
Bangladesh

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

Contacts

Sameer Sattar

Sattar & Co, Dhaka

ssattar@sattarandco.com

1. INTRODUCTION

The primary laws governing M&A transactions in Bangladesh are the Companies Act 1994 (Companies Act) and the Companies Rules 2009 (Companies Rules). M&A transactions in Bangladesh are typically structured through: (1) a Scheme of Amalgamation which is approved by the High Court Division (HCD) of the Supreme Court of Bangladesh under Sections 228 and 229 of the Companies Act; and/or (2) a transfer of the shares of the target from the seller to the purchaser.

In addition, when M&A transactions in Bangladesh involve publicly listed companies, the Securities and Exchange Ordinance 1969, the Bangladesh Securities and Exchange Commission Act 1993 and the relevant rules/guidelines published by the Bangladesh Securities and Exchange Commission will be relevant and applicable. However, this guide is intended to address and focus on M&A transactions involving private companies.

Acquisitions (ie an acquisition of shares) are more common in Bangladesh than other forms of M&A transactions. However, the discussion in this negotiated M&A guide is focused on [both] forms of M&A transactions: the court-approved merger/amalgamation process and acquisition of shares. Unless otherwise stated expressly, M&A transactions under this guide shall refer to all forms of M&A transactions which are recognised in Bangladesh.

2. LEGAL LANDSCAPE

The terms ‘merger’, ‘amalgamation’ and ‘acquisition’ have not been defined under the Companies Act or Companies Rules. The term ‘amalgamation’, though not defined, is used in the Companies Act. In general, the following statutes are applicable in M&A transactions in Bangladesh:

2.1. Companies Act

Under the provisions of Sections 228 and 229 of the Companies Act, parties may apply to the HCD for the sanctioning of a ‘compromise or arrangement’ in connection with a scheme, (popularly known as a scheme of amalgamation), if the compromise or arrangement is for the merger (amalgamation) of two or more companies. Once the HCD allows the said ‘compromise or arrangement’ in the form of an order, the entities which sought the order under the Scheme of Amalgamation are considered to have amalgamated upon complying with the order of the HCD.

Acquisitions are mainly governed by Section 38 of the Companies Act which provides the procedure of the transfer of shares, mainly through the instrument of transfer (Form 117).

There are many reported judgments that shed light on the merger laws in Bangladesh. Though the word ‘merger’ is absent from the Companies Act, it seems that the HCD has used the word merger in cases wherein the parties had submitted a Scheme of Amalgamation. This was the case in *Robi Axiata Limited and another vs. Registrar, Joint Stock Companies and Firms and another*, 22 BLC (2017) 337 (the Robi-Airtel Merger case), wherein Robi Axiata Limited and Airtel Bangladesh Limited were to merge/amalgamate. In this case, the Scheme of Amalgamation (after modification) was approved. It follows that the terms ‘merger’ and ‘amalgamation’ are used interchangeably in Bangladesh.

2.2. Foreign exchange laws

All cross-border transactions are subject to the foreign exchange laws of Bangladesh. Bangladesh has very strict foreign exchange control laws: inward and outward remittance transactions are highly regulated.

The Foreign Exchange Regulation Act 1947 (FERA) is the primary law in this regard. It provides the legal basis for regulating foreign exchange matters, inward and outward remittance related matters, and so on. Bangladesh Bank, as the central bank of Bangladesh, is responsible for administering foreign exchange transactions in Bangladesh. All foreign exchange and cross-border transactions need to be transacted in compliance with FERA, the 2018 Guidelines for Foreign Exchange Transactions (GFET) as published by the Bangladesh Bank, and the circulars of the Bangladesh Bank published from time to time. The general rule in Bangladesh is that no person or resident of Bangladesh is eligible to make any payment outside Bangladesh without the permission of the Bangladesh Bank. However, general permission has been provided under the GFET and the circulars of the Bangladesh Bank for several types of transactions involving outward remittances from Bangladesh.

Under Section 13 of FERA, a person who is a resident of Bangladesh is not allowed to transfer any share or security of a company incorporated in Bangladesh to any person who is not a resident of Bangladesh without special or general permission of the Bangladesh Bank. If shares are being transferred across borders, it is necessary to comply with the requirements of the Bangladesh Bank. Some of the requirements include share valuation by a certified chartered accountant and prior approval from Bangladesh Bank, as stated in the Foreign Exchange Investment Department (FEID) Circular No. 1 dated 6 May 2018 (Circular of 2018) and in the FEID Circular No. 1 dated 18 June 2020 (Circular of 2020).

