IR GLOBAL | ACC Association of Corporate Counsel

The Art of Deal Making: Using External Expertise Effectively

IR Global members collaborate with the Association of Corporate Counsel (ACC) to offer jurisdiction-specific advice on using external expertise effectively. In the following pages, you will hear from professionals in the legal, accountancy and financial sectors who are key to ensuring that an M&A deal is successful providing all parties seek the right advice.

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IR Global – The Future of Professional Services

IR Global was founded in 2010 and has since grown to become the largest practice area exclusive network of advisors in the world. This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

Multi-Disciplinary
We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

Niche Expertise
In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area ensuring the very best experts are on hand to assist.

Vetting Process
Criteria is based on both quality of the firm and the character of the individuals within. It's key that all of our members share a common vision towards mutual success.

Personal Contact
The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

Co-Operative Leadership
In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

Ethical Approach
It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

Strategic Partners
Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.

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FOREWORD BY EDITOR, ANDREW CHILVERS

The Art of Deal Making: Using an M&A strategy to power business growth

For ambitious companies eager to expand into overseas markets, often the conventional route of organic business development is simply not fast enough. The other option to invest in or buy a business outright is far quicker but often fraught with unforeseