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

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

This is the **Philippines** section. Select a topic from the menu and explore the questions within.

*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Regulatory noncompliance is a common issue in the Philippines and this can mean additional costs for rectification and operations post-closing. In highly regulated industries, e.g., healthcare and telecommunications, regulatory noncompliance issues are prevalent, particularly in locally owned target companies (as opposed to target companies that are owned by large multinational companies).

Requiring the seller to attend to housekeeping matters before closing is common. Seeking protection via a reduction in the purchase price or a holdback of the purchase price, with either party completing cleanup measures after closing, may also be considered.

**Pricing and payment**

*Foreign exchange controls*

Generally, no foreign exchange control regulations or approvals are required in a share sale. However, if the seller has not registered its investment in the target company with the central bank, Bangko Sentral ng Pilipinas (BSP), the buyer will generally not be able to obtain such BSP registration for its acquisition of shares in the target company.

BSP registration is not mandatory but it will be needed if the buyer would like to purchase foreign exchange from the domestic banking system to fund the repatriation of capital and remittance of dividends.

If the foreign investment is not registered with the BSP, the buyer may legally purchase foreign exchange outside the banking system.

In the case of an asset sale, the buyer that registers an acquiring entity with the Securities and Exchange Commission (SEC) may choose to obtain BSP registration for its investment in the acquiring entity.

**Signing/closing considerations**

*Is a deposit required?*

A deposit is not commonly seen in share sales and asset sales.

Is simultaneous signing/closing common?

It is common for there to be a gap between signing and closing, as closing is often subject to the condition that all government approvals and nonregulatory consents and approvals have been obtained.

*Share sale*

The transfer of the shares from the seller to the buyer is only recorded in the stock and transfer book of the target company after the tax clearance process for the share sale is completed.

*Asset sale*

An asset sale will generally require the buyer to establish a local subsidiary or branch office, and this may have an impact on the timing of the closing of the transaction, unless the buyer has an existing subsidiary or branch that can act as the acquiring entity.

## Approvals/registrations

**Foreign investment restrictions**

*Foreign investment screening procedure*

The Philippines has a foreign investment screening procedure for transactions involving strategic industries, such as military-related industries, cyber infrastructure, pipeline transportation or such other activities that may threaten territorial integrity and the safety, security and well-being of Filipino citizens. Foreign investment screening procures may also apply to transactions involving entities delivering (or associated with) public services that may effectively result in the grant of control of such entities to foreigners, or foreign corporations. While the foreign investment review procedures are mandatory and suspensory under current Philippine laws and regulations, those laws and regulations have been amended recently and we have yet to see how they will be implemented. For further information, see the more detailed section on "Foreign investment restrictions".

*Other foreign investment restrictions*

Foreign investors may own up to 100% of a domestic enterprise in the Philippines if the domestic enterprise is not engaged in any of the activities listed in the "negative list" of the Foreign Investments Act (FIA).

Under the FIA, a domestic market enterprise that is more than 40% foreign-owned must have a paid-in or assigned capital of the Philippine peso equivalent of at least USD 200,000. This amount may be reduced to USD 100,000 if: (i) if the activity of the domestic market enterprise involves advanced technology as determined by the Department of Science and Technology; or (ii) it is endorsed as startup or startup enablers by the lead host agencies pursuant to Republic Act No. 11337, otherwise known as the Innovative Startup Act; or (iii) a majority of the direct employees are Filipinos, but in no case shall the number of Filipino employees be less than 15.

An export enterprise is not required to comply with this minimum capitalization requirement. An export enterprise is a manufacturer, processor or service entity that exports 60% or more of its output, or a trader that purchases products domestically and exports 60% or more of such purchases.

A buyer must determine whether foreign equity restrictions apply to the target company or the business. If such restrictions apply, the buyer may need to establish a joint venture with a Philippine partner to comply with foreign equity restrictions.

*Foreign investment registration*

In respect of a share sale, if the acquisition results in foreign equity in the target company exceeding 40%, it must register under the FIA. An FIA-registered corporation is required to re-register under the FIA in case of further increases in its foreign equity pursuant to, among other things, an additional subscription to its shares of stock.

In respect of an asset sale, yhe buyer must establish and register a Philippine subsidiary or a branch office of a foreign corporation and comply with the foreign investment restrictions discussed above, in addition to any minimum paid-up capital requirements under the FIA and other applicable laws.

**Other regulatory or government approvals**

Most M&A transactions in the Philippines do not require special statutory or regulatory approval unless the target company operates within certain regulated industries, such as banking, insurance and telecommunications, or is subject to special registrations.

A statutory merger, which involves the transfer of assets, requires approval from the SEC.

If an asset sale involves the sale of all, or substantially all, of the assets of the seller, the sale will need to be approved by the board of directors and stockholders representing at least two-thirds of the outstanding capital stock, and the seller must comply with the Philippine Bulk Sales Law.

**Antitrust/merger control**

Transactions in the Philippines are subject to mandatory and suspensory merger control if they meet certain thresholds. Certain types of transactions qualify for expedited review, like no horizontal or vertical relationships between the parties, export-oriented operations, negligible Philippine presence, and real estate joint ventures. For further information, see the more detailed section on "Antitrust/merger control".

## Employment

The Philippines recognizes and guarantees the employees' right to security of tenure and to form organizations for their collective benefit and welfare. Employees' right to security of tenure means that they can be removed from their jobs only for one of the specified just and authorized causes and after the observance of the procedural due process defined by law. In cases of valid removals, severance payments may be required, depending on the cause of the removal.

**Share sale**

If the acquirer buys the shares of the target company, the underlying employment relationship between the target company and its employees is unlikely to be affected and will not require any action by the buyer.

**Asset sale**

The general rule is that employee contracts are considered personal contracts and the buyer in good faith has no obligation to absorb employees of the seller or to continue employing them. However, this general rule is not absolute. In certain cases, the Philippine Supreme Court has been known to disregard the personal nature of labor contracts and hold the purchaser, vendor or both liable in transactions where it has been deemed that good faith was lacking.

## Tax

**Capital gains tax (CGT)**

CGT is payable at a rate of 15% on the sale or disposition of unlisted shares by nonresident foreign corporations.

If the fair market value of the shares sold exceeds the amount of cash and/or the fair market value of the property received by the seller or transferor, the excess will be considered a "gift" subject to donor's tax.

In the case of an asset sale, corporate income tax is payable at the rate of 20% or 25%, whichever is applicable (except land and/or buildings and shares, which are subject to special tax rates).

There is no tax payable in the case of a merger.

**Stamp duty**

Stamp duty is payable at a rate of PHP 1.50 on each PHP 200 of the par value or 50% of the Documentary Stamp Tax (DST) paid upon original issuance of no-par shares for a transfer of shares.

Further, in respect of transfers of real property, DST at the rate of 1.5% is payable on deeds of sale, conveyances and donations of real property.

In mergers, the issuance of shares by the surviving corporation is subject to a DST of PHP 2 on each PHP 200 (or fractional part thereof) of the par value of the shares. However, transfers of stock or real property pursuant to the merger are exempt from DST, provided the requirements of the Tax Code are met.

Finally, sales or exchanges of shares of stock listed and traded in the Philippine Stock Exchange (PSE) are exempt from DST.

**Value-added tax**

The Tax Code imposes value-added tax (VAT) on the sale of goods or properties and the performance of services in the course of business. The VAT is imposed at the rate of 12% of the gross selling price of the goods or properties sold, i.e., the total amount of money that the buyer pays or is obligated to pay to the seller in consideration for the sale.

There is no VAT on a normal share acquisition. The transfer of the assets of absorbed corporations to another corporation pursuant to a merger is not subject to VAT.

