

Private M&A 2021

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Private M&A

2021

Contributing editors**Will Pearce and Louis L Goldberg**

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Dominican Republic, Georgia, New Zealand, South Korea, Thailand and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.



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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

- 1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Acquisition and disposal of Sudanese companies vary according to the type of each company. In a public joint stock company, unlike private companies in which the public are not entitled to subscribe in shares, the shares should be transferred in Khartoum Stock Exchange through a financial services company (a financial brokerage company dealing with Khartoum Stock Exchange delegated by the selling shareholder). Following the accomplishment of the transaction on the Khartoum Stock Exchange, it should be registered before the commercial register in a process that would take one to two months.

Regarding private companies, the transfer of shares agreement shall be entered into between the parties and submitted along with the form C7 with the Registrar of Companies.

The general rule mandates that movable assets are transferred by possession and fixed assets (eg, real estate) are transferred after being notarised before the notary public and registered in the Registrar of Lands.

Legal regulation

- 2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The applicable law governing acquisitions in Sudan depends on the target sale item (ie, assets or shares). In cases of the sale of shares, the following would be applicable: the Companies Law of 2015, Khartoum Exchange Law of 2016, Investment Law of 2013. In an asset sale, the applicable law would depend on the type of asset. Sudanese law shall prevail in a sale of shares or assets in the sense that the registration process will be subject to the laws of Sudan.

Legal title

- 3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

Under Sudanese law, there is no distinction between a beneficial and a legal title. Legal and beneficial title of shares are assumed once the transaction is executed via the Khartoum Stock Exchange or the Registrar of

Companies. The process is different in assets, whereby the general rule mandates that movable assets are transferred by possession and fixed assets (eg, real estate) are transferred after being notarised before the notary public and registered in the Registrar of Lands.

Multiple sellers

- 4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

Sudanese law does not explicitly prohibit the concept of drag-along clauses, and hence it may be covered under the shareholders' agreement or the articles of association.

Exclusion of assets or liabilities

- 5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

The acquisition of shares shall neither affect 'the rights and liabilities of the merged companies nor any legal proceedings undertaken by or against any of the merged companies'. Pursuant to article 14 of the Banking Law of 2004, the approval of the Central Bank of Sudan is required for any merger of a Sudanese bank.

Generally, there are no required consents or notifications to effect the transfer of assets or liabilities.

Consents

- 6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

If the assignor is a juristic person, the transfer of shares requires the approval of the board of directors. However, there are no approvals required if the assignor is a natural person. As for the sale of assets, generally there are no required approvals.

7 | Are any other third-party consents commonly required?

Yes, if the articles of association require it. Further, some of the company's material documents might include a change of ownership or control clauses whereby the prior consent of such party is required.

Regulatory filings

8 | Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Administrative fees shall be paid in the case of a transfer of shares. As for the assets, administrative fees and taxes are imposed.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 | In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Experts and board members have to prepare reports on the transaction. In this regard, pursuant to article 126 of the Companies Act of 2015, an 'experts report' shall be prepared by an expert on behalf of each merged company. Further, pursuant to article 125 of the Companies Act of 2015, a 'clarification report' shall be prepared by the board members of any merged company.

Duty of good faith

10 | Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Pursuant to the general rule under Sudanese law, there is a general duty to act in good faith, which also entails negotiating in good faith. Apart from any fiduciary duties the directors have towards their own companies, there are no other duties imposed thereon when negotiating a transaction.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

The general set of transaction documentation is usually the share and purchase agreement, the escrow agreement and shareholders' agreement (if any). In a share deal, the parties are obliged to execute additional documentation as deemed required by Khartoum Stock Exchange at the time of sale. In an asset sale, on the other hand, it involves the same set of documentation apart from a sale of asset agreement, which entails all the target assets as opposed to the share purchase agreement and separate agreements on various types of assets to execute the same before governmental authorities.

12 | Are there formalities for executing documents? Are digital signatures enforceable?

Yes, in some cases, documents are required to be notarised, signatures should be verified by a bank or signed before the competent person (eg, the broker executing the transfer of shares before the Khartoum Stock Exchange).

The local law allows for electronic signing under article 8.1 of the Electronic Transactions Act of 2007 'The legal effect of an electronic signature cannot be denied in terms of its validity and ability to operate

under it solely due to its full or partial reproduction in an electronic format.' Article 8.2 also states that 'If the law requires the signature of a document or provides legal effect in case of a lack of signature, if an electronic signature is used in this regard, the electronic signature satisfies the requirements under this law.'

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

In Sudan, purchasers tend to undertake a full due diligence on the target company, where the lawyers examine the operations of the company from a legal standpoint including, inter alia, required licensing, full review of the constitutional documents to assess if there are any restrictions and any third-party consents required pertaining to the material agreements concluded by the target company, and an assessment of the employees' rights and general compliance of the target company to the Sudanese laws. In addition to the legal due diligence, a financial due diligence is also exercised simultaneous to the legal one to assess the financial status of the target company.

