



COUNSELLORS AT LAW

Merger & Acquisition relating Foreign Investment

Introduction

- Short introduction ABNR
- Basics Mergers & Acquisitions
- This presentation: process / procedures, documents, common terms

Types of transactions

TYPES

Share acquisition

- Sale of existing shares or subscription for new shares
- A company acquires the shares in another company (target)
- Target usually becomes a subsidiary of the purchasing company
- Specific provisions in the Company Law (Art. 26, 62, 89, 125-128),131-133) may apply

Business acquisition

- A company acquires the assets of another company
- Complicated process: separate transfer of each asset, contract, debt
- Advantage: liabilities remain with the selling company (pick and choose)
- Specific provisions in the Company Law (Art. 62, 102) may apply

Merger/consolidation

- Companies merge into one new company (surviving and disappearing company)
- Transfer of assets and liabilities through general succession of title
- Specific provisions in the Company Law (Art. 26, 57, 62, 89, 122-123, 126-129, 130, 132-133) apply

Types of transactions

MERGER

Art. 1 Section 9 Company Law:

- “Merger” means any legal act committed by one Company or more to combine itself with another existing Company, resulting in the assets and the liabilities of the merging company passing by operation of law to the surviving Company, and the legal entity status of the merging Company ceases to exist by operation of law.

CONSOLIDATION

- Art. 1 Section 10 Company Law:
- “Consolidation” means any legal act committed by two Companies or more to consolidate by establishment of one new Company which by operation of law acquires assets and liabilities from the consolidating Companies, and the legal entity status of the consolidating Companies ceases to exist by operation of law.

ACQUISITION

Art. 1 Section 11 Company Law:

- “Acquisition” means any legal act committed by a legal entity or an individual to acquire shares of a Company, resulting in the control over such a Company passing.

Types of transactions

METHODS

Private sale

- Sale of (part of the) shares and/or assets
- One on one sale, no selection of prospective purchasers

Controlled auction

- Sale of (part of the) shares and/or assets
- Selection of a limited number of prospective purchasers
- Usually two phases: indicative offer, binding offer
- Quite rare in Indonesia

Public offer

- Offer to *all* shareholders to acquire shares in a listed company
- Friendly or hostile
- Capital markets legislation applies

Parties involved

Seller

- General Meeting
- Board of Directors
- Board of Commissioners

- Regulators

- Financing banks

- Advisors (investment bankers, lawyers / notary, accountants, actuaries, environmental consultants)

Target

- General Meeting
- Board of Directors
- Board of Commissioners

- Employees
- Unions

- Customers
- Suppliers
- Creditors

- Regulators

- Advisors

Purchaser

- General Meeting
- Board of Directors
- Board of Commissioners

- Regulators

- Financing banks

- Advisors

Non-disclosure agreement

PRIMARY OBJECTIVE

- Confidentiality of certain information
- Only limited effect, risk of unauthorized disclosure cannot be eliminated

SCOPE OF NDA

- Confidential information
- Persons related to the interested party, including affiliates, employees and advisors

OPTIONAL

- Non-compete
- Non-poaching
- Standstill
- Exclusivity

Non-disclosure agreement

LIABILITY FOR BREACH

- Remedies
- Compensation of damages and losses
- Penalties?

AFTER EFFECT?

- Time limit
- Destruction/return of information

Information memorandum

IMPORTANT NOTICE

- Distribution of IM does not constitute an offer
- IM has not been approved by any authority
- Limitation of distribution and exclusion liability
- Confidentiality, link to NDA
- Correctness and completeness IM to be verified by prospective purchaser and its advisors
- Meaning of information, including forward-looking statements, limitation requirement to update information
- IM does not contain legal, financial or commercial advice
- Non-exclusivity, possibility to amend sale process, or terminate negotiations
- No liability for costs incurred
- Prospective purchasers only to contact investment bank
- Governing law

(Vendor) due diligence

OBJECTIVES

DD

- Get a clear picture of the target, including (potential) liabilities
- Limit risk of disclosure by seller
- Topics: corporate, regulatory & compliance, finance, assets, manpower, commercial contracts, insurance, litigation