According to Clause 2(b) of the Circular of 2020, permission from Bangladesh Bank is not required in order to repatriate the sale proceeds of shares amounting to BDT 10m and the same can be done without valuation reports from independent valuers. In all other cases, share valuation from an independent valuer, prior permission from Bangladesh Bank and/or *post facto* reporting to Bangladesh, as applicable, will need to be complied with as per the Circular of 2018, along with other foreign exchange laws of Bangladesh.

2.3. Foreign investment laws

Section 4 of the Foreign Private Investment (Promotion and Protection) Act 1980 clearly states that the Government of Bangladesh shall accord fair and equitable treatment to foreign private investment which shall enjoy full protection and security in Bangladesh.

The Industrial Policy 2016 states that all but four sectors – (1) arms and ammunition, and other defence equipment and machinery, (2) forest plantation and mechanised extraction within the bounds of reserved forests, (3) production of nuclear energy, and (4) security printing and mining – are open for private investment in Bangladesh.

It is well known that Bangladesh is a foreign private investment friendly country.

2.4. Competition laws

For M&A transactions, a legislation which is usually overlooked is the Competition Act 2012. Under Section 21 of the Competition Act 2012, any form of combination (which means the acquisition or taking control or amalgamation or merger in the trade as per Section 2(1)(h) of the Competition Act 2012) that is likely to cause an adverse effect on competition in the market of goods or services is prohibited. The Bangladesh Competition Commission may approve such combination provided that the same does not adversely affect the competition in the market.

2.5. Banking laws

In case of acquisitions, transfer of shares and/or related resignation of directors of any company is subject to obtaining prior permission from the company's lenders (banks or financial institutions) under Section 27A of the Bank Companies Act 1991. In some cases, such restrictions may also be found in facility agreements signed by the company.

With regards to the mergers of banks and/or financial institutions, the Bank Companies Act 1991 and the Financial Institutions Act 1993 shall be applicable. It is stated that no merger/amalgamation of a bank with another bank, or a financial institution with another financial institution, shall be permissible without the approval of the Bangladesh Bank. The Bangladesh Bank must be satisfied that such an amalgamation will not be detrimental to the interest of the stakeholders, the bank/financial institution and/or the financial system of the country.

Section 76 of the Bank Companies Act 1991 also stipulates that any compromise or arrangement between a banking company and its creditors or any class of them, or between such company and its members or any class of them, or any amendment in such compromise or arrangement shall not be sanctioned by the HCD unless the same is approved by the Bangladesh Bank. As per Section 49 of the Bank Companies Act 1991, Bangladesh Bank may, on a request from the banks concerned, assist as an intermediary in proposals for the amalgamation of banks. It is also noteworthy that Section 14A of the Bank Companies Act 1991 stipulates that shares of banks may not be concentrated amongst individuals, companies or members of the same family, and no individual, company or family members may purchase more than 10 per cent of any bank individually, jointly or both. Section 28 of the Financial Institutions Act 1993 states that no financial institution may be amalgamated with any other financial institution or acquire the majority of shares in any other financial institution without the prior approval of the Bangladesh Bank.

2.6. Other laws

In an M&A transaction where a transfer of assets is involved, the transfer of movables shall mainly be governed by the Sale of Goods Act 1930, and transfer of immovable property shall be governed by the Transfer of Property Act 1882. It is also to be noted that a sale of moveable assets may not require registration; however, the sale of immoveable assets may require mandatory registration and same will be governed under the Registration Act 1908 and the Registration Rules 2004.

Apart from the above, contract laws may also be applicable to acquisitions, such as the Contract Act 1872.

2.7. Industry-specific requirements

In addition to the above laws, there may be other industry-specific laws which may be relevant to entering into and consummating an M&A transaction. Such laws may require the prior approval and involvement of the relevant regulatory authorities (for example, Bangladesh Export Processing Zones Authority (BEPZA) in the garments sector, Bangladesh Telecommunication Regulatory Commission (BTRC) in the telecom sector, etc) for the said M&A transaction.

Additionally, if a company involved in an M&A transaction has any restrictive agreement with another person/entity, such contractual obligations will also need to be complied with.