Vendors' due diligence is not common in Sudan and purchasers do not tend to rely on such reports unless the transaction documentation provides warranties and limitations covering the same.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

If a misleading statement is made to a public official, a penalty of imprisonment may apply under article 97 of the Criminal Code of 1991 'a person who provide a public official with a statement, knowing it is a false statement, intended to mislead that official or to induce him to commit a specific act, shall be punished by imprisonment for a period no longer than one year or by a fine or by both penalties'. In the event of submitting a false statement to a person (other than a public official), article 138 of the Civil Transaction Act of 1984 shall apply to 'a person who commits any act that causes damages to third party shall be liable for compensation, even if the person is undistinguished'. This will be subject to the discretionary power of the competent court. We are of the view that such liability cannot be excluded by agreement between the parties since it is related to public order.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

The company's file in the general commercial register is available, otherwise it is difficult to collect further information. Any major lawsuit is sometimes published in the newspaper or news websites, which are usually reviewed by buyers prior to any agreement.

Impact of deemed or actual knowledge

- 16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Subject to the provisions of the Sudanese Civil Code and subject to the terms of the share purchase agreement, actual or constructive knowledge could potentially limit the buyer's recourse in connection with the representation and warranties provided by the seller, subject to the court's discretion unless the buyer proves that the seller provided assurances for the absence of defects or intentionally and fraudulently concealed defects.

PRICING, CONSIDERATION AND FINANCING**Determining pricing**

- 17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Generally, the price is determined upon the agreement of the parties.

Form of consideration

- 18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Regarding the transfer of shares, cash is the common form of consideration. As for the assets, the consideration is made by a certified bank cheque. There is normally no overriding obligation on the buyer to pay multiple sellers the same consideration unless the parties have agreed otherwise.

Earn-outs, deposits and escrows

- 19 | Are earn-outs, deposits and escrows used?

In Sudan, the purchase price is usually deposited at an escrow account to provide both parties with the required assurances. Earn-outs are not commonly used.

Financing

- 20 | How are acquisitions financed? How is assurance provided that financing will be available?

Acquisitions are financed by all sources of funding legally available (eg, debt financing through Sudanese banks or foreign financial institutions and equity financing). Determination of any guarantees is subject to negotiations between the buyer and the financial institution.

Limitations on financing structure

- 21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

There are no limitations that impact the financing structure, except in some cases, in which banks require the borrower to be the owner of any property mortgaged to the bank.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS**Closing conditions**

- 22 | Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Yes, however, there is no constant practice in this regard, as conditions are decided on a case-by-case basis. In Sudan, the parties usually agree to include, inter alia, the following conditions:

- full payment of the purchase price;
- obtaining any required consents and approvals, if applicable;
- convocation of the relevant general assembly meetings to effect such transfer;
- reconciliation of any of the major issues that were found by the due diligence exercise; and
- the restriction on distributing dividends during the period between signing and closing.

- 23 | What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

There are certainly various terms and obligations whose extent is dependent upon the nature of the obligation and its importance to the negotiating parties.

Pre-closing covenants

- 24 | Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Examples include the following:

- continue to operate the business in the ordinary course;
- maintain its properties and insurance;
- comply with all laws;
- update the buyer on any changes or developments concerning the business;
- not to terminate customer or vendor agreements without obtaining the prior consent of the buyer;
- not to make any capital expenditures without obtaining the prior consent of the buyer;
- not to pledge or transfer any company assets outside the ordinary course of business without obtaining the prior consent of the buyer; and
- not to negotiate with any other party concerning the sale of the business.

Termination rights

- 25 | Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Pursuant to the general rule *pacta sunt servanda*, the contract may not be terminated or amended unless upon the agreement of the parties. However, a contract may be terminated after signing in accordance with article 117 of the Civil Transaction Act of 1984 if the execution of the debtor's obligation is becoming exhaustive due to unexpected general exceptional events. The obligation is not considered as exhaustive under article 117 'unless the loss exceeds 1/3 of the obligation'.

