

BRIEFING NOTE

May 2021

Key issues and trends in private M&A transactions from a BVI and Cayman Islands law perspective

Though the Covid-19 pandemic is continuing to take its toll on M&A markets worldwide, there are now clear signs that a recovery is underway. For example, although the number of M&A deals in Q1-Q3 2020 in Asia-Pacific (“**APAC**”) declined by 14% from 2019, deal value trends, on the other hand, moved in the opposite direction. In Q1-Q3 2020, M&A values across APAC rose by 31%, which was largely driven by megadeals involving Chinese energy companies and Japanese technology firms.¹ Positive valuations, lower acquisition premiums and a growing mid-market, as well as private equity fund-backed transactions in the fintech, pharmaceutical and healthcare sectors, have also continued to assist with the recovery of M&A activity in APAC.

Interestingly, sponsor-backed transactions accounted for 26% of overall M&A activity in 2020, the highest proportion since pre-credit crunch. With private equity firms in possession of a record US\$2.9 trillion in available capital at the end of 2020, we expect sponsor driven activity to continue.²

British Virgin Islands (“**BVI**”) and Cayman Islands companies have continued to play a significant role in M&A transactions in APAC and beyond throughout the Covid-19 pandemic as they offer a flexible and well-tested means of deal structuring. The absence of exchange controls, tax neutrality and certain relatively recent changes in law designed to facilitate the electronic closing of transactions, among other things, have continued to drive the popularity of the BVI and the Cayman Islands as jurisdictions of choice for structuring M&A transactions.

In this article, we examine some of the recent trends and key issues that continue to impact M&A transactions in APAC in the context of the Covid-19 pandemic from a BVI law and a Cayman Islands law perspective, both from a substantive and process standpoint.

1. Timing of M&A transactions

Deal timelines continue to be generally extended as a result of Covid-19 and we expect that this trend will continue until the pandemic is brought under control. These delays have resulted for a number of reasons, including the following key reasons:

¹ Baker Tilly. https://www.acuris.com/assets/Baker%20Tilly_APAC_Dealmakers_2020_final.pdf?1hZxdxMsiX_3qhctEE_qh8mCpja_wyPA

² Refinitiv. <https://www.refinitiv.com/perspectives/market-insights/records-broken-in-global-capital-markets-to-q3/>

i. Negotiations and meetings

Negotiations and meetings are continuing to take longer to complete due to the ongoing travel restrictions and social distancing restrictions which have been put in place. As video conferencing facilities evolve and become more popular, we expect that both buyers and sellers will continue to become more familiar with them which will expedite deal-making going forward.

BVI and Cayman Islands law are adaptable and well-suited to the current environment in which many meetings are being held virtually. As an example, subject to a BVI or a Cayman Islands company's memorandum and articles of association (collectively, the "**M&AA**"), BVI and Cayman Islands law both permit meetings of a company's board of directors and/or shareholders to be held by telephone or by other electronic means so long as those persons participating can hear each other. "Electronic means" typically includes video conferencing facilities, Skype, Zoom, Teams, WeChat, and any similar electronic service. Additionally, resolutions of the directors and the shareholders may also be passed in writing subject to a BVI or a Cayman Islands company's M&AA. This flexibility has continued to drive the popularity of BVI and Cayman Islands vehicles in acquisition transactions throughout the Covid-19 pandemic.

ii. Due diligence

Due diligence is generally continuing to take longer to complete as ongoing travel restrictions and social distancing rules make site visits, meetings with senior management and financial projections, among other things, more challenging to organize and complete. Many buyers are also undertaking enhanced due diligence to address the specific risks brought about by the Covid-19 pandemic and we have elaborated on this in paragraph 2 below.

It should be noted that the BVI Registrar of Corporate Affairs (the "**BVI Registrar**") and the Cayman Islands Registrar of Companies have continued to remain open throughout the pandemic with some relatively minor changes which has been helpful from a reliability point of view. Registered agents in the BVI and registered office service providers in the Cayman Islands are, on the whole, also operating normally.

iii. Regulatory and antitrust approvals

Regulatory and antitrust approvals are generally continuing to take longer to obtain from relevant authorities.