VDD

- Provides an independent view of the business (including past performance and prospects)
 - Potential reliance?
- Education of sellers/shareholders about the strengths, weaknesses and challenges of the business
- More controlled sale process
 - Potential issues flagged upfront
 - Reduce extent of access required for buyers to do their due diligence
- Value critical issues can be fixed ahead of process if identified upfront
- Allows to present issues in a better light / offer solutions
- [Will provide comfort on quality of past years financials / normalisation]
- [Can also provide analysis of company's prospects and business plans]

(Vendor) due diligence

INFORMATION FLOW

(Virtual) data room

- Contains documents on relevant aspects of the company, for instance corporate, real estate, intellectual property, employment, commercial contracts, regulatory & compliance, litigation documentation

Clean room for highly confidential / sensitive information

Interviews

- Meeting with management
- Expert meeting with VDD advisors

Site visits

Check public registers

(V)DD report

- Report describing / analysing relevant legal aspects of company
- DD report often contains recommendations
- Advisor may be willing to issue a reliance letter

Due diligence items

CORPORATE

- Transfer of shares without spousal consents
- No share certificates
- No shareholder register
- No Annual General Meetings of Shareholders (e.g. for approval annual report)

LICENSES

- Missing/expired licenses
- Failure to fulfill reporting requirements

ASSETS

- Uncertified land
- No building permits

MANPOWER

- Payments below Minimum Regional Wage (*Upah Minimum Regional*)
- No payment of social benefits (Jamsostek / BPJS)

Due diligence items

CONTRACTS

- Change of control clauses

TAX

- Double bookkeeping

LITIGATION

- Pending litigation

Transaction documentation

- (Letter of Intent, Memorandum of Understanding, Term Sheet)
- Share Purchase Agreement (SPA)
- Business Purchase Agreement (BPA)
- Shareholders Agreement (SHA)
- Service Level Agreement (SLA)
- Transitional Services Agreement (TSA)
- Management Representation Letter
- Deed of Transfer

SPA / BPA

SHARE PURCHASE AGREEMENT

- Agreement between Seller(s) and Purchaser(s) regarding the sale and purchase of shares in a company (stock merger or acquisition)

BUSINESS PURCHASE AGREEMENT

- Agreement between Seller(s) and Purchaser(s) regarding the sale and purchase of assets in a company (corporate merger or acquisition)
- Combined share / business purchase agreement is also possible

Purchase price

CASH

- Rupiah or foreign currency

SHARES

EARN OUT

- Mechanism is used where the price which Purchaser is prepared to pay and price which Seller is expecting are substantially different → i.e. if Purchaser believes Seller's projections are too high

PRICE ADJUSTMENT MECHANISMS

- Closing accounts
- Locked box

Warranties & indemnities

WARRANTIES

- A statement by the seller about a particular aspect of the target company's business.
- A breach of warranty will only give rise to a successful claim in damages if the buyer can show that the warranty was breached and that the effect of the breach was to reduce the value of the asset acquired.
- The onus is therefore on the buyer to show breach of contract and quantifiable loss.
- For unidentified issues

EXAMPLES

Sellers' warranties

- Incorporation of company, authority to enter into the agreement, all corporate actions are taken or will be taken to enter into the agreement, seller is owner of Shares and no encumbrances on Shares, accounts, tax, IP & ICT, contracts, real property, employment, pensions, insurance, claims

Warranties & indemnities

EXAMPLES (CONT.)

Purchasers' warranties

- Authority and capacity to enter into the agreement, commitment letters from banks, consents from government authorities, non-contravention internal rules or the law, non-awareness breach Sellers' warranties

INDEMNITIES

- Provide guaranteed compensation to a purchaser in circumstances in which a breach of warranty would not necessarily give rise to a claim for damages or to provide a specific remedy that might not otherwise be legally available.
- Usually for identified issues

EXAMPLES

- Often relate to tax and similar potential liabilities

Warranties & indemnities

DISCLOSURE CLAUSES

- To the best of the Sellers knowledge, no information is withheld that is important for a prospective purchaser of the Shares to obtain a true and fair view of the business, material assets and liabilities of the Company or would make any Due Diligence Information materially untrue or inaccurate
- No liability under any Sellers' warranty in respect of any matters Disclosed.