**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?

Acquisitions are the most common form of M&A transaction. Acquisitions may be structured in one of two ways: The acquiring entity may acquire shares from the shareholders of the target company (share acquisition) or acquire assets directly from the target company (asset acquisition). In a share acquisition, the acquiring entity acquires the target company, or an interest in the target company, and, indirectly, the latter's business, assets and liabilities. In an asset acquisition, the acquiring entity generally acquires only specific assets, contracts and corresponding liabilities of the target company.

Auction processes are used with increasing frequency, with binding bid offers at the final offer stage.

The Philippines also recognizes the concept of a statutory merger or consolidation. In a merger, the surviving company absorbs a target company. In a consolidation, two or more companies consolidate to form a new corporation.

Mergers and consolidations are procedurally more complicated to effect than a share acquisition or an asset acquisition, and require the approval of the SEC.

In a merger, the surviving corporation, which will be one of the constituent corporations to the merger, absorbs all of the assets and liabilities of the constituent corporations. In a consolidation, a new corporation — called the "consolidated corporation" — acquires and assumes all the assets, rights, franchises and liabilities of the constituent corporation, similar to the surviving corporation in a merger.

Effectively, a merger or consolidation is a combination of two transactions, namely:

An asset or business sale by the absorbed corporation (as the seller) in favor of the surviving corporation or consolidated corporation (as a buyer).

The dissolution of the absorbed corporation by operation of law when the merger or consolidation becomes effective.

The absorbed corporation(s) may be viewed as the seller(s), but because it will dissolve by operation of law after the merger or consolidation becomes effective, it may not receive the consideration for the transfer of its assets to the surviving corporation or consolidated corporation. Instead, what normally happens in a merger or consolidation is that the surviving corporation or consolidated corporation, as the case may be, issues shares to the stockholders of the absorbed corporation(s) as consideration for the transfer of assets of the absorbed corporation(s).

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

There are three forms of business vehicles that are recognized in the Philippines:

Sole proprietorships

Partnerships

Corporations

Of the three, the corporation is generally the most common.

Unlike a sole proprietor and a general partner (who have unlimited liability), the liability of shareholders of an incorporated stock corporation is generally limited to their investment in the corporation.

Foreign corporations may register branch offices, representative offices, regional headquarters or regional operating headquarters in the Philippines and do business through such registered entities without incorporating a stock corporation in the Philippines.

There are substantial differences between the laws and regulations that apply in M&A involving public companies and those that apply in M&A involving private companies.

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

A Philippine incorporated stock corporation is the only type of limited liability company in the Philippines. A stock corporation has a juridical personality separate from its stockholders, and the liability of the stockholders for the obligations of the stock corporation is limited to their investment in the capital stock of the stock corporation.

Subject to compliance with nationality restrictions in certain industries, where applicable, a foreign corporation may incorporate a stock corporation in the Philippines.

## Is there a restriction on shareholder numbers?

There is no maximum number of shareholders applicable to a Philippine incorporated stock corporation, which is the only type of limited liability company in the Philippines. However, a Philippine stock corporation must have at least two individual shareholders, irrespective of whether the corporation also has juridical shareholders.

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

A share acquisition is procedurally simpler and tends to be more widely used than an asset acquisition. A share acquisition basically involves the transfer from the shareholders of the target company to the buyer of the shares in the target company. In such transactions, specifically where the buyer acquires all of the outstanding shares of the target company, the buyer effectively acquires the target company with all of its assets and liabilities (including contingent and undisclosed liabilities).

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

An asset acquisition tends to be more complex than a share acquisition because the former transaction may involve the transfer of various categories of assets and liabilities to the buyer. The transfer of each category of assets and liabilities may require different legal requirements and documentation.

Unlike a share acquisition, in an asset acquisition, the seller generally retains all assets and liabilities not otherwise acquired or assumed by the buyer.

# 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?

It is customary to prepare a letter of intent or term sheet at the beginning of the transaction.

