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

Common deal structures

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

As in other jurisdictions, the acquisition of a business in Malaysia may be structured as either a sale of shares or a sale of assets (or a combination of the two). In particular, the buyer may purchase the shares of the company operating the business from its shareholders or purchase the assets of the business directly from that company.

Auction processes are not uncommon in Malaysia and are becoming increasingly prevalent, especially when they involve significant target businesses. They are customary for businesses being sold by private equity firms and large corporations. Bid letters are widely used to regulate the auction process. Typically, the sellers may require the bidders to submit an indicative nonbinding bid based on limited information, followed by a final, binding bid upon the completion of a reasonably extensive due diligence exercise.

Malaysia has long had provisions in its Companies Act for schemes of arrangement. These were originally modeled on the UK Companies Act 1948 and they have remained largely intact under the current version of the Companies Act (which came into effect in January 2017). The scheme involves a court-convened meeting to approve the scheme followed by the sanction of the high court if requisite majorities are obtained at the court-convened meeting. The Companies Act also contains provisions to facilitate schemes of the amalgamation of companies, which are often used in corporate reorganizations.

In addition to the sale of shares, assets or businesses, and schemes of arrangement and amalgamation, there are provisions in certain statutes (such as the Financial Services Act and the Capital Markets and Services Act) that enable the transfer of assets and liabilities through vesting orders issued by a court following the approval of the transaction by the sectoral regulatory authority. The foregoing methods of effecting mergers often involve one or more of the following:

Transferring one company's business assets to another company, followed by the liquidation or disposal of the transferor company.

Establishing a new company that acquires the assets of two or more entities that, following the transfer of assets, are liquidated or disposed of.

Transferring the shares in one company (company A) to another company (company B), followed by the liquidation of company A and a distribution of its assets in its present form (in specie) to company B.

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

Under the Companies Act, a company may be limited by shares, limited by guarantee or unlimited. The usual form of a subsidiary company is a company limited by shares. If a company is limited by shares, the liability of its members (shareholders) is limited to the amount, if any, unpaid on their shares.

# What are the different types of limited liability companies?

Companies limited by shares and companies limited by guarantee.

# Is there a restriction on shareholder numbers?

The limit of the number of members is 50 (exclusive of employee members) for private companies. There is no limit for public companies.

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

A share acquisition is generally simpler to implement from both the seller's and buyer's point of view. A share acquisition involves the transfer of ownership of only the shares in the target company, which, as a matter of Malaysian law, is a relatively straightforward process. It also provides continuity of the business for the buyer and a clean break for the seller.

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

An asset sale involves identifying and transferring title to specific assets or categories of asset and, as such, it is generally more complicated. The target's assets will commonly include land and premises, inventory and work in progress, book debts, intellectual property rights, goodwill, insurance, leasing, hire purchase and other contracts, and plant and machinery. It is therefore often necessary to transfer each asset or category of asset from the target to the buyer by way of different conveyances, assignments and transfers that, in some instances, will also require consents from third parties not directly involved in the transaction. New permits or authorizations may also be required to carry on the business. The transfer of assets also raises additional concerns in relation to the employees of the business.

One of the main advantages of asset acquisition is that the buyer may choose specific assets or liabilities to be purchased or assumed, leaving behind those assets and liabilities that it does not require. The asset buyer will not generally inherit the target company's liabilities unless those liabilities are specifically acquired.

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