



WRITING ABOUT A RARE M&A MODEL - TRANSFER OF ALL SHARES BUT NOT ATTACHED TO EMPLOYEES AND CUSTOMERS IN THE SALE TRANSACTION OF NAM HAI DINH VU PORT OF GEMADEPT

1. Practice of M&A transaction models in the market:

Mergers and acquisitions, widely known in Vietnam as M&A – short for "Mergers and Acquisitions". M&A is a very broad concept, covering almost every field, every aspect of corporate law, investment, finance, accounting. Vietnamese law does not have an official or uniform definition, explanation or guidance on M&A; however, from the practical experience of ATA Legal Services, usually, an M&A transaction is carried out according to one of the following models:

1.1. Firstly: Purchase a part or all of the shares/contributed capital in the enterprise and receive back respectively all rights and obligations arising from production, business, administration, and administration activities of the enterprise corresponding to the shares/contributed capital repurchased

In Vietnam, this practice is popular and prioritized by many businesses. The transfer/transfer of shares/contributed capital in this structure is carried out through contracts or stock exchanges; accompanying the transfer of shares/contributed capital, rights to operate the business, management rights for internal affairs of the enterprise, the right to manage people, asset management at, etc.,. At the acquired enterprise will also be transferred under shares. The level of governance and powers of the transferee shall be determined in proportion to the number of shares/contributed capital to be transferred/transferred.

This practice is preferred because in principle it will minimize legal disturbances in the enterprise's organizational model and structure, at the same time, there is less needed to carry out change procedures, record changes at competent State agencies

and not affect too much the contingent of employees at the purchased enterprise/ sell. Usually, the acquirer will replace the seller directly or appoint his/her representative to participate in the process of managing and operating production and business activities of the enterprise since inheriting the status and results available at the enterprise. The enterprise continues to maintain licenses, contracts, agreements entered with third parties, including labor contracts with employees previously.

1.2. Second: Purchase assets of the target enterprise

In this structure, the target business will transfer its assets to the buyer. Common types of assets traded include investment projects, land use rights, ownership rights to factories, production machinery/equipment, and intellectual property rights (such as trademarks, inventions, and utility solutions, etc.,). According to this structure, the transfer of ownership of assets is zoned within the scope of transferred assets, excluding and not accompanied by the transfer of the right to operate the enterprise, the right to govern the internal affairs of the enterprise, the right to manage people, asset management, etc., at the target enterprise (in other words, the transferee is only entitled to receive ownership of the property and no other rights of the enterprise).

In this practice, parties in M&A transactions will have to go through procedures to record the "name transfer" of assets. In some cases, such as project transfer, land use right transfer, license transfer, etc., these procedures will be quite complicated, and the

transferee may have to meet many conditions as prescribed by law to achieve ownership/use rights for that asset.

1.3. Third: Implement one of the forms of enterprise restructuring (reorganization) according to the Enterprise Law: merger, consolidation, division and separation of enterprises

The contents, methods, order, and procedures for merging, consolidating, dividing, and separating enterprises are specified in Articles 198 to 201 of the Law on Enterprises in 2020. However, with the legal framework still quite general, at the same time, due to the complexity of the procedures as well as the complexity from the consequences of procedures due to the loss or formation of more businesses, along with a lot of procedures, records and work arising, so in fact, investors are less likely to choose this model.

Overall, the form of restructuring under the Enterprise Law is an advanced combination of both models mentioned above. Accordingly, when carrying out the procedures, 2 procedures will take place in parallel: (i) procedures for "changing the name" of shares/ contributed capital, shareholders/ capital contributing members

(shares/ contributed capital of the merged / consolidated / divided / separated company will be replaced by shares / contributed capital of the merging company/ consolidating company/ following formed companies when dividing/separating; At the same time, shareholders/ capital contributors of the merged/ consolidated/ divided/ separated company will become shareholders/ capital contributing members of the merged company/ consolidating company/ companies formed after division / separation) and (ii) procedures for "name transfer" for assets (assets of the merged / consolidated / divided / separated company will be "transferred to" Name "for the merged company/ consolidated company/ companies formed after division/separation). To complete a corporate restructuring transaction in one of the forms above, enterprises and parties to the transaction will need to implement a lot of procedures and work. After completing the transaction, the merged / consolidated / divided / separated company will lose, all rights and obligations to assets, contracts, partners, employees, etc., of that company will be succeeded by the merged company/ consolidating company/ companies formed after the division / separation.

2. M&A transaction Nam Hai Dinh Vu by Gemadept

As mentioned above, the transfer of shares without employees and customers of Gemadept in Nam Hai Dinh Vu is a rare and rare case in the market. According to Gemadept's Board of Directors, all employees and customers of Nam Hai Dinh Vu will be transferred to Nam Dinh Vu Port – considered as phase 2 of Nam Hai Dinh Vu Port to ensure the operation of Nam Dinh Vu

Port can be ready for deployment without any obstacles. Gemadept assesses that the transaction brings many benefits to the parties involved.

So is this transaction really beneficial for Gemadept, Nam Dinh Vu and in order to do it, what will Gemadept, Nam Hai Dinh Vu and Nam Dinh Vu need to pay attention to, what works need to be carried out to ensure

the interests of the parties in the transaction as well as related parties? ATA Legal Services will discuss further below:

First: Is the transaction not customary but in accordance with the law?

