

# Private mergers and acquisitions in **Bangladesh**: overview

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Q&A guide to private mergers and acquisitions law in **Bangladesh**.

The Q&A gives a high level overview of key issues including corporate entities and acquisition methods, preliminary agreements, main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, competition and environmental issues.

To compare answers across multiple jurisdictions, visit the *Private Acquisitions Country Q&A tool*.

This Q&A is part of the global guide to private mergers and acquisitions law. For a full list of jurisdictional Q&As visit [www.practicallaw.com/privateacquisitions-guide](http://www.practicallaw.com/privateacquisitions-guide).

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## Corporate entities and acquisition methods

1. What are the main corporate entities commonly involved in private acquisitions?

The main corporate entities commonly involved in private acquisitions are:

- Limited liability companies (both private and public, listed and non-listed).
- Registered foreign companies.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

## Restrictions on share transfer

The shares in a private or public company are freely transferable. However, any share transfer by a shareholder in a private limited company can be restricted through its articles of association. For any transfer of shares to be valid, it must comply with the company's articles of association. The board of directors of a public company can reject transfers only on limited grounds citing "sufficient cause", which has often been interpreted by the courts to mean failure to comply with legal requirements. It is also common for private companies to incorporate pre-emption rights granted to the shareholders in its charters.

## Foreign ownership restrictions

Although **Bangladesh** operates an exchange controlled economy, foreign ownership is allowed in almost all sectors except in certain licensed ones such as freight forwarding, logistical services, banking and insurance. The restricted sectors have a maximum foreign shareholding threshold to facilitate licences to operate in the sectors after incorporation.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The most common ways to acquire a public company include:

- **Acquisition of shares (transfer and issue of shares).** An acquisition of shares can take place either by subscribing to fresh equity in a company or purchasing existing equity in the target from another shareholder. For mergers and acquisitions, the company must stay up to date by filing its most recent annual return. Any transfer of shares must be recorded in the Office of the Registrar of Joint Stock Companies.
- **Mergers (amalgamation).** The target entity merges into the acquiring entity following a court order and the target is then dissolved. All the assets and liabilities of the target company vest in the buyer. Purchase consideration is paid by the buyer to the shareholders of the target company, either by allotting shares or paying cash for the value of their shares. The Companies Act 1994 principally regulates mergers under the head of amalgamations. Such amalgamations are required to be sanctioned by the High Courts of **Bangladesh**. After the court's approval of the amalgamation and on approval from at least 75% of the shareholders, the transferee company can give 21 days' notice to acquire the shares of the dissenting shareholders. Unless the dissenting shareholders apply otherwise to the court within 30 days from receipt

of the notice, the transferee company can acquire the shares. For a merger, an application must be made to the relevant High Courts seeking directions to convene meetings of shareholders and creditors to obtain their consent. The scheme must be approved by a majority in number representing 75% of the value of the shareholders and creditors present and voting at the meetings. Afterwards, a petition must be filed with the High Courts seeking approval of the scheme.

- **De-mergers.** This structure is adopted to avoid the tax inefficiencies of a slump sale or itemised sale of assets. The target company's undertaking or division is de-merged from the target under a court order and then transferred to the buyer. All the assets and liabilities of the undertaking then vest in the buyer. Shareholders of the target company are either allotted shares in the buyer or paid in cash. Unlike a merger, the target company will continue to exist. The same process as for a merger must be followed.
- **Slump sale.** A slump sale is the sale of an undertaking for tax purposes, or more commonly the sale of a business as a going concern, where the undertaking of the target company is sold along with its assets and liabilities through a court sanctioned scheme. The contract may include the requirement to pay consideration in the form of a lump sum, as opposed to assigning values to individual assets.
- **Acquisition of assets (itemised sale of assets).** Acquisitions of movables are governed by the Sale of Goods Act 1930. The Companies Act defines shares and debentures as movable property and lays down the mechanism for their transfer. Acquisitions of immovable property are governed by the Transfer of Property Act 1882. These statutes deal with the numerous aspects of transfer, such as pre-requisites for valid transfers, rights and obligations of the seller and the buyer, implied conditions and warranties, point of transfer of title and risk in the assets. Transaction costs play an important role in the structuring of the mode of the acquisition of the assets and documentation of asset transfers. These costs include stamp duty and taxes such as capital gains and sales tax. A sale of moveable assets does not need any registration but the sale of immoveable assets must be registered with the Office of the Sub-Registrar.
- **Joint ventures.** Where a wholly owned entity is not the preferred option for an investor, a business can be undertaken as a joint venture, for example, for a foreign entity wanting to enter certain sectors with foreign equity ceilings (for example, aviation, pharmaceuticals, and garment manufacturing). In other sectors, from a new entrant's perspective, factors such as the local partner's pre-established marketing and distribution chain and human resource availability play an important role in opting for a joint venture. In large projects involving a prolonged and often arduous developmental phase, acquisition of a stake after the commissioning of the project helps avoid numerous development problems and risks.