A letter of intent or term sheet is not generally binding on the parties, except when expressly provided therein. A letter of intent or term sheet would normally provide which provisions are binding on the parties.

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

**Exclusivity:** Yes, it is common practice to include a provision on exclusivity.

**Break fee:** A break fee is not common.

**Confidentiality:** Yes, it is also common practice to include a provision providing for confidentiality.

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

No. It is not common for separate agreements on exclusivity, confidentiality and break fees to be subsequently entered into by the parties. However, these terms may be further negotiated and corresponding provisions may be included in the definitive agreements (i.e., asset purchase agreement/share purchase agreement).

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

Yes, the Civil Code of the Philippines (Civil Code) provides that "every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith." A party may claim damages for negotiating in bad faith under the foregoing provision of the Civil Code.

Moreover, a claim for damages may also be made under the following provisions of the Civil Code:

Art. 20: Every person who, contrary to law, willfully or negligently causes damage to another shall indemnify the latter for the same.

Art. 21: Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Fairly common.

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

Frequency/market practice: Working capital and NAV are fairly common.

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

Frequency/market practice: Rarely.

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

Frequency/market practice: The buyer usually bears the responsibility of ensuring the target company prepares this.

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

Frequency/market practice: Rarely.

## Is an earn-out common?

Frequency/market practice: Rarely.

## Is a deposit common?

Frequency/market practice: Rarely.

## Is an escrow common?

Frequency/market practice: Rarely.

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

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

Frequency/market practice: Rarely; this is typically only available where there is a long period before execution and completion.

## Is the MAE general or specific?

Frequency/market practice: Both are seen.

## Is the MAE quantified?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common; this depends on the industry.

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

Frequency/market practice: Waterfall provisions are rarely used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## 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; we generally get this for private deals.

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

Frequency/market practice: It is rare to update warranty disclosure. Notification of possible breach is more common. In the case of a material breach, a right to terminate is fairly common.

# 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 but are 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 growing. There is a trend toward a limitation to actual knowledge of a specified list of senior management.

## 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: Rarely; it varies case by case.

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

## Is it common to repeat warranties at closing?

Frequency/market practice: Repetition at completion is fairly common.

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

Frequency/market practice: It is fairly common to have simultaneous signing and closing.

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

Frequency/market practice: Bring-down certificates at completion are fairly 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 a fairly common standard, but with a carve-out for fundamental representations, which must be absolutely true.

## 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: It is commonly less than 100%. Bigger deals in terms of purchase price tend to have a lower aggregate cap.

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

Frequency/market practice: This is determined on a case-by-case basis, but a liability cap on warranties only is more common.

## What are the common exceptions to the cap?

Frequency/market practice: A waiver/limitation of liability for fraud and gross negligence is void under Philippine law; carve-outs of key or fundamental warranties (e.g., title, capitalization, authority) from the liability cap are more common.

## Is a deductible or basket common?

Frequency/market practice: Fairly common.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: A cap on the period of survival is fairly common, but the period varies case by case.

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

Frequency/market practice: Carve-outs on survival of liability for tax and fraud are common.

## Is warranty insurance common?

Frequency/market practice: Rarely.

# 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; this is determined on a case-by-case basis.

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

Frequency/market practice: Fairly common; this is determined on a case-by-case basis.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Rarely; this is not required and not usually stipulated in the purchase agreement.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

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

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Dispute resolution

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

Frequency/market practice: Yes, subject to certain conditions.

## What is the common governing law?

Frequency/market practice: Philippine law is generally adopted.

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

Frequency/market practice: Arbitration is more common; the place of arbitration is subject to agreement of parties.

# Agreeing to the acquisition agreement → Stamp duty and tax

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

Frequency/market practice: Stamp duty is payable on share transfer (0.75% of par value of the shares of stock sold) and sale of real property (1.5% based on whichever is higher between the consideration and fair market value). The liable party depends on the contract. It is more common to see the buyer assuming liability as the seller normally shoulders the capital gains tax.

## 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.

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