3. TRANSACTION STRUCTURES

It has been already discussed that there are two main structures which are used in M&A transactions amongst which, with regards to private companies, acquisitions are more common. An acquisition is a simple transfer, either directly or indirectly, of shares, voting rights and/or assets, in or from one company to another person or a means to take over control of the assets or management of a company. In the case of acquisition of shares, the company being acquired only has its shareholding structure changed but its business, liabilities, rights, obligations, etc. remain its own.

An amalgamation, as has been already stated, is often referred to as a merger in Bangladesh. It has been seen in the Robi-Airtel Merger case that the HCD has used the word merger in cases wherein the parties had submitted a Scheme of Amalgamation. In the case of amalgamation, the transferor and transferee companies apply to the HCD with a Scheme of Amalgamation. In an amalgamation, at least two entities are involved, the transferor company and the transferee company, and it is understood that the process involves the complete blending or transfer of the transferor company's undertaking into the transferee company. This has been seen in the case of 20 BLC (2015) 150, wherein the HCD had directed the transferor company to be dissolved and consequently, its properties and liabilities were vested in the transferee company.

The terms merger or amalgamation do not have precise legal meanings under the Companies Act. However, under Section 2(2) of the Income-tax Ordinance 1984 (ITO), 'amalgamation' is defined as a merger of one or more companies with another, or a merger of two or more companies to form a company. The said definition of the ITO also states that all the property and liabilities of the amalgamating company or companies immediately before the merger becomes the property of the amalgamated company.

Similarly, the term 'acquisition' is not defined in the Companies Act. However, Section 2(1)(a) of the Competition Act 2012 provides a definition in a similar vein and states that 'acquisition' means to acquire or to agree to acquire, directly or indirectly, any share, voting rights or assets of any enterprise or to take control over assets or management thereof.

3.1. Advantages and disadvantages

The primary advantage of structuring an M&A transaction through an acquisition in Bangladesh is that there is no involvement of the courts. Thus, the parties involved can structure the transaction in a manner that is most suited for them. Since there is no involvement of the court in an acquisition, it will save time and costs. Therefore, acquisitions are usually preferred by parties. An amalgamation is a lengthy process which involves the HCD and this usually results in an increase in time/costs. However, a cross-border acquisition can also be a burdensome process considering the extent of time required for fulfilling the reporting requirements, valuation of shares, the repatriation of sales proceeds and obtaining prior approval from Bangladesh Bank, and so on.

3.2. Tax considerations

Section 31 of the ITO provides that capital gains tax shall be payable by an assessee in respect of any profits and gains arising from the transfer of a capital asset. Therefore, any gain from the transfer of capital assets (eg, shares) is taxable under the heading of capital gains under the ITO.

Section 31A of the ITO provides the tax implication in relation to the capital gains from the transfer of business or undertaking, which states that tax shall be payable by an assessee on 'capital gains from the transfer of business or undertaking' in respect of any profits and gains arising from the transfer of business or undertaking in its entirety. All of its assets and liabilities, and such profits and gains, are deemed to be the income of the assessee in respect of the income year during which the transfer takes place.

Section 56 of the ITO states that, in the case of non-resident transferor, the transferee must withhold and deduct the applicable capital gain tax at source at the time of making the payment to the non-resident transferor.

3.3. Stamp duty

Stamp duty at the rate of 1.5 per cent is payable as per the Stamp Act of 1899 to give effect to a transfer of shares in Bangladesh. According to the Stamp Act 1899 stamp duty is payable, if relating to the sale of a share in an incorporated company, at the rate of BDT 2 for every BDT 1,000 (or part thereof) of the value of the share. This stands at 0.2 per cent of the purchase consideration.

4. PRE-AGREEMENT DOCUMENTATION

4.1. Term sheet/letter of intent /memorandum of understanding

In Bangladesh, a term sheet, letter of intent or a memorandum of understanding is typically used as the pre-agreement documentation for M&A transactions. Generally, pre-agreement documentation is not binding. However, certain clauses of the same can, if agreed by the parties and drafted accordingly, be given a binding nature (such as confidentiality clauses, representations and warranties, etc).

The purpose of pre-agreement documentation is to set out the commercial terms of the proposed transaction to ensure that the intention of the concerned parties is aligned prior to either party incurring any costs. The parties, by the pre-agreement documentation, tend to agree in principle the estimated consideration price, matters relating to the due diligence, key condition precedents, proposed closing date, etc.

The advantage of any pre-agreement document is that it tends to create an initial understanding between the parties with regards to the commercial terms and structure of the proposed transaction. In certain circumstances, the pre-agreement documentation may protect the interests of the concerned parties regardless of whether the transaction is closed subsequently.