## Share purchases: advantages/asset purchases: disadvantages

A share purchase is a very simple and straightforward process that is easy to execute and implement for the following reasons:

- Value added tax (VAT) and other indirect taxes are not payable. The only incidence of indirect transfer tax is stamp duty, levied at 1.5% of the purchase consideration. Both VAT and a higher rate of stamp duty are levied on an itemised sale of assets.
- There is minimal disruption to the target business in a share purchase. A share purchase does not trigger the need to obtain fresh consents or licences. An asset transfer necessitates obtaining fresh business licences and consents.

- There is no question of transferring employees. In addition, no employee consent is required unless the employment agreement states otherwise. Other than slump sale, in an asset purchase, the employees must be terminated and then rehired, as local laws do not acknowledge transfer of employment.

## Share purchases: disadvantages/asset purchases: advantages

The following must be considered:

- In an asset purchase the liabilities are not automatically transferred. Assets can also be specifically selected in an itemised sale, thereby mitigating a number of legal risks for the buyer. This will in turn reduce the scope and extent of the due diligence process over the target company. Therefore, an asset purchase can be implemented relatively quickly.
- If the asset purchase is structured as a slump sale, there can be significant direct tax and indirect transfer tax savings.
- Carry-forward and setting-off of losses is permitted in asset sales, facilitating further tax benefits to the buyer.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

In general, the sale of companies is performed mostly on the basis of private negotiation and discussions among the parties. However, foreign owned joint ventures and multi-national companies also take part in auction-based sale offers and often these are tagged to a global sale proposition. Some big local companies can also adopt auction-based sale arrangements.

There is no provision in **Bangladesh** law to regulate or impose auction processes. Generally, when sponsors feel that there are more parties interested in purchasing their stake, or there are inherent values in the stake that can be paid back in terms of additional monetary consideration, the buyer will be selected through a bidding process.

Investment bankers are typically appointed to run the auction and shortlist potential buyers to ensure a bidding process that is fair and transparent to all the stakeholders involved and to maximise values to the selling sponsors. Investment bankers arrange for an electronic data room and provide due diligence materials for the bidders and/or make available a common vendor due diligence report. Corporate presentations and face-to-face interviews with certain key managerial personnel of the company are also organised.

After performing their own due diligence, bidders submit a detailed bid letter in the form of a letter of intent containing the terms of the bid. After a recommendation from the investment bankers and buyer's selling sponsors, the buyer then moves to the next stage in the process, which is negotiating the deal terms.

## Preliminary agreements

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

### Term sheet

This kind of pre-agreement term sheet is often drawn up as a letter of intent, a memorandum of understanding and/or a simple term sheet made by parties before they enter into a binding contract. These preliminary documents typically specify a number of terms that are intended to be non-binding, including:

- Purchase consideration and forms of payment.
- Binding agreements to be entered into by the parties.
- Closing date and closing obligations.

The binding and enforceable terms generally include:

- Tax and stamp duty obligations.
- Audit and revaluation based on closing date and price adjustment methodology.
- Exclusivity.
- Confidentiality.
- Governing law and dispute resolution.

### Exclusivity agreement

Exclusivity agreements require parties to a transaction to negotiate exclusively with each other, with a view to entering into a contract until a set closing time within which the parties are not allowed to negotiate with other intended buyers or sellers. Exclusivity agreements are enforceable in **Bangladesh** and breach of an agreement enables the deprived party to obtain an interim injunction from a court to claim or enforce damages.

### Confidentiality agreement

Confidentiality agreements require the parties to undertake to keep all commercially sensitive and publicly unavailable proprietary information confidential at all times, irrespective of successful closing of the transaction, and to use the information only in relation to evaluating the proposed transaction. The confidentiality agreement is often referred to as a non-disclosure agreement (NDA) and sets out the obligations and restrictions in relation to the

confidential information. These agreements are binding and enforceable. The execution formalities and remedies for breach are similar to an exclusivity agreement.

## Asset sales

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

Whether assets or liabilities are automatically transferred entirely depends on the asset sale structure and whether the sale contains all the liabilities or not.

In the case of a merger, de-merger or slump sale, it is envisaged that assets and liabilities will be sold together and, as such, permission from the original company jurisdiction of the High Court is required. The extent of the liabilities to be transferred is determined by the court after hearing all the stakeholders. In contrast, in an itemised sale of assets, no liability is transferred except encumbrances and liens directly attached to the assets, such as tax liabilities, mechanics or a developer's lien, or encumbrances directly related to the asset.

The transfer of employees is subject to compliance with certain employment law rules and only possible in mergers, de-mergers or slump sales.

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

Whether creditors must be notified or their consent obtained to the transfer in an asset sale depends entirely on the asset sale structure and whether it includes all the liabilities or not. In a merger, de-merger or slump sale, permission from the court is required and to approve the scheme the court requires the parties to submit consent from the creditors.

In an itemised sale, the consent of the creditors must be secured if the asset is mortgaged to them. Otherwise consent is required only if contained in an agreement between the company and the creditor. However, in general, most financial creditors require that their consent be obtained before an asset is sold.