Although BVI and Cayman Islands regulatory approvals are not typically required with respect to M&A transactions, the change of control and/or management of a BVI or a Cayman Islands regulated entity (including its direct or indirect parent), such as a licensed trust company or a corporate service provider, does require the prior written approval from

the BVI Financial Services Commission (the “**BVI FSC**”) or the Cayman Islands Monetary Authority (“**CIMA**”) (as applicable) and the timing of obtaining the requisite approval(s) needs to be factored into the acquisition timetable. It is usual practice to hold a preliminary meeting with the BVI FSC or CIMA (as applicable) to discuss the regulatory requirements of an acquisition involving a BVI or a Cayman Islands regulated entity and deal completion will be conditional upon approval being provided. Local law advice should be sought as early as possible as any BVI or Cayman Islands regulatory consent requirements will inevitably have an impact on the timing of a proposed acquisition.

It should be noted that recent years have seen a trend towards consolidation in the financial services industry and we expect to see further consolidation of licensed BVI and Cayman Islands trust companies, fund administrators, banks, and other regulated businesses as a result of the economic re-alignment brought on, to some extent, by the restrictive economic environment in which these businesses have been operating in for the last 12-15 months.

iv. Third-party consents

Third-party consents to M&A transactions are in some instances continuing to take longer than usual to obtain due to the effects of, among other things, lockdown restrictions during the Covid-19 pandemic.

From a local law standpoint, to the extent that any third party consents (such as from shareholders or creditors) need to be obtained under the M&AA of a BVI or a Cayman Islands buyer, seller or target company, or pursuant to the terms of any contract to which the relevant company is a party (such as a joint venture agreement or a shareholders’ agreement), the timing implications should be evaluated and appropriately reflected in the transaction timetable.

In certain circumstances, it may be possible for the requisite consents to be provided post-closing and this is a matter which BVI or Cayman Islands legal counsel (as appropriate) will be able to advise upon.

v. Acquisition agreements

Acquisition agreements in APAC are evolving and we have seen an increase of completion accounts and earn-out mechanisms which is indicative of the current more cautious, buyer-friendly environment. We have also seen considerable interest in material adverse change conditions. There is also a pattern of M&A transactions being delayed where there are difficulties in completing valuations and/or if the buyer wants to apportion a greater degree of closing risk and/or indemnity risk to the seller.

BVI and Cayman Islands law are flexible on these types of terms and mechanisms, which will ultimately be a commercial matter for the parties to agree upon.

2. Due diligence

Many buyers are continuing to undertake enhanced due diligence to assess the ongoing effects of the Covid-19 pandemic on the target company's business. Whilst the specific concerns will vary depending on the nature of business that is being undertaken by the target company, some typical examples include:

- i. Are there heightened liquidity and/or solvency risks?
- ii. What is the financial condition of the target company's business and its key customers? Has the target company's financial condition recently deteriorated?
- iii. What insurance is in place to mitigate any losses and does it extend to financial loss owing to Covid-19?
- iv. Is the target company overexposed to suppliers that are particularly vulnerable to the effects of Covid-19?
- v. Has the target company recently breached the terms of any financial covenants and/or the term of any debt instruments or security documents?
- vi. What are the termination rights under key contracts and has the target company recently defaulted under any contracts?
- vii. Is there any ongoing litigation?
- viii. Are there sufficient business continuity plans and crisis management procedures in place?

From a BVI and a Cayman Islands law standpoint, buyers will be reassured that offshore legal counsel typically undertakes a wide-ranging review encompassing the following matters:

- i. Basic corporate information, M&AA, directors and shareholders

Whilst certain basic corporate information and the identities of the current directors of a Cayman Islands company are a matter of public record, its constitutional documents and statutory registers are a matter of private record and can only be obtained with the consent of the relevant company authorizing its registered office service provider to disclose it. This consent will invariably be provided as it is market practice for Cayman Islands legal counsel to review these documents.

In contrast, a broader range of corporate information is publicly available in relation to a BVI company. Its certificate of incorporation and M&AA may also be obtained from a company search, and its register of members is also publicly searchable to the extent that it has been filed with the BVI Registrar. All of the other statutory registers of a BVI



company (such as its register of directors and register of charges) are generally a matter of private record and can only be obtained with the consent of the relevant company authorizing its registered agent to disclose it. This consent will invariably be provided as it is market practice for BVI legal counsel to review these documents.