4.2. Non-disclosure and exclusivity obligations

Parties also enter into non-disclosure and exclusivity agreements in the pre-agreement stage or include clauses to this effect in the term sheet, letter of intent or a memorandum of understanding. This is to maintain the confidentiality of all the information that is shared during the negotiation stage. It also ensures that the same parties do not look for a similar deal with any third party. The parties to the transaction ought to ensure that the confidentiality clause has a binding effect. If drafted accurately, the binding nature of the confidentiality clause will ensure that the parties do not disseminate information that they learn during the negotiation or due diligence stage, even if the transaction does not close.

5. DILIGENCE STAGE

The due diligence stage forms an integral part of any M&A transaction. Due diligence is usually conducted after executing a pre-agreement document. This is to ensure that, even if the transaction does not close for whatever reason, the information obtained by either party remains confidential. During the due diligence stage, the following issues should be taken into consideration.

5.1. Charter documents

The primary work while doing the due diligence exercise is to check the status of incorporation of the target company and the corporate and shareholding structure of such a company. In addition, at the due diligence stage, the parties must check the charter documents of the target company to understand any specific restriction and/or procedure that needs to be complied with in any M&A transaction involving the target company.

5.2. Registration and licences

Any company doing business in Bangladesh requires certain general registrations and licences, such as the certificate of incorporation, trade licence, tax and VAT-related registration, factory licence, fire licence, etc. In addition, industry-specific licences and registrations may also be required based on the nature of the business. During the due diligence exercise, it is important to identify the regulatory compliances which are required for the target company to conduct its business in Bangladesh. At the diligence stage, it is important to identify whether such licensing

requirements have been met by the company, and the time period for which such licenses and certificates are valid. If a licence is nearing the period of cancellation for any reason, it is important to identify the process and the time required for the same to be extended/renewed.

Moreover, in a merger or amalgamation, the HCD typically provides that the licences of the transferor company are to be transferred to the transferee company, as was the case in 20 BLC (2015) 150. In such an event, it is always beneficial for the transferee company to check any licences so that they do not get terminated or cancelled after completion of the amalgamation/merger.

5.3. Financial liabilities, mortgages and charges

It is important to identify whether any financial liabilities exist in relation to the target company, whether there are any mortgages, charges or liens on any asset (including shares) of the target company, or whether the said company has provided any corporate guarantee with regards to any loan. The transferee or the buyer will have to determine whether it is willing to assume such liabilities or whether it would prefer that the target company settles such liabilities prior to the closing of the M&A transaction. It is necessary to be vigilant for any liabilities that may exist in relation to the target company so that it does not work to the detriment of the transferee at a later stage.

5.4. Pre-emption and first refusal rights

Under Section 155 of the Companies Act, when issuing further capital, it is a legal requirement that any further shares being issued must be offered to the existing shareholders in proportion.

Moreover, in Bangladesh, it is common to have the right of first refusal enshrined in the articles of association of a company or in any agreement of the shareholders. As such, it is pertinent to check the articles of association of a target company or the relevant shareholders' agreement before any shares are transferred.

5.5. Liabilities or obligation to parent company

In certain circumstances, if a target company is controlled by any other company or has common shareholding with another company, it may have certain restrictions under the relevant agreements between the companies. This may restrict the rights of the transferor in the long run. Therefore, this needs to be identified at an early stage before the execution of any binding agreement.

5.6. Employment matters

It is very important to review the existing employment policies of the target company, check whether it complies with the prevalent laws of Bangladesh and that no claims from current or former employees are pending against it. This is important since non-compliance with certain provisions of the employment laws of Bangladesh carries criminal penalties and/or significant fines.

5.7. Disputes and litigation

It is common for a company and/or its members/directors to be involved in proceedings in Bangladesh, be it court proceedings or arbitral proceedings. It is important that the transferee company or the buyer is duly informed or aware of such proceedings against the target company (and/or its members/directors) to properly ascertain whether it is willing to acquire an undertaking with existing/potential liabilities, for which it may be indirectly responsible as a result of the acquisition.

6. TYPICAL DOCUMENTATION

In most M&A transactions, the important documents include, *inter alia*, the following:

6.1. Corporate and other authorisations

- (a) Board and/or shareholders' authorisation regarding the approval of the Scheme of Amalgamation and/or transfer of shares;
- (b) no objection notification from lenders (banks or financial institutions) under Section 27A of the Bank Companies Act 1991 and/or under facility agreements.