## Share sales

8. What common conditions precedent are typically included in a share sale agreement?

Common conditions precedent in share sale agreements include:

- Obtaining the necessary corporate approvals including resolutions from the board of directors.
- Completion of due diligence to the satisfaction of the buyer.
- Obtaining the necessary regulatory approvals, if relevant.
- Obtaining approvals (or non-objections) from shareholders with pre-emptive rights, customers, suppliers and financial institutions, if applicable.
- Obtaining a valuation certificate/approval from the central bank for repatriation if the seller is a non-resident.
- Identification of an escrow agent if the transaction contemplates interim price adjustment.
- Representations and warranties being true and correct as on the closing date.
- Settlement of certain identified litigations, tax, disputes, regulatory issues/proceedings or providing adequately for their resolution.
- Delivery of the physical shares along with duly executed share instruments and affidavits or electronic transfer in a depository account.
- Resignation of directors nominated by the seller, if relevant.
- Payment of the sale consideration into the buyer's bank account.

## Seller's title and liability

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Under the Sales of Goods Act 1930, shares are considered to be goods. Therefore, unless the circumstances of the contract demonstrate a different intention, the following terms are implied by law as to the seller's title to the shares:

- An implied condition on the seller that it has a right to sell the shares.
- An implied warranty that the buyer has and enjoys quiet possession of the shares.

- An implied warranty that the shares are free from any undisclosed charge or encumbrance in favour of any third party.

Other terms and conditions are also incorporated in the form of warranties in the contract to address this. In general, these are often heavily negotiated between the parties, including their exact wording.

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

## **Seller**

There is no specific provision under local laws and regulations on this. However, under local practice, it is addressed by incorporating indemnification clauses into the transaction documents where the seller indemnifies the purchaser for a number of years for any loss occurring out of pre-contractual misrepresentation, misleading statements or similar matters. This indemnification is enforceable in **Bangladesh**. Otherwise, it will be difficult to hold a seller liable if their contracts subsume earlier representations in relation to the target.

## **Advisers**

Advisers can be held liable only for fraud or gross negligence. However, advisers are liable only to their employers.

## **Main documents**

11. What are the main documents in an acquisition and who generally prepares the first draft?

## **Share sale**

The main documents in a share acquisition include:

- Share sale and purchase agreement (typically prepared by the buyer).
- Termination agreement, with respect to any existing joint venture or shareholders' agreements (prepared by the seller).
- Novation or subrogation agreement, with respect to any existing joint venture or shareholders' agreements or new shareholders' agreement (prepared by the buyer).

- Disclosure letter (prepared by the seller).
- Waiver letters from the existing shareholders (prepared by the seller).
- Fresh set of company bye-laws (prepared by the buyer).
- Escrow agreement, if necessary (prepared by the escrow agent in conjunction with the buyer).
- Earn-out or compensation agreements with key employees of the target company (prepared by the buyer).

## **Asset sale**

The main documents in an asset sale are as follows:

- Business transfer or asset sale and purchase agreement (prepared by the buyer).
- Relevant employment documents and employee consents if relevant (prepared by the buyer and seller).
- Assignment and assumption agreement with respect to existing contracts in the case of a slump sale (prepared by the buyer).
- Novation agreement with respect to existing contracts in the case of an asset sale (prepared by the buyer).

If the transaction is structured as a merger or a de-merger, a scheme of arrangement and other relevant documents are prepared by both parties.

## **Acquisition agreements**

12. What are the main substantive clauses in an acquisition agreement?

The main substantive clauses in an acquisition agreement include:

- Purchase considerations and modality of payment.
- Interim adjustment, hold-back and escrow arrangement.
- Conditions precedent to the acquisition.
- Conditions subsequent to the acquisition, including perfection.
- Closing and closing-related actions.
- Post-closing obligations.

- Representations, warranties and covenants.
- Indemnities, particularly tax indemnities.
- Governing law and dispute resolution process.
- Non-compete restrictions.
- Payment of costs and expenses.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

**Bangladesh** courts uphold a choice of foreign law and party autonomy as agreed between the parties when entering into the contract. It was decided in *PLD 1964 Dacca 637*, that when the intention of the parties to a contract is expressed in words, this express intention determines the proper law of the contract and overrides every presumption. A share purchase agreement can provide for a foreign governing law if the parties agree to it. In practice, if all the parties to the agreement are Bangladeshi, **Bangladesh** law is adopted as the governing law.

Another key aspect of any agreement is dispute resolution and most cross-border transactions contemplate an overseas seated arbitration for resolving disputes. **Bangladesh** arbitration law permits enforcement of foreign arbitral awards in **Bangladesh**. Parties can also agree to waive certain rights under the Arbitration Act. In contrast, only judgments from reciprocating territories such as England, Australian Capital Territory, Singapore and India are enforceable in **Bangladesh**.

In certain situations, the following laws may also apply automatically:

- Tax law.
- Anti-trust law.
- Exchange control law.
- Land law.
- Employment law.