DEFINITIONS

- Disclosed: means facts, matters or other information disclosed in the Disclosed Information in such a manner and with such detail that a prudent individual who is knowledgeable in the relevant field reviewing the relevant information should have reasonably assessed the financial, legal, commercial or other relevance and consequences of such disclosure
- Disclosed information: information in (i) the Agreement, (ii) in the Disclosure Letter, (iii) in the Due Diligence Information, (iv) in the Vendor Due Diligence Reports, (v) in the documentation received during the site visits or (vi) in any correspondence
- Due diligence information: (i) the information contained in the Data Room, (ii) the documents and information provided pursuant to the questions and answer sessions, (iii) the questions raised and answers provided as included in the Data Room (iv) the documentation received in the Management Presentation or the Site Visits (v) the documentation received during or in connection with the Expert Meetings (vi) publicly available information

Warranties & indemnities

DISCLOSURE LETTER

- To disclose matters and information on behalf of the Sellers in relation to the Sellers' Warranties
- Depending on agreement parties, Seller must disclose all known breaches of warranties
- Information on recent matters not contained in the Due Diligence Information (VDR already closed), Vendor Due Diligence Reports
- Outside control of the Sellers

CONSEQUENCES

- Limited to claim for losses
- No right to terminate, dissolve (*ontbinden*) or amend the agreement
- Party in error (*dwaling*) bears the risk of that error

Limitations of liability

LIMITATIONS

- Time limitations: 3-5 years is common, depending on the type of warranty or indemnity
- Monetary limitations: often depends on the value of the transaction
- Aggregate minimum claims (basket): also often depends on the value of the transaction

MAXIMUM LIABILITY

Again often depends on the value of the transaction

Warranty & Indemnity Insurance

- Designed to sit behind the warranties/indemnities in the sale agreement and respond in circumstances where there would be a valid claim under them
- The same limitations as in the sale agreement generally apply to the insurance policy
- Claims can usually be submitted after the escrow amount has eroded or the escrow has fallen away
- For Seller or Purchaser

Payment obligations

- Parent guarantee
- Bank guarantee
- Escrow
- Deferred payment
- Earn out

Forum

Under jurisdiction clause parties can determine to either bring proceedings before public courts or alternative dispute resolution (mediation, arbitration)

COURT

- Not always quality (in Indonesia), independent / impartial, specialized expertise
- In principle open to public
- Proceedings in Indonesian
- Predefined procedures, inflexible
- Lengthy, particularly because of possibility to appeal (including supreme court appeal)
- Low cost?
- Preliminary relief proceedings
- Difficult to execute in certain countries

Forum

MEDIATION

- Amicable settlement, particularly suitable if parties have a continuing work relation
- Success depends on willingness parties to come to an agreement

ARBITRATION

- (Supposed) expertise arbitrators
- Confidential
- Proceedings in English
- Flexible
- Quick and efficient, no room for appeal
- Expensive, but full recovery of costs if case is won
- Enforceability

Signing

SPA / BPA

- Direct signing of the SPA / BPA
- Signing in counterparts
- Notarisation and legalisation

Conflict of interest

TYPES OF CONFLICTS

- Formal or direct conflict: legal act of the Company with or legal proceedings against the member of the Board of Directors
- Qualitative or indirect conflict: interest of another company in which the member of the Board of Directors also plays a role, for instance as a member of the Board of Directors or Board of Commissioners

Conflict of interest

CONFLICT OF INTEREST MEMBERS BOARD OF DIRECTORS

Article 99 of the Company Law:

- Representation by other members of the Board of Directors or
- Representation by the Board of Commissioners if all members of the Board of Directors are conflicted
- Representation by other party appointed by the General Meeting if both the Board of Directors and the Board of Commissioners are conflicted.