6.2. Transaction documents

- (a) Term sheet, letter of intent or a memorandum of understanding between the companies/shareholders;
- (b) share purchase agreement;
- (c) Scheme of Amalgamation (not applicable for acquisition/transfer of shares);
- (d) deed and documents in relation to the transfer of assets and liabilities;
- (e) instrument of transfer of shares (ie, Form 117);
- (f) affidavit by the transferor of shares;
- (g) annual summary of share capital and list of shareholders (ie, Schedule X) to record the change of shareholding structure;
- (h) documents in relation to the resignation of the existing director(s) and appointment of a new director (Form IX);
- (i) share certificates; and
- (j) certificate of transfer of shares.

7. MAIN TRANSACTION AGREEMENT

7.1. Scheme of Amalgamation

In a merger and/or amalgamation, the main transaction document is the Scheme of Amalgamation. The Scheme of Amalgamation contains provisions concerning the transfer of the undertaking of the transferor company to the transferee company. These may include:

7.1.1 Transfer of assets

Usually, one of the main reasons for a merger or amalgamation is to transfer the assets of the transferor company to the transferee company. The parties to the said transaction may opt for separate methods with regards to the separation of the assets of the transferor company. A simple example would be the parties specifying which assets should be transferred without any further requirement of documentation. For example, movable properties may be deemed transferrable through delivery.

7.1.1 Contracts, deeds and licences

A Scheme of Amalgamation may specify the contracts, deeds and/or licences that the transferor company is a party to, which are to be transferred to the transferee company. Additionally, the Scheme of Amalgamation may go on to provide that, upon sanction of the Scheme of Amalgamation by the HCD, the said undertakings are to be vested in the transferee company in such manner as if the transferee company has been a party to the same instead of the transferor.

7.1.2 Transfer of liabilities

For the benefit of the transaction, the Scheme of Amalgamation may specify that all liabilities, including debts and loans, of the transferor company are to be, upon sanction of Scheme of Amalgamation by the HCD, vested in the transferee company without any further act,

instrument or documentation.

7.1.3 Legal, taxation and other proceedings as well as treatment of taxes

Taxation issues are a matter of great concern in a merger/amalgamation transaction. Therefore, it is prudent to insert clauses that provide that the tax liability, including income tax and any VAT, that the transferor company has accumulated shall be deemed to be vested in the transferee company after the completion of the transaction. If the transferor company had enjoyed any tax benefits, the parties ought to ensure that the Scheme of Amalgamation contains a provision that provides that the benefits are also to be transferred to and deemed to be vested in the transferee company.

7.1.4 Employment issues

As is evident from the Robi-Airtel Merger case, the HCD protected the employees of the transferor company as they are usually the least represented during the negotiations of a proposed amalgamation. Therefore, a Scheme of Amalgamation should contain detailed provisions (mainly regarding voluntary retirement and/or transfer of their employment to the transferee company) with regards to the employees of the transferor company. It is advisable to ensure that the employees of the transferor company are adequately compensated if choosing voluntary retirement. Further, the Scheme of Amalgamation may provide that the transferee company will be obliged to employ the transferor company's employees (if they choose to transfer) and ensure the continuation of all benefits that the employee has earned while being employed by the transferor company.

7.1.5 Amendment of memorandum and articles of association

Under Section 12 of the Companies Act, if a transferor company is to amalgamate with a transferee company, then the transferor company may need to amend its memorandum of association, after obtaining the sanction of the HCD. Moreover, an amalgamation may require that the transferee company, upon amalgamating with the transferor company, amend its memorandum of association and/or articles of association to reflect any changes that are required. It is beneficial to include such changes in the Scheme of Amalgamation.

7.1.6 Dissolution

Upon the sanction by the HCD of a Scheme of Amalgamation, the transacting parties may require the transferor company to be dissolved. In this regard, the HCD may direct the dissolution of the transferor company, preferably without winding up this will incur additional costs. In such a case, the transferor company will be removed from the register of the Registrar of the Joint Stock Companies and Firms (RJSCF). Also, if included in the Scheme of Amalgamation or deemed necessary by the HCD, it may order the RJSCF not to register any other entity with a name similar to that of the transferor company.

7.1.7 Failure to obtain sanction

The Scheme of Amalgamation is entirely subject to the approval of the HCD. Therefore, a Scheme of Amalgamation ought to contain provisions which provide that if the sanction of the HCD is not received, the negotiated Scheme of Amalgamation shall stand null and void and the concerned parties shall continue as before.