## Warranties and indemnities

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Seller warranties or indemnities are typically included in an acquisition agreement. These cover areas such as:

- Title and marketability to shares, assets and properties of the target.
- Shares, assets and properties, free of any encumbrances.
- Organisation and authorities of the target company and the sellers.
- Approvals obtained to complete the transfer.
- Capitalisation of the target.
- Lack of conflicts or consents.
- Financial statements.
- Undisclosed liabilities.
- Absence of certain changes, events and conditions.
- Material contracts.
- Condition and sufficiency of business assets.
- Inventory.
- Accounts receivable and accounts payable.
- Customers and suppliers.
- Insurance.
- Legal proceedings and governmental orders.
- Compliance with laws and permits.
- Employee benefit plans and employee matters.
- Real property and leases.
- Taxes.
- Books and records.
- Related party transactions.
- Bank accounts and power of attorney.
- Environmental matters.

The indemnity clause allows the holder to require an indemnity providing that it be compensated for any losses or damages.

15. What are the main limitations on warranties?

## Limitations on warranties

The following limitations are imposed on warranties:

- Limitation periods overriding statutory limitations.
- Cap on damages or compensation payable.
- Exclusion of indirect damages.
- Matters disclosed in a disclosure schedule.
- Minimal thresholds for making claims.

## Qualifying warranties by disclosure

Qualifying warranties by disclosure is fairly common. Whenever a seller intends to qualify warranties, they do so by providing disclosures. These serve as an exception to the warranties.

16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

## Damages

Damages are a remedy provided under the Contract Act. Where there is a breach of warranty, direct damages can be claimed by the aggrieved party. Contract law does not permit the payment of indirect, special, consequential or punitive damages. **Bangladesh** contract law acknowledges both liquidated and un-liquidated damages. Sometimes a contract contains a specific sum payable to the party that suffered as a result of a breach (liquidated damages) and other times the court will award damages or compensation after applying contract law principles (un-liquidated damages).

## Indemnification

Indemnification is another contractual remedy that is generally included in the main acquisition contract. The intention of an indemnity clause is to restore the non-breaching party to the same position as if no loss or damage had occurred.

### **Hold back of purchase consideration**

Hold back of purchase consideration is another practical and useful tool to address breach of warranties. However, due to statutory reasons any part of the share purchase price cannot be hold back, rather the payment is apportioned as a performance payment contingent upon completion of certain targets.

### **Indemnity insurance**

Indemnity insurance is emerging as an option for parties to a transaction to address the risks arising from breach of warranties.

### **Time limits for claims under warranties**

The statute of limitation sets out three years as the period for making claims for damages. However, the tax statute allows authorities to open assessment proceedings even after six years have passed. Parties to a contract typically negotiate for a time limit based on these principles.

## **Consideration and acquisition financing**

17. What forms of consideration are commonly offered in a share sale?

### **Forms of consideration**

In **Bangladesh**, cash is the most common form of consideration. Share swaps are also allowed especially for mergers and de-mergers. Consideration in the form of certain assets is possible but not that common.

### **Factors in choice of consideration**

Foreign exchange control rules, direct tax and value added taxes are the major factors when determining the different forms of consideration.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

## Structure

A buyer listed in **Bangladesh** can raise cash to fund an acquisition using the following routes:

### Rights issue

A rights issue is an offer of shares to existing shareholders on the basis of their current shareholding percentage.

### Private placement

A private placement is a private issue of additional shares out of the stock exchange subject to approval from the **Bangladesh** Securities Exchange Commission to selected private parties, especially to institutional investors. It can also be a private investment in public equity (PIPE), where share warrants are issued to institutional investors and converted into shares after a maturity period. There have been a few instances of PIPE transactions in **Bangladesh**.

### Repeat public offer

This is a public offer of additional shares issued under a fresh prospectus as approved by the **Bangladesh** Securities Exchange Commission and underwritten by an investment/merchant bank as underwriter.

### Issue of debentures/bonds

Proceeds for acquisition can also be raised by issuing other non-equity instruments, like debentures or bonds. These issues must be approved by the **Bangladesh** Securities Exchange Commission and underwritten by an investment/merchant bank as underwriter.

## Consents and approvals

These include the following:

- Approval of the board of directors.
- Approval of the shareholders is also required for private placement of shares and repeat public offers.
- Permission from the **Bangladesh** Securities Exchange Commission is required.
- Agreement with the relevant exchange in **Bangladesh** is required.
- An underwriter certificate from an investment/merchant bank as underwriter is required for repeat public offers and issues of bonds.

## Requirements for a prospectus

An offer document must be circulated among the potential investors. For a rights issue, this document is called a letter of offer. In all other cases, it is called a prospectus. A copy of the offer document must be filed with the Registrar of Companies and the **Bangladesh** Securities Exchange Commission.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Under the Companies Act, a company in **Bangladesh** is prohibited from providing any financial assistance, whether directly or indirectly, to a potential buyer of shares in that company.

## Signing and closing

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

### Signing

In a private company share sale, the following documents are commonly produced and executed at signing and closing meetings:

- A share purchase agreement, asset purchase agreement or business sale agreement.
- Relevant corporate resolutions approving the execution of the agreements and identifying authorised signatories.