Here, it is necessary to separate 2 clear entities in the transaction to understand the rights and obligations of each entity: 1. Gemadep entity as a shareholder/share owner of Nam Hai Dinh Vu; 2- Subject Nam Hai Dinh Vu – the enterprise is the subject of M&A transactions.

For Gemadep, as a shareholder, the Enterprise Law allows Gemadep to have rights and obligations, including the right to transfer part or all of its legally owned shares. Thus, when Gemadep has fully contributed capital in accordance with the law and has full ownership of shares in Nam Hai Dinh Vu, Gemadep can completely transfer these shares to a third party.

However, for employees and customer issues, these are 2 contents under the competence of the business and not of shareholders. Specifically, employees will sign labor contracts and customers will sign service contracts with Nam Hai Dinh Vu. The rights and obligations of employees, customers and Nam Hai Dinh Vu will be governed by the respective contracts. Particularly for employees, the rights and obligations may be further adjusted by the Internal Labor Regulations, the Collective Labor Agreement and other documents of the enterprise that have been issued and applied in accordance with regulations. With the situation posed by Gemadep, Nam Hai Dinh Vu will be forced to carry out procedures to terminate labor contracts with employees and terminate service contracts with customers. This whole process will become legal, in accordance with the law and with the signed contract, when the affected employees and customers have agreed/agreed to terminate

the contract with Nam Hai Dinh Vu and accepted the transfer of rights and obligations of Nam Hai Dinh Vu to Nam Dinh Vu.

Thus, basically, the transfer of shares without Gemadep's employees and customers in Nam Hai Dinh Vu is completely possible when all employees and customers approve.

Second: What conditions are needed for Gemadep to "retain" and "transfer" employees and customers to Nam Dinh Vu?

Considering the provisions of labor law and civil law of Vietnam, based on basic principles of contract performance, according to ATA Legal Services, in order for Gemadep to retain employees and customers of Nam Hai Dinh Vu for transfer to Nam Dinh Vu, the parties to the transaction must meet the following prerequisites:

(i) Nam Hai Dinh Vu will have to reach an agreement on the termination of the labor contract with all employees and the termination of the service contract with all customers and Nam Dinh Vu will reach an agreement on signing a new labor contract with all employees of Nam Hai Dinh Vu and signing a new service contract with all customers of Nam Hai Dinh Vu. The process of negotiating and reaching this agreement will have to be carried out and reached before Gemadep signs a contract to transfer shares of Nam Hai Dinh Vu to the purchaser of the shares;

(ii) Nam Hai Dinh Vu must ensure insurance, labor benefits for employees and benefits for customers at the time of termination of the corresponding contract;

(iii) Nam Dinh Vu must ensure to inherit, not change or reduce any rights or increase any obligations in the contract that employees or customers have previously entered into with Nam Hai Dinh Vu;

(iv) The entire "transfer" process must involve the simultaneous participation and coordination of both Nam Hai Dinh Vu and Nam Dinh Vu so that the interests of Nam Hai Dinh Vu's employees and customers are not interrupted.

Third: The difficulties and consequences that the parties in the share purchase and sale transaction must face and handle to enter into the contract and complete the transaction

Because the transaction is in a non-conventional form, the parties certainly must develop a very detailed plan and roadmap to solve all relevant issues. However, employees or customers are all "unselfish" subjects of the business, so certainly, even if there are plans and roadmaps, their implementation will not be easy. In principle, employees and customers of Nam Hai Dinh Vu have the right to refuse the offer to terminate the current contract and transfer to Nam Dinh Vu. This will force Nam Hai Dinh Vu to continue to comply and perform the signed contracts.

Even if employees and customers have agreed, the transfer will face difficulties and consequences, which can be clearly seen:

(i) How to ensure benefits for employees, especially with benefits calculated according to seniority, according to the performance of labor contracts?

(ii) How to ensure the interests of customers, especially customers who still need to continue using Nam Hai Dinh Vu's services?

(iii) What is the plan to settle benefits for employees and customers who agree with the transfer to Nam Dinh Vu but with additional

conditions such as extending the transfer period or increasing benefits in the new contract?

(iv) Nam Dinh Vu itself is a company established later, Nam Dinh Vu Port has just started to open, put into operation compared to Nam Hai Dinh Vu has had a previous operation time, revenue and market share are more stable, not to mention the experience and strengths of new shareholders, In terms of the balance of forces, it can be seen that there is a tilt of the balance in favor of Nam Hai Dinh Vu in terms of strength. Therefore, to reach an agreement with employees and customers on the transfer to Nam Dinh Vu, Gemadept and Nam Dinh Vu themselves will have to "compensate" with more favorable policies and higher incentives. This invisibly adds pressure and difficulties for a new business like Nam Dinh Vu.

It can be said that the transaction of transferring shares but retaining Gemadept's employees and customers briefly can be said to be a profitable and simple transaction. However, the implementation of this transaction will be very difficult, and need to solve a lot of related and may arise. Therefore, in our opinion, these transactions should only apply to cases where enterprises subject to M&A have a small number of employees and customers, and at the same time correlate forces between enterprises subject to M&A and enterprises receiving employees, Customers do not spread too much to avoid the case of having to "offset benefits", causing more difficulties for the parties to the transaction.

ABOUT US

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