7.1.8 Modification

The Scheme of Amalgamation may be modified by the HCD. For example, in the Robi-Airtel Merger case, the HCD had intended that the employees be provided with certain additional benefits that had not originally been included within the said Scheme of Amalgamation. This was done through modification of the Scheme of Amalgamation by the HCD. Therefore, it is

advisable to add a clause in a Scheme of Amalgamation stating that the board/members of the transferor company and the transferee company shall accept the alterations made by the HCD, and give effect to the Scheme of Amalgamation in accordance with the said alterations.

7.2 Statutory requirements

With regards to a merger/amalgamation in Bangladesh, the Scheme of Amalgamation must be drafted in accordance with Sections 228 and 229 of the Companies Act and relevant Rules of the Companies Rules. Rule 47 of the Companies Rules states that the application made under Sections 228 and 229 of the Companies Act must be verified by a director or other principal officer of the concerned company(ies). As per Rule 48 of the Companies Rules, upon the admission of the application, the HCD shall give directions as to:

- (a) The dates as to when the scheme (ie, the Scheme of Amalgamation) shall be placed before the creditors/members of the company(ies);
- (b) The person who is to act as chair;
- (c) The time and place where the meetings of the creditors and members are to be held and the procedure to be followed at such meetings;
- (d) The notice to be given to the creditors and/or the members;
- (e) The time within which the chair is to submit their report to the HCD;
- (f) The date when a further hearing of the application is to take place.

As per the Companies Rules, it is also required that an affidavit be filed showing that the directions given by the HCD under Rule 48 have been duly complied with. Such affidavit must be filed not less than seven days before the date fixed for the further hearing of the application.

7.3 Share purchase agreement

It is common practice in Bangladesh for the parties to an acquisition to execute a share purchase agreement (along with an agreement for sale of assets, if any) which typically tends to contain obligations, liabilities and rights of the parties with regards to the transaction. However, the execution of a share purchase agreement is not a legal requirement in Bangladesh. Rather, it is executed to ensure that the parties' rights and obligations in connection with the transaction are recorded in writing. With regard to the transfer of shares (acquisition), the formal legal requirement is that a completed Form 117 has to be submitted to the RJSCF, along with an affidavit on the part of the transferor regarding the transfer of shares.

The main clauses of a share purchase agreement include:

7.3.1 Purchase consideration

This is one of the important clauses of a share purchase agreement by which the parties to a transaction agree to a specific purchase consideration.

7.3.2 Escrow mechanism

Parties usually opt for an escrow arrangement in an acquisition, which helps minimise the risk of non-completion and allows the purchaser to make claims against the seller and retrieve the funds if the seller does not meet certain terms and conditions, as agreed between the parties. An escrow mechanism allows risk mitigation by assuring access to capital for any post-transaction issues that may arise, such as undisclosed liabilities, any type of regulatory liability, employment claims, tax issues, misrepresentations in relation to financial statements, etc.

7.3.3 Conditions precedent

Typically, a share purchase agreement will contain certain conditions precedent, subject to the satisfaction of which, the parties may proceed with the transaction. These conditions precedent can vary, including obtaining/renewal of necessary registrations/licences from any relevant

regulatory authority, obtaining no objection from lenders, etc. Additionally, a transaction may also be subject to obtaining any necessary consent from the existing shareholders of the target company and/or the transferee.

Moreover, conditions precedent may include the requirement of the transferee company to be satisfied with its due diligence, including legal, financial, tax, commercial, operational, environmental and intellectual property due diligence. The parties to the transaction may also be required to update all statutory records with regards to themselves, provided that the same is not up to date.

7.3.4 Representations and warranties

Generally, representations and warranties protect the parties to the transaction. Typically, a breach of representations or warranties results in a party (in favour of whom the representations or warranty was provided) gaining the right to claim damages for such breach. Therefore, how the representations and warranties clause is drafted in an agreement shall have important consequences in such transactions.

7.3.5 Indemnification

Generally, the target company and/or the sellers indemnify the buyer and/or the transferee. Such indemnification could be drafted in a manner so as to ensure the protection of the buyer and/or the transferee from any liability that has been recognised during the diligence stage or from any agreed or undisclosed liability (which may arise after the closing).