### Closing

At closing, the following documents are commonly signed or produced:

- Conditions precedent satisfaction letter, along with documents evidencing the satisfaction of the conditions precedent.
- Relevant corporate resolutions recording the closing of the transaction, including approval of the transfer, change in bye-laws and resignation/appointment of directors.
- Central Bank approval for remittance to a foreign seller, if relevant.

- Bank remittance certificate from the receiving bank.
- Share transfer form.
- Issue of share certificates in favour of the buyer.
- Relevant entries in the corporate registers and books.
- Resignation of the seller's nominees from the board of directors.
- Appointment of the buyer's nominees to the board of directors.
- Execution of relevant supplementary agreements like non-compete or non-solicitation agreements.

## Post-closing

- Filing of relevant forms with the company registry.
- New bye-laws of the company.
- Notification to the central bank about any change in foreign shareholding.

The documents in an asset sale are more or less the same. A scheme of arrangement must be filed in court with respect to a merger or de-merger by the target and buyer.

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

Different types of documents have different legal formalities. Some documents are deemed to be an "instrument" in terms of stamp duty and these documents must be properly stamped (a form of local levy or tax) including:

- Conveyance of any asset within **Bangladesh**.
- Share transfer instrument.
- Amended articles.
- Any local law governed deed.
- Any other instrument.

If the instrument relates to immovable property, it must be registered in the sub-registrar offices of assurances by paying the requisite registration fees. The share transfer instrument and the amended articles must be filed with the Registrar of Companies. The stamp rates are set out in the Stamp Act. The stamp duty must be paid at (or before) the execution of the instrument. If the instrument is executed outside **Bangladesh**, it must be stamped within three months of its receipt in **Bangladesh** to be permitted as evidence in local courts.

A person authorised by the board of directors can sign any document on behalf of the company.

22. What are the formalities for the execution of documents by foreign companies?

There are no special requirements for the execution of documents by foreign companies. Foreign companies typically pass corporate resolutions authorising any of its officers or directors to execute documents. However, if a particular document must be produced to a regulatory or government authority (such as the Registrar of Companies), it must be apostilled and notarised and then legalised by the **Bangladesh** Embassy in the country of the executor.

23. Are digital signatures binding and enforceable as evidence of execution?

Although not common in **Bangladesh**, contracts executed using digital signatures are recognised as legal, valid and binding. However, contracts that are required to be drafted in writing must be issued by a recognised issuing agency under the Information and Communication Technology Act 2000 before a digital signature is used.

24. What formalities are required to transfer title to shares in a private limited company?

## Corporate approvals

Corporate approvals and resolutions must be executed for the transfer of shares. In general, a resolution of the board of directors will suffice unless otherwise set out in the articles of association, or the existing shareholders have pre-emption rights. The board of directors of the transferor and transferee must approve the transaction.

## Foreign exchange approvals

Foreign exchange approvals only apply if the seller is a non-resident and the sale proceeds are intended to be repatriated. Under these circumstances, the **Bangladesh** Bank accepts fair value of the shares on the date of sale based on the appropriate combination of the following three valuation approaches, depending on the nature of the company as certified by a merchant banker or chartered accountant.

- **Asset based approach.** Equivalent to the fair value of assets minus the fair value of liabilities. This method is considered most appropriate for resource firms, financial services firms, investment companies (real estate investment trusts, closed-end investment companies) and small businesses with limited intangible assets or early stage companies. In this approach, the net asset value of the unlisted target company (net assets after meeting all the liabilities) is estimated as the fair value. This approach often indicates the most conservative valuation because it does not take into account the value of any intangible assets (such as goodwill).
- **Market value approach.** Multiple based analysis or comparable analysis mostly applies to private company valuations. Comparable company trading multiples analysis utilises the valuation multiples of similar or comparable publicly or privately traded companies to value an unlisted target company. Peers can be grouped based on any number of criteria, such as industry focus, private company size, or growth. The multiples can be equity based multiples like price-to-earnings (P/E), price to book value of equity (P/B) and more. The multiples derived from this type of analysis are for a given point in time and generally change over time. The recommended equity based multiple is the earnings multiple. The P/E ratio, which is equal to a company's market price per share divided by its earnings per share (EPS), is the most widely used earnings multiple. It provides an indication of how much investors are willing to pay for a company's earnings. When it is difficult to find the right comparable listed companies, adjustments must be made to reflect differences, such as business mix, geographic spread and capital structure. At least three years average EPS of the target company must be used in the valuation.
- **Income approach.** This valuation is highly sensitive to assumptions of future cash flows. The income approach is not used in isolation, but is used as one of the drivers to determine the final price. The income approach is primarily driven by three key inputs: free cash flow (FCF), terminal value and discount rate. The valuer must carefully verify all the inputs, validating them with rational assumptions. Valuing the target company involves the following steps:
  - the last recorded FCF in the audited financial statement is assumed to be the terminal perpetual cash flow for the future. The FCF will be arrived at by taking operating cash flow from the audited financial statement minus capital expenditure. The valuer must ensure that all overdue liabilities are deducted;
  - the discount rate (r) must be the weighted average cost of capital or the yield rate on a 20-year **Bangladesh** Government Treasury Bond on the date of sale, whichever is higher;
  - trend cash flow growth of the company (g) will be the average of annual cash flow growth over the past three to five years according to audited financial statements;
  - the valuation of the company is then calculated by fair value =  $FCF/(r-g)$  where FCF = operating cash flow – capital expenditure, r= discount rate and g = average growth rate of free cash flow in the last available five years.