The M&AA of a BVI target company and a Cayman Islands target company may reveal important information in the context of an M&A transaction. For example, it could assist in determining whether:

- a. any third party consents are required to implement a proposed acquisition, or whether certain conditions need to be complied with prior to its consummation;
- b. there is any security over the sale shares of the target company that needs to be discharged prior to the proposed acquisition;
- c. there is a shareholders' agreement in relation to the target company (which could impose certain consent requirements on the parties with respect to the acquisition);
- d. an acquisition falls within the scope of any board and/or shareholder reserved matters;
- e. there are certain restrictions on the transfer of the sale shares, such as drag-along or tag-along rights which are triggered by the proposed acquisition; and/or
- f. the directors of the company may resolve to refuse or delay the registration of a transfer of sale shares in the target company at their discretion.

The register of members of a BVI company and a Cayman Islands company may also reveal information that is important in the context of an M&A transaction, such as whether:

- a. the sale shares are fully paid;
- b. the sale shares are certificated; and
- c. any share security is in place.

Please refer to our guide entitled "[Searches and constitutional documents from a BVI law and Cayman Islands law perspective](#)" for further details in relation to BVI and Cayman Islands searches and constitutional documents.

ii. Outstanding charges

Although the register of charges (if any) of a BVI company and the register of mortgages and charges of a Cayman Islands company are matters of private record, the register of registered charges of a BVI company is publicly searchable. Broadly speaking, the purpose of filing particulars of charge in a BVI company's register of registered charges is

to protect the priority of the underlying security interests and to put third parties on constructive notice of them. Offshore legal counsel will review the register of registered charges of a BVI company and request a copy of the register of charges or register of mortgages and charges (as applicable) to be provided to ascertain whether any of the target company's assets are subject to existing security interests.

iii. Good standing

In the BVI, "good standing" means that the relevant company is on the Register of Companies, has paid all fees, annual fees and penalties due and payable and has filed with the BVI Registrar a copy of its register of directors which is complete. A BVI law firm can order a certificate of good standing from the BVI Registrar with respect to a BVI company which confirms that the relevant company is in good standing as a matter of BVI law.

A Cayman Islands company is deemed to be in good standing if all fees and penalties under the Cayman Companies Act (As Revised) (the "**Cayman Act**") have been paid and the Registrar of Companies of the Cayman Islands has no knowledge that the company is in default under the Cayman Act. Only the registered office service provider of a Cayman Islands company can order a certificate of good standing from the Cayman Registrar which confirms that the relevant company is in good standing as a matter of Cayman Islands law.

An offshore law firm that is conducting due diligence on a BVI company or a Cayman Islands company will order or request to be provided (as applicable) a certificate of good standing to ascertain whether the relevant company is in good standing.

iv. Litigation

In the BVI, a search can be conducted to verify whether there are any actions or petitions against a company in the Eastern Caribbean Supreme Court, the Court of Appeal (Virgin Islands) and the High Court (Civil and Commercial Divisions) at the time of the search.

In the Cayman Islands, a search can be conducted to verify whether there are any actions or petitions against a company in the Grand Court of the Cayman Islands at the time of the search.

These searches will invariably be completed by offshore legal counsel.

v. Certificate of incumbency.

Offshore legal counsel will usually review an up-to-date certificate of incumbency issued by the registered office service provider or registered agent (as applicable) of the relevant company. Most certificates of incumbency typically confirm that the applicable company is in good standing, as well as its name and company number, registered office address, the identities of the directors and shareholders and share

capital (if applicable). It is usually also possible to request a confirmation from the registered agent or the registered office service provider (as applicable) that it is not aware of any proceedings which are pending or which have been threatened against the relevant company, and that no receiver has been appointed to its knowledge.

vi. Books and records.

Every BVI and Cayman Islands company must maintain books and records that are sufficient to show and explain that company's transactions, as well as enable the financial position of the company to be determined with reasonable accuracy. This includes keeping copies of invoices, contracts and similar documents. A BVI and a Cayman Islands company must also keep copies of all resolutions of its directors and shareholders and minutes of any meetings.

Whether a review of a BVI or a Cayman Islands company's books and records is necessary will depend on a variety of factors, including the risk appetite of the buyer and the activities of the relevant BVI or the Cayman Islands company. To the extent that there are any agreements, the buyer may request these to be reviewed to identify, among other things, any consent requirements in relation to a proposed acquisition and any termination provisions which could be triggered by a change of control. We have generally seen an increase in these types of requests which is reflective of the cautious approach that is currently being adopted by many buyers.

