate a separate confidentiality agreement as well as a separate exclusivity agreement. Confidentiality agreements are often dealt with separately as they are quite detailed and not easily integrated into a term sheet. Exclusivity provisions also feature in letters of intent or term sheets.

## Is there a duty or obligation to negotiate in good faith?

Indonesian law requires party to enter into a contract with good faith, but it is silent on whether the negotiation should be in good faith.

However, parties who abuse a stronger bargaining position and induce another party to enter into a contract may face scrutiny in accordance with the concept of abuse of circumstances (misbruik van omstandigheden) which the weaker party could raise with the appropriate dispute settlement forum (court or arbitral tribunal).

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Purchase price adjustments are fairly common, especially where sophisticated parties are involved and the size of the deal is substantial.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Adjustments are generally based on net debt or working capital adjustments. However, in some transactions involving Indonesian conglomerates, we have seen that: (i) buyers request that sellers use the debt-free and cash-free mechanism; or (ii) parties agree a locked-box mechanism.

At the same time, we see a locked box purchase price adjustment mechanism gaining traction with sellers.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely; this is generally not acceptable.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is a point of negotiation, given the advantage of being able to instruct the auditor who will prepare the closing balance sheet. We see both options being agreed, depending on the negotiating position of the parties.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Fairly common; in larger transactions, we would typically see this statement being reviewed by an auditor.

## Is an earn-out common?

Frequency/market practice: Rarely/not at all.

## Is a deposit common?

Frequency/market practice: Rarely/not at all

## Is an escrow common?

Frequency/market practice: Starting to be common, but there are some technical constraints that prevent companies from using an escrow. In Indonesia, an escrow can only be conducted by banks, which involves a lot of technical mechanisms, e.g., KYC process.

## Is a break fee common?

Frequency/market practice: Rarely/not at all

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Fairly common; this is a point of substantial negotiation. This condition is becoming more and more acceptable, given the relatively long period between signing and closing in Indonesia.

## Is the MAE general or specific?

Frequency/market practice: Where an MAE is accepted, it is a specific MAE.

In unpredictable situations (e.g., during the COVID-19 outbreak in 2020) we have seen parties tarting to request a specific MAE clause related to force majeure.

## Is the MAE quantified?

Frequency/market practice: Rarely; this depends on the parties. However, there is a trend towards parties agreeing to a quantification of the MAE trigger.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common. However, the parties should also assess the competition risks of the non-compete clause(s).

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Waterfall provisions, etc., are rarely used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Common (in conjunction with a non-compete). However, the parties should also assess the competition risks of the non-solicitation provisions.

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Common (in conjunction with a non-compete). However, the parties should also assess the competition risks of the non-solicitation provisions.

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; this depends on the sophistication of the parties. Sometimes, parties limit the permitted reasons for the right to access so that it is not broad.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: It is common to update warranty disclosure. However, notification of breach is uncommon — usually by default (but has been resisted in deals recently by sophisticated offshore sellers).

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers are commonly seen and often not quantified (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are common. These are generally limited to a group of persons. Arguments still prevail over actual knowledge or knowledge after due enquiry (prior to signing the agreement).

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Fairly common.

## Is disclosure of the data room common?

Frequency/market practice: Very common; other than against fundamental warranties.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; repetition at completion is common, although this requirement is usually subject to negotiation between the parties.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: This issue is always a point of discussion, whether it is agreed depends on the negotiation position of the parties involved.

## Is a bring-down certificate at closing common?

Frequency/market practice: Bring-down certificates are very common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely; double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: The buyer will ask for 100%. If an offshore firm (or an Indonesian firm affiliated with an offshore firm) is advising, usually a lesser percentage is used for business warranties, e.g., 20-50%.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Generally, the overall (purchase price) cap applies to all claims.

## What are the common exceptions to the cap?

Frequency/market practice: Fundamental warranties are often excepted (e.g., title, capitalization, authority). Often, tax and specific areas of concern are also excepted, sometimes with specific higher caps. Separate caps can be negotiated.

## Is a deductible or basket common?

Frequency/market practice: Fairly common; a basket is common.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: Fairly common; a general survival of 18-24 months is common. Fundamental warranties and tax warranties are commonly longer than general warranties (five to six years).

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: It is common to carve out fraud.

## Is warranty insurance common?

Frequency/market practice: Rarely; this is not used very often, but it is making its market entry in Indonesia.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Rarely.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Fairly common; it is common to request but is not required by law.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common; if Indonesian law is used, usually only direct damages (foreseen) are recoverable.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: It is fairly common for the warranties (but not indemnities) to be qualified by the buyer's knowledge.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes.

## What is the common governing law?

Frequency/market practice: Governing law varies, depending on the parties. Singapore law can be used and if UK firms are involved they will try to argue for English law.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration is more common; usually the SIAC in Singapore. Some Indonesian parties refuse offshore arbitration and some insist on Indonesian arbitration, commonly known as BANI (Indonesian National Arbitration Board).

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: Stamp duty is only IDR 10,000 per document, and the parties can agree who pays (whether orally or in the transaction agreements).

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is fairly common to have a tax indemnity, usually included in the purchase agreement. It is usually in short form.

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