## Share transfer instrument

When payment of sale consideration is received, the share transfer form, in a format set out in the Companies Act, and a notarised affidavit must be executed by the seller confirming the sale and receipt of consideration. For non-residents, the affidavit must be legalised by the **Bangladesh** Embassy.

## Perfection

The company must include and record the transfer in its share book. The company, transferee or transferor must lodge the transfer instrument and affidavit with the Company Registration Office by paying a registration fee and stamp duty. For shares that are already dematerialised, the seller instructs the depository participant to transfer them to the buyer and execute the transfer order.

## Tax

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

### Share sale

Stamp duty is payable on the share transfer at a rate of 1.5% of the agreed purchase consideration.

### Asset sale

Stamp duty for the conveyance of any immovable or movable property is 3% of the purchase consideration. In addition, for immovable property, a local government tax of 1% and a registration fee of 2% of the property value is payable.

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

### Share sale

There is no stamp duty on transfer of dematerialised shares.

### Asset sale

There is no exemption from stamp duty on an asset sale, however, duty can be avoided on a de-merger.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

## Share sale

The seller must pay 15% capital gains tax. The capital gain is calculated by subtracting the acquisition cost and development cost from the sale consideration. For a non-resident seller, the purchaser must withhold the capital gains tax and submit it to the National Board of Revenue.

## Asset sale

An asset sale structured as a merger in accordance with the income tax rules can be tax neutral for the parties involved if it satisfies the following conditions:

- All the property of the amalgamating company or companies immediately before the merger becomes the property of the amalgamated company.
- All the liabilities of the amalgamating company or companies immediately before the merger become the liabilities of the amalgamated company.
- The shareholders with no less than nine-tenths in value of the shares in the amalgamating company or companies (other than shares already held in it immediately before the merger by the amalgamated company, its subsidiary or a nominee) become shareholders of the amalgamated company.

A de-merger is tax neutral by its structure. After de-merging, the undertaking's transfer is dealt with in the same way as a share sale.

For all other asset sales, including slump sales and item-wise sales, the seller must pay 15% capital gains tax. The capital gain is calculated by subtracting the acquisition cost and development cost from the sale consideration. In addition, there is a potential 15% VAT obligation triggered by an asset sale. For individuals holding an asset for less than five years, capital gains tax must be paid at the highest applicable income tax rate.

## Transfer pricing regime

The transfer pricing regime as incorporated in the Income Tax Act requires that all international transactions between parties must take place at arm's length. This is defined as a price in a transaction, the conditions (for example, price, margin or profit split) of which do not differ from the conditions that would have applied in a comparable uncontrolled transaction between independent entities under comparable circumstances.

The arm's length price in relation to an international transaction is determined by applying the most appropriate methods (for example, comparable uncontrolled price, resale price, cost plus, profit split or transactional net margin).

If, in the course of any assessment, the Deputy Commissioner of Taxes believes that the price charged or paid in an international transaction is less than what would have been determined under the set method for calculating the arm's length price, the Deputy Commissioner of Taxes can determine the price of the transaction. Where it is found that the fair market value is higher than 15% or more of the sale price, the government can exercise its power to procure the asset at the sale price. In addition, every person who has entered into any international transaction exceeding BDT20 million must furnish an additional report from a chartered accountant

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

**Bangladesh** has double taxation avoidance agreements with the UK, Singapore, Sweden, Korea, Canada, Pakistan, Romania, Sri Lanka, France, Malaysia, Japan, India, Germany, The Netherlands, Italy, Denmark, China, Belgium, Thailand, Poland, Philippines, Vietnam, Turkey, Norway, USA, Indonesia, Switzerland, Mauritius, Saudi Arabia, UAE and Myanmar. Many of these agreements provide a lower tax rate for capital gains earned by the residents of that country.

### Share sale

The general capital gains tax rate is 15%. A 10% tax rate applies on capital gains made by firms and companies from transferring public company shares listed on stock exchanges. The rate goes down to 5% for sponsor shareholders and directors of banks, financial institutions, insurance companies, merchant banks, leasing companies, portfolio management companies, stock dealers or stockbrokers. For other individuals, these gains are exempt from tax. Any capital gain made from transferring stocks or shares in a publicly listed company made by a non-resident assessee is exempt from tax if they are entitled to a similar exemption in their country of residence.

### Asset sale

There are no exemptions other than for mergers and de-mergers.

29. Are other taxes potentially payable on a share sale and an asset sale?

No other tax is payable.

30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Carrying forward unabsorbed depreciation and business losses is allowed only at company level and the regulations benefit a merger, de-merger and slump sale structure. However, it is not in principle allowed on an inter-company level even if the companies belong to same group.