3. Representations and warranties

Both buyers and sellers need to continue to be mindful of the impact that the Covid-19 pandemic may have on the accuracy of the representations and warranties which are provided in an acquisition agreement. For example, a customary representation that the seller has operated its business in the ordinary course consistent with past practice may require the seller to disclose actions it has taken to address the pandemic as it relates to its business.

The trend of shorter and less detailed warranty schedules in acquisition agreements in APAC, compared to international equivalents, has generally continued. We have not recently seen any material changes to the relatively standard representations and warranties given by the seller in relation to the sale of shares in a BVI or a Cayman Islands target company. These will usually confirm, among other things:

- i. the due incorporation, valid existence and good standing of the target company;
- ii. the target company's solvency;
- iii. the power of the target company to own its assets and carry on such business as is being conducted;
- iv. the due authorization of the acquisition;



- v. the due authorization and valid issuance of the sale shares, and the sale shares being fully paid up, unencumbered and freely transferable;
- vi. any litigation or arbitration proceedings involving the target company;
- vii. whether the target company has any direct or indirect interest in any land in the BVI or the Cayman Islands; and
- viii. the target company's compliance with relevant laws (including the provisions of the applicable economic substance regime).

To build on the points above, the following additional matters should be noted:

- i. The definition of solvency in the BVI and the Cayman Islands is divergent. In short, the BVI definition includes balance sheet and cash flow tests, whereas the Cayman Islands position is limited to a cash flow test. Of course, the parties to an acquisition agreement may, and commonly do, agree upon a broader definition for the purposes of the applicable warranty.
- ii. To the extent that the seller is a BVI company, it may need to obtain shareholder approval with respect to the disposal. This will depend on the M&AA of the seller and the value of the disposition. Please refer to paragraph 2 of our guide entitled "[Avoiding BVI law and Cayman Islands law pitfalls in banking & finance and corporate transactions](#)" for further details in relation to this.
- iii. If a BVI or a Cayman Islands company has any direct or indirect interest in any land in the BVI or the Cayman Islands, material stamp duty may be payable in connection with a transfer of its shares. Please refer to paragraph 4 of our guide entitled "[Avoiding BVI law and Cayman Islands law pitfalls in banking & finance and corporate transactions](#)" for further details in relation to this.
- iv. From time to time, the acquisition agreement may contain a representation from the seller which provides that a restrictions notice has not been issued by the registered office service provider of the Cayman Islands target company with respect to the sale shares. A restrictions notice may be issued by the registered office service provider of a Cayman Islands company to a shareholder in connection with his/her/its shares if certain requirements of the beneficial ownership regime have not been complied with. The consequences of a restrictions notice include, among other things, that a transfer of the relevant shares is void and that no rights are exercisable in relation to the shares. A restrictions notice may be withdrawn where the underlying obligation is complied with, there was a valid reason for failure to comply with a notice or the rights of a third party in respect of the relevant shares are being unfairly affected by the restrictions notice.



4. Conditionality and share transfer deliverables

We have recently seen the list of conditions precedent (“**CPs**”) becoming shorter on APAC M&A transactions despite the more buyer-friendly environment. Traditionally, the list of CPs on APAC deals has been longer than the standard short, legal and regulatory focused CPs in more developed markets which demonstrates a willingness among Asian parties to accept more execution risk.

From a BVI and a Cayman Islands legal perspective, we have not recently seen any material changes to the CPs and share transfer deliverables that are customarily provided in an M&A transaction. These items are relatively standardized and typically include the following documents:

- i. the constitutional documents, statutory registers and all books and records (including financial and accounting records) of the target company;
- ii. a fully executed share transfer form with respect to the sale shares in the form prescribed by the relevant target company’s M&AA;
- iii. duly executed resolutions of the board of directors and shareholders, if required, of the target company approving, among other customary matters, the transfer of the sale shares, the updates to the company’s register of members and the cancellation and issuance of share certificates (to the extent that share certificates have, or will be, issued);
- iv. a certified, updated copy of the target company’s register of members showing the purchaser as the holder of the sale shares; and
- v. new share certificates and evidence that the existing share certificates have been cancelled (to the extent that share certificates have, or will be, issued).

Additional documentation may be necessary if the parties agree to undertake other key actions as part of the closing process, such as changing the board of directors and/or the registered office service provider or registered agent (as applicable) of the target company. In addition, to the extent that the target company’s M&AA (or any agreements to which the target company is a party) imposes additional requirements in relation to a transfer of shares, this needs to be factored into the list of CPs to be provided.

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