7.3.6 Dispute resolution

It is important for an arbitration clause to specify the language in which the arbitration shall take place, the governing law and the seat of the arbitral proceeding. The matter of place or seat of arbitration is important in the context of the laws of Bangladesh. Section 3 of the Arbitration Act 2001 (Arbitration Act) states that the Arbitration Act shall apply where the place of arbitration is in Bangladesh. If the seat of the arbitration is in Bangladesh, the Arbitration Act shall apply and the HCD, under Section 7A of the Arbitration Act, can perform an intervening role and take any interim protective measures which may appear reasonable or appropriate to the HCD. In the recent case of *Southern Solar Power and another vs. Bangladesh Power Development Board and others*, 2019 (2) 16 ALR 91, however, the HCD has held that it is competent to entertain an application under Section 7A of the Arbitration Act – even in relation to arbitrations taking place outside of Bangladesh. If both the buyer and seller are non-residents, the parties may wish to conduct the arbitration in a foreign jurisdiction.

The share purchase agreement may also contain clauses regarding, *inter alia*, sale and purchase of shares, pre-closing, closing and post-closing obligations, non-compete and non-solicitation obligations (if applicable), termination, confidentiality, governing law, tax obligations, cost in relation to the transaction, stamp duty payment obligations, and other miscellaneous and boilerplate clauses.

8 CLOSING

8.1 Amalgamation

Typical closing conditions in an amalgamation include submitting the Scheme of Amalgamation to the HCD. As mentioned earlier, the HCD may ask the parties to modify the Scheme of Amalgamation as the HCD deems fit; the parties must comply with such order. Finally, when the HCD approves the Scheme of Amalgamation and passes an order, the parties are obliged to follow the order of the HCD accordingly.

In the case of 20 BLC (2015) 150, the HCD sanctioned a Scheme of Amalgamation and gave a

set of directives to be followed by the parties to the transaction. Generally, it is perceived that, in any similar transaction, the HCD may order such directives to the parties thereto. The HCD passed an order similar to the following in the 20 BLC (2015) 150 case:

- (a) Both the transferor and transferee company be amalgamated in accordance with the Scheme of Amalgamation, which shall form part of the order or judgment passed by the HCD.
- (b) The judgment and order of the HCD shall take effect after filing of the certified copy of the same with the RJSCF by the transferee company, subject to annexing a copy of the said judgment and order to every Memorandum of the transferee company issued after the order is made.
- (c) The transferee company shall abide by and comply with all the terms and conditions contained in a letter by any regulatory authority.
- (d) All pending suits and proceedings to which the transferor company was a party shall be commenced and be continued by or against the transferee company, as the case may be, as if the same or has been filed by or against the transferee company.
- (e) The whole undertaking, properties and liabilities of the transferor company shall be vested in and be transferred to the transferee company, subject to the compliance of the terms and conditions of the Scheme of Amalgamation and any other obligations as imposed by any regulator.
- (f) All the shares, debentures, policies, and other like interests held by the transferor company shall stand transferred to, be vested in, be appropriated by and be allotted to the transferee company.
- (g) The judgment and order of the HCD shall not affect the personal guarantee or similar other obligations, if any, of the directors and shareholders of the transferor company or any other charge documents, if any, executed by or on behalf of the transferor company and all these shall be aiding on the transferee company in such manner as if those were executed and registered by them, as the case may be, with concerned authorities.
- (h) Upon amalgamation, the accounts of the companies shall be finalised and circulated amongst the members of both the transferor and transferee companies.
- (i) All mortgages, charges, undertakings, assurances obligations and liabilities, if any, of the transferor company shall be transferred to and vested in, be taken by and be enforceable by or against the transferee company in the same manner and to the same extent as if all of these acts, deeds and things have been done by the transferee company.
- (j) Upon the amalgamations coming into effect, the transferor company shall stand dissolved without winding up and the RJSCF is directed not to register any company in the name and style of the transferor company.
- (k) All the liabilities of the transferor company (if any) shall become liabilities of the transferee company and if any property of the transferor company is encumbered, in any manner, the same shall continue and the properties of the transferor company shall be transferred to and be vested in the transferee company subject to such encumbrance and charges, if any.
- (l) The HCD generally directs that all regulatory bodies, government authorities, lending institutions such as banks and leasing companies shall give effect to the Scheme of Amalgamation without any further act, petition or order whatsoever.
- (m) The transferee company shall cause a certified copy of the judgment and order as passed by the HCD to be delivered to the RJSCF for registration, within 14 days from the date of receiving a certified copy of the judgment and order.