Shareholders agreement

- Regulates the relationship between shareholders in addition to / deviation of the Articles of Association
- Nomination, appointment and removal members Board of Directors / Board of Commissioners
- Financial reporting, information, business plan, selection of accountant
- Procedure in case of a transfer of Shares / exit: drag along, tag along, Russian Roulette, Mexican shootout
- Change of control: put or call option
- Payment of dividend
- Miscellaneous: non-compete, confidentiality, termination

SLA, TSA, Deed of Transfer, etc.

SERVICE LEVEL AGREEMENT

- Agreement often entered into between Seller and Purchaser to ensure services that are rendered one of the Parties continue to be performed at a certain level

TRANSITION SERVICES AGREEMENT

- Agreement entered into between the Target and Seller to ensure that Seller continues to provide certain services to the Target pending integration into the group of the Purchaser.

MANAGEMENT REPRESENTATION LETTER

- Sellers give warranties and indemnities, in order for the Sellers to have comfort, they may ask the management to declare that:
 - it has not knowingly withheld any information that would make the information provided the purchaser untrue or inaccurate
 - it is not aware of any fact or circumstance which will cause a breach of the warranties

DEED OF TRANSFER

Pre-closing covenants

CONTINUATION

- Carry on business activities in the ordinary course
- Preserve its present business organisations, lines of business and its relationships with customers, suppliers and other third parties, in each case consistent with past practice

PURCHASER CONSENT FOR SELECTED MATTERS

Usually, a materiality threshold is applied

Prior written consent for issues, for instance:

- Amend of Articles of Association
- Issue or cancel shares
- File for liquidation or bankruptcy
- Amend annual budget
- Amend accounting principles
- Acquire or dispose of any shares or assets
- Waive third party debts or obligations

Pre-closing covenants

PURCHASER CONSENT FOR SELECTED MATTERS (CONT.)

- Make investments other than provided in the annual budget
- Change employment conditions
- Provide or take out loans
- Enter into, assign, amend or terminate material agreements, other than in the ordinary course of business
- Take out material additional amounts under the existing loan facilities
- Settle any material legal proceedings or other dispute

EXCUSED CONDUCT

- Meeting obligations under the SPA
- The Seller and the relevant Group Company could not reasonably have acted otherwise.

Closing conditions

- Corporate approvals
- Spousal consents
- Regulatory approvals
- Announcement to employees and creditors, severance
- Certain issues identified in the framework of the due diligence to be fixed
- No material adverse change (MAC)
- No material breach of warranties

Corporate approvals

BOARD OF DIRECTORS

In principle, the Board of Directors (members) has/have a general authority

In principle the Board of Directors may resolve to sell the shares / business, unless determined otherwise in the Articles of Association or Shareholders Agreement

Limitations authority Board of Directors (members) in principle only have an internal meaning

BOARD OF COMMISSIONERS

In addition, prior approval of the Board of Commissioners may be required on the basis of Art. 12 of the Company Law, the Articles of Association or Shareholders Agreement

Requiring BOC' s consents according to the Company Law:

- approving the allocation of interim dividends;
- approving the draft of Merger before the submission of the same to the General Meeting of Shareholders; and
- approving the draft of Acquisition as prepared by the Board of Directors.

GENERAL MEETING

Prior approval of the General Meeting with special quorum and approval requirements for:

- merger, consolidation, acquisition, (Art. 89 Company Law)
- transfer of assets of the Company or encumber the assets of the Company having value that exceeds 50% (fifty percent) of the net assets of the Company in 1 (one) transaction or more, related or not (Art. 102 Company Law)

Spousal consents

Article 36 Section (1) of the Marriage Law

- Regarding assets that form part of the marital estate, a husband and wife may act with the consent of both parties
- Spousal consent: spouse acknowledges and gives irrevocable consent to and does not have any objections to husband/wife entering into and fully performing transaction documents relating to acquisition.