## Employees

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

### Asset sale

**Bangladesh** employment laws do not require an employer to consult with their employees with respect to an asset sale as long as the asset is an itemised sale of assets and does not include employee transfer. Employment laws do not contain any rules with respect to giving notice or obtaining consent of the employees in an asset sale. If the employment agreement contains any provision on this, it must be adhered to. If the company has entered into a collective bargaining agreement that requires the employer to obtain consent (or provide notice), it must be complied with.

However, where there is a slump sale, de-merger or merger, or sale of a business as a going concern, permission is required from a court and any proposed transfer of employees makes the employees a stakeholder to the transaction. The court will hear the employees or their representative when finalising the permission as it deems fit. A transfer of employees is not possible unless expressly sanctioned by the court in the approved scheme.

### Share sale

**Bangladesh** employment laws do not require an employer to consult with their employees with respect to a share sale as long as the employment agreements do not contain any provisions on this, or a collective bargaining agreement does not impose this requirement.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

### Asset sale

There is no provision in local regulations about protection for workers against dismissal in the context of a share or asset sale. In any case, a permanent worker must be provided with 120 days' notice along with a gratuity at the rate of 30 days' wages for each of their completed years. For employment over ten years, a gratuity at the rate of

45 days' wages for each of the completed years is required. For a temporary worker, the notice period is 30 days and no gratuity is payable.

In the case of redundancies, 30 days' notice applies along with a notice to the Chief Inspector of Factories and Establishments. Employees must be selected for dismissal on a "last in/first out" basis.

Dismissal of "non-worker" category employees must comply with the relevant employment agreement, if any. In the absence of an employment agreement, or if the agreement is silent, fair and reasonable compensation must be paid. This also reduces the risk of any litigation or action for wrongful termination.

The previously blurred line between workers and managers (non-workers) under the subsisting laws of **Bangladesh** has been cleared up by relevant case law. The Supreme Court of **Bangladesh** in several judgments has opined that "what is important in determining whether a person is a worker or not is to see the main nature of the job done by him and not so much his designation" (*MR Chowdhury, General Manager, Shields Limited v 1st Labour Court [2 BLC (1997)]*). In *Muhammad Yousaf v Punjab Textile Mills Ltd (1973 PLC 358 / 1974 LLC 16)*, it was held that a supervisor who merely performs supervisory duties and enjoys no power to engage or remove, or to take disciplinary action against other workers, falls within the definition of "worker" and this has been clearly acknowledged in order No. 5, dated 31 December 2013 in Labour Appeal No. 397 of 2013. Therefore, the main point when determining whether an employee is a worker or manager is not their job title, but whether he/she has an independent right to hire and fire others.

## Share sale

See above, [Asset sale](#).

## Transfer on a business sale

See above, [Asset sale](#). Employees are not automatically transferred to the buyer in a business sale. Any transfer must be mandated in the transfer scheme approved by the court.

## Pensions

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

In **Bangladesh**, provident funds and gratuity funds are the relevant pension schemes for private companies. These funds are inherent to the company and cannot be transferred. However, it is possible to liquidate a fund and then transfer the residual value to a new fund.

Employees commonly participate in private pension schemes established by their employers. If an employee is transferred as part of a business acquisition under the same terms as sanctioned by the court for the scheme, the

transferee must honour the existing pension rights, or provide equivalent rights. When transferring a business, court approval of the scheme is necessary.

## Competition/anti-trust issues

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Anti-trust and competition issues are currently governed by the newly enacted Competition Act 2012. The provisions relating to the constitution of the Competition Commission have been brought into force and a director and a chairman have been appointed. However, the provisions set out in the Competition Act 2012 are currently reactive pending the incorporation of the underlying competition rules needed to impose proactive measures.

Any combination (including acquisitions, amalgamations or mergers) in the goods and services market that adversely affects competition, or causes an adverse affect on competition, is prohibited. However, a combination that will not adversely affect competition or cause an adverse affect on it can be approved by the Competition Commission (Commission) following an investigation. The Commission has wide powers to investigate any combination that adversely affects competition, either on its own motion or after a complaint from any third party.

Statutory and regulatory authorities will be able to seek a reference from the Commission to determine if a proposed combination is anti-competitive. The Commission will issue its decision within 60 days based on the following principles:

- If the combination does not, or is not likely to, have an appreciable significant adverse effect on competition, it will approve the combination.
- If the combination has, or is likely to have, an appreciable significant adverse effect on competition, it will direct that the combination not be allowed.

The Commission will enact competition rules setting out the requirements for combinations that will be approved. The Commission is yet to quantify the meaning of significant adverse effects and the relevant thresholds for mandatory approval before combination. However, until these rules are set out, the Commission will enjoy the discretion to decide on the effect of any combination. If, during or after completion of an investigation of a complaint, the respondent, the Commission and the complainant agree on the terms of an appropriate order, the Commission (without hearing any evidence) can confirm the agreement as a consent order subject to:

- The order being published in the *Official Gazette* within seven working days for comments within a period of 30 days.
- The Commission receiving and reviewing representations from third parties with a material interest in the consent order, and holding hearings as appropriate.
- Making the consent order as agreed and proposed, or indicating changes to the draft order before it comes into effect.