It is stated under Section 229(2) of the Companies Act that, where an order is made by the HCD for the transfer of property or liabilities, that property shall by virtue of the order, be transferred to and vested in, and those liabilities shall by virtue of the order be transferred to and become the liabilities of, the transferee company.

It is also stated under Section 229(3) of the Companies Act that, where an order is made by the HCD under Section 229 of the Companies Act, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the RJSCF for registration within 14 days after the completion of the order. If any company defaults in complying with this obligation, that company and every officer of the company who is knowingly and wilfully in default will be liable to a fine as

provided under the Companies Act.

8.2 Transfer of shares/acquisition

Primarily, it should be ensured that all conditions precedent contained in the share purchase agreement between the parties have been duly complied with. The executed share purchase agreement acts as a roadmap to define what the parties are obliged to do to effectively implement the terms and conditions of the acquisition. Therefore, it is pivotal to comprehensively draft the terms and conditions of the agreement. In any agreement, there are certain liabilities on each party to do or to refrain from doing something. Similarly, upon execution of a share purchase agreement, it imposes a duty on each party to adhere to conditions set out in the agreement.

In an acquisition, the closing conditions are very straightforward. The transferee (the buyer) must pay the purchase consideration and the transferor (the seller) must transfer the shares. The parties typically agree on a procedure to do so and include it in the executed share purchase agreement. For determining the purchase consideration, the parties mainly agree on a fixed consideration or a price on the basis of a valuation report. In many cases, purchase consideration may also be based on an agreed accounting principle or formula which in turn is based on the financial position of the target company.

The most important closing action is the submission of Form 117 and affidavit to the RJSCF and the recording of the same with the RJSCF. The person transferring the shares must confirm the authenticity of the transfer in their presence before the RJSCF. With regard to a cross-border M&A transaction, the authentication of the signature of an individual is the main concern for the RJSCF. Under Section 38(3A) of the Companies Act, it is required that if the transferee is a foreign national or resides abroad, the transfer documents (mainly the instrument of transfer and affidavits in support of the transfer of shares) must be sent to the RJSCF after obtaining verification from the Ministry of Foreign Affairs, after being attested by the concerned High Commission of Bangladesh situated in the country of execution.

The payment of the purchase consideration is mainly conditional upon the execution and filing of closing documents such as Form 117 and filing of the same to the RJSCF, along with the annual summary of share capital and list of shareholders (Schedule X) to record the change of shareholding structure. Other necessary documents include the documents in relation to the corporate authorisations. The closing also includes the handing over of original share certificates from the transferor to the transferee, the resignation of the existing director(s) and appointment of a new director in the board of the target company and the filing of necessary documents (Form IX) with RJSCF. Therefore, in a closing, there are obligations on the part of the transferor, the transferee and the target company.

Additionally, the RJSCF may not record a transfer or issuance of shares if the applicable stamp duty has not been paid. Therefore, applicable stamp duties have to be paid as per the Stamp Act 1899.

The parties to an M&A transaction ought to ensure that the transfer of shares is recorded in the target company's share register and share transfer register. When there is the involvement of a non-resident transferor and/or sale proceeds are to be repatriated to Bangladesh or remitted from Bangladesh as outward remittance, share valuation (to determine the fair value of the share), prior approval from Bangladesh Bank or post reporting to Bangladesh Bank is required. This is on the basis of transaction modality and the value of the shares.

9 POST-CLOSING

9.1 General actions for post-closing

Depending on the transaction, if the transferor or the company being acquired require a new board of directors then this ought to be constituted immediately after the closing of the transaction so transferor company or the company being acquired can conduct its day-to-day business.

In case of amalgamation, post-closing actions require the parties to comply with the order or judgment passed by the HCD.

9.2 Regulatory filings

The main task is to update the record with the RJSCF in relation to the shareholding structure and board of directors of the company. Therefore, relevant filings such as Schedule X and Form XII need to be completed. Once the record is updated, certified copies need to be obtained to confirm the updated records. As already discussed, a cross-border transfer of shares will have a *post facto* reporting requirement to the Bangladesh Bank (on the basis of the transaction modality).

In case of an amalgamation, post-closing regulatory requirements, as well as any other ongoing statutory requirements, will be enumerated in the order or judgment passed by the HCD, including delivering the certified copy of the judgment and order as passed by the HCD to the RJSCF for registration within 14 days from the date of receiving the certified copy of the judgment and order.