Regulatory approvals

BKPM

- Approval for conversion of the company into a foreign investment (PMA) company
- Approval for transfer of shares in an existing foreign investment (PMA) company

OJK

Approval transfer of shares in financial services company

BANK INDONESIA

Approval transfer of shares in bank

Announcement and severance

ANNOUNCEMENT

Article 127 Company Law

- The Board of Directors of the Company that is to enter into a Merger, Consolidation, Acquisition, or Division must announce an abridged plan in at least 1 (one) Newspaper and announce in writing to the employees of the Company that is to enter into a Merger, Consolidation, Acquisition, or Division within 30 (thirty) days prior to the call for a GMS for approval of Merger, Consolidation, Acquisition, or Division .

SEVERANCE

Article 163 of Manpower Law

- In the event of a change in status, merger, consolidation, or a change in ownership and the employee is not willing to continue the employment relationship with the new controller of the company, the employee concerned shall be entitled to a severance package under the following calculation: **“1x severance pay + service appreciation pay (must have worked for more than 3 years to be eligible) + compensation**

Material adverse change

MEANING

- Transaction may be cancelled in the event of a material adverse change between Signing and Closing
- Often formulated as a condition precedent in SPA/BPA or as part of public offer, also used in financing documentation

SCOPE

- "Material Adverse Change" means any change, effect, circumstance or development that is, in the long term, materially adverse to the financial condition, properties, assets, liabilities, products (whether in development or marketed), business or results of the business of the Group, taken as a whole, provided that none of the following (or the results thereof), in and of themselves, shall be deemed to be a Material Adverse Change:
 - Any changes or conditions generally affecting the industries in which the Group operates;
 - General economic or regulatory, legislative or political conditions or securities, credit, financial or other capital markets conditions, in any jurisdiction;
 - Any failure by a Group Company to meet any internal or published projections, forecasts, estimates or predictions in respect of revenues, earnings or other financial or operating metrics for any period.

Material adverse change

- The public announcement or pendency of the transaction contemplated by this Agreement, including the impact thereof on the relationships of the Group with employees, labor unions, customers, clients, suppliers or partners;
- Any change in Law, regulation or generally accepted accounting principles (or interpretations thereof), in any jurisdiction applicable to the business of the Group; and
- Any facts or circumstances known prior to the Signing Date to the Party invoking the relevant provision against the other Parties which could reasonably be expected to have such effect

General economic downturn (in the sector in which the company is active) generally not believed to be acceptable as a Material Adverse Change

Important to align MAC clause in SPA/BPA with existing MAC clause in financing documentation

Closing

MEANING

Transfer of legal ownership shares / assets

COMMON ACTIONS

- Deliverance evidence of the due satisfaction of the closing conditions
- Statements Seller / Purchaser non-awareness claim under warranties or otherwise under or in relation with the Agreement
- If locked box mechanism is applied: deliverance statement non-awareness leakage
- If escrow: execute escrow agreement
- Execute the SHA and /or other transaction documents
- Transfer by Seller of the shares / assets by execution of notary deed of transfer
- Transfer of the purchase price to account Seller (existing shares) / Escrow Agent

Closing

BREACH OF CLOSING OBLIGATIONS

- The non-Defaulting Party shall have all the rights and remedies available to them under the Agreement. The non-Defaulting Party may also request specific performance (*nakoming*)
- The non-Defaulting Party shall be entitled to determine a new date for Closing
- Penalty?

Press release

OBJECTIVE

- Informative
- Legal

INFORMATIVE

- Type of transaction
- Reasons for transaction
- (Future) business strategy

LEGAL

- General availability of price-sensitive information
 - Company website
 - Indonesian Stock Exchange
- Financial instruments listed on other regulated financial markets?

Press release

DO' S

- Release before or after market opening hours (without breaching the requirement to publish without delay)
- Publish complete and unadjusted information

DON' TS

- Hide bad news
- Include confidential information
- Delay publication

Post-closing obligations

Regulatory:

- Announcements (in case of merger, acquisition or consolidation)
- Merger notification

Commercial:

- Release of guarantees
- Trade receivables/payables; post-Closing receipts
- Use of names
- Retention of records
- Wrong pockets
- Insurance
- Registration of intellectual property
- Tax indemnity
- Non-solicitation / non-poaching
- Non-embarrassment clause

Claims & procedures

- Buyer vs Seller
- Third party claims
- Indemnified claims

Questions & Answers



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Thank You



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