- Refusing to issue the order if additional information warrants it.

## Environment

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

In a share sale, the target continues to be liable for cleaning up contaminated land. In a sale of an undertaking as a going concern, the liability is transferred to the buyer

In an asset sale, it depends on whether liability is also transferred along with the asset. If the sale contract is silent on this, the subsisting owner (that is, the transferee) must clean up the contaminated land.

### Online resources

#### Board of Investment (BIDA)

W [www.bida.gov.bd](http://www.bida.gov.bd)

**Main activities.** This is the government trade department with guidance and information on foreign investment.

#### Bangladesh Bank

W [www.bangladesh-bank.org](http://www.bangladesh-bank.org)

**Main activities.** This is the central bank of **Bangladesh** and financial services regulator. It regulates all foreign exchange transactions and remittances.

#### Bangladesh Securities Exchange Commission

W [www.sec.gov.bd](http://www.sec.gov.bd)

**Main activities.** This is the capital markets regulator, regulating the issue of shares, public offering of shares, public offering of bonds and listing of securities.

#### Laws of **Bangladesh**

W <http://bdlaws.minlaw.gov.bd/>

**Main activities.** This is the online portal of legislative texts that is maintained by the Ministry of Law, Justice and Parliamentary Affairs.

## National Board of Revenue

W [www.nbr.gov.bd/](http://www.nbr.gov.bd/)

**Main activities.** This is the national board of revenue with guidance, information and updates on direct and indirect taxation in **Bangladesh**.

## **Bangladesh** Competition Commission

W [www.ccb.gov.bd/](http://www.ccb.gov.bd/)

**Main activities.** This is the website of national competition commission that regulates competition and antitrust issues in **Bangladesh** and provides guidance, information and updates on competition laws and regulations.

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**Professional qualifications.** Lawyer, **Bangladesh**

**Areas of practice.** Mergers and acquisitions; private equity; banking and finance; telecommunications; capital markets.

**Non-professional qualifications.** LLB, University of London; MBA in Corporate Finance, IBA, University of Dhaka.

#### Recent transactions

- Represented Shanghai and Shenzhen Stock Exchanges in acquiring Dhaka Stock Exchange.
- Advised AES in its acquisition of Covanta Portfolio.

- Advised GlaxoSmithKline in an acquisition of a pharmaceutical company.
- Acted for Ophir Energy in acquiring the Satos exploration portfolio in the Bay of Bengal.
- Acted for Zhenhua Oil in the US\$2 billion acquisition of three oilfields and one gas compression station from Chevron.
- Acting for IFC and Exceleerate Energy as their common counsel in the US\$1 billion Maheshkhali Floating Storage and Regasification Terminal Project.
- Acted as the common counsel in carrying out the **Bangladesh** aspects of the US\$50 billion Lafarge and Holcim merger.
- Acting in structuring diverse PPP projects including Payra Port, the Chinese Economic Zone at Anwara, Rooppur Nuclear Plant, various components of South Asia Sub-regional Economic Cooperation (SASEK) Road and so on.
- Advised ONGC-OIL JV and POSCO Daewoo in three separate PSC contracts for exploration in three offshore blocks.

**Languages.** Bengali, English

**Publications.**

- *Project Finance* (GTDT).
- *Legal Aspects of Doing Business in Asia* (CILS).
- *Foreign Tax & Trade Briefs* (Lexis Nexis).
- *Commercial Laws of the World* (WestLaw).
- *Franchising in Asia* (Lex Noir).
- *Money Laundering, Asset Forfeiture & Compliance* (Lexis Nexis).

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**Professional qualifications.** Lawyer, **Bangladesh**

**Areas of practice.** Mergers and acquisitions; private equity; banking and finance; employment law; real estate.

**Non-professional qualifications.** LLB, Dhaka University.

### Recent transactions

- Advised on raising US\$10 million equity by preferred shares for Fenchuganj Power Plant.
- Advised Nokia in US\$5 million private equity investment.
- Advising Mitsubishi in the acquisition of ETA Melco.
- Advised Underwrite Laboratories in the acquisition of Magnus Textiles.
- Acted for China Railway Construction Company in its potential acquisition of the US\$1 billion First Dhaka Elevated Expressway Project.
- Represented sponsors in Sutiakhali and Teknaf Solar Park Plants (IPP) in a negotiation to execute PPAs. Acting in five more solar projects under development by different sponsors.
- Acting as **Bangladesh** Counsel for the Evergreen Group with 13 industries in **Bangladesh**, for an initial public offering on the Hong Kong Exchange.
- Acting for Semen Indonesia in a high value acquisition of a large Cement Plant in **Bangladesh**.
- Represented Sinohydro in negotiating the river training contract for the US\$3billion Padma Bridge Project.

**Languages.** Bengali, English

**Publications.** *Project Finance (GTDT); Employment Terms & Conditions (Towers Watson).*

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- [Acquisitions - Auctions](#)