26 | Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

In private M&A transactions, break-up and reverse break-up fees are commonly agreed mutually between the parties as a percentage of the purchase price, which is usually covered in the transaction documents. Though, under Sudanese law, there is room to claim reduction in the case of excessive fees. Based on the principle of *pacta sunt servanda*, such fees are applicable when and if there has been a contractual arrangement to that end.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 | Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

The seller usually warrants and represents to the buyer that some statements are true, accurate and not misleading in all respects from signing to closing and do not omit to state any material fact necessary to make the statements herein not misleading. The scope of such statements is as follows:

- assuming the full capacity, power and authority to execute, deliver and perform this agreement;
- the seller is the legal and beneficial owner and sole holder of the sale shares and there are no options, encumbrances or any other rights through which third parties can claim one or more of the target company;
- no actions, suits, appeals, claims, applications, investigations, orders, proceedings, grievances, arbitrations or alternative dispute resolution processes of whatever nature, in progress, pending or to the seller's knowledge, threatened against the seller, which prohibits, restricts or seeks to enjoin the sale and transfer of sale shares contemplated by this agreement nor threatened against the target company, or any material property or asset of the target company or directors of the target company in regards to their actions as such nor is there any basis for such action, proceeding, claim or lawsuit;
- the valid existence of a target company and good standing under the laws of the jurisdiction of its incorporation;
- concluding the share purchase agreement does not violate any applicable laws;
- the target company is not in breach of any agreements;
- the target company does not have any indebtedness or encumbrances or pledge;
- the target company holds valid licences and is in compliance of all the regulatory aspects; and
- there are no shareholders' resolutions concerning the paying out of dividends, reserves or capital that still have to be effected.

The indemnification is usually a quantum and a course of action in the event of a breach of any of the above warranties.

Limitations on liability

28 | What are the customary limitations on a seller's liability under a sale and purchase agreement?

The customary limitations on sellers' liability are as follows:

- purchaser's knowledge;
- limitations on quantum;
- time limits;
- recovery from third parties and conduct of claims;
- no liability if loss is otherwise compensated;
- future acts;
- acts approved by the buyer; and
- no double recovery.

Transaction insurance

29 | Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Transaction insurances are not common in Sudan.

Post-closing covenants

30 | Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Post-closing covenants are not common in Sudan as sellers tend to refuse their incorporation in the share purchase agreement given that it will conflict with their business. Such covenants varies among others, confidentiality on any technical information, non-solicitation and non-compete.

TAX

Transfer taxes

31 | Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

No taxes are imposed on the transfer of shares. However, taxes are applicable on the transfer of real estate properties and shall be fixed in accordance with the relevant jurisdiction, its market value and area.

Corporate and other taxes

32 | Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

The seller shall bear the cost of taxes in cases of a transfer of a real estate property.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 | Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Pursuant to article 66 of the Labour Law of 1997, in the case of a share transfer, the employees do not transfer as said employees remain with the target company, hence acquisition of shares does not involve the process of employees' transfer 'in case the employer who had contracted with the employee is replaced by another employer due to the sale of business [...] the employment contract shall be valid and enforceable with the other employer'.

Although the Labour Law does not explicitly prohibit the employees' automatic transfer in the event of an asset sale. Practically, the transfer

of employees cannot automatically be implemented before the Social Insurance Authority.

Notification and consultation of employees

- 34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

No.

Transfer of pensions and benefits

- 35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In a share transfer, employees of the target company maintain all their benefits, pensions and acquired rights, etc ... as the change of the shareholding of the target company does not affect the employees' status, unless contractually agreed otherwise by the parties.

However, in an asset sale, the buyer is under the obligation to continue employing the target company's employees with either the same or more favourable employment terms and conditions than those stipulated under the employees' current employment contacts.

To effect the aforesaid from a practical perspective, the transfer of employees is concluded through one of the following structures:

- first structure: the employees to resign as employees of the target company and enter into new employment relationships with the buyer. According to such structure, employees are assumed to receive all their employment entitlement from the target company before entering into new employment relationships with the buyer. In this case, the benefits of the employees cease to exist and commence a different scheme with the new buyer; and
- second structure: a tripartite agreement to be concluded between the target company, the buyer and each relevant employee, whereby the employees agree to terminate their existing employment relationship with the target company and continue their employment relationship with the buyer, whereby benefits or pension are transferred to the buyer.

UPDATE AND TRENDS

Key developments

- 36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Given the recent political situation in Sudan, there are no significant legal, regulatory or market practice developments and trends in private M&A transactions during the past 12 months.

Coronavirus

- 37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

No material amendments have been undertaken on Sudanese law to address the pandemic. However, the Sovereign Counsel declared the health emergency in response to the spread of covid-19 and was followed by Emergency Decree No. 1 issued by the Prime Minister, which



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lists the crimes, contraventions and their respective fines. The Decree also extends the power of the police to include undertaking necessary procedures to enforce the decisions of the competent authority (ie, the President of the Republic, the Governor or his or her delegate). For example, the fine for non-compliance with the Competent Authority's decisions is 5,000 Sudanese pounds, non-adherence to medical examination (S£10,000), isolation (S£20,000) and quarantine (S£5,000).

Private sector companies have been left to take the measures they deem necessary to limit the spread of infections at the workplace, while simultaneously ensuring they remain compliant with the Sudanese Labour Law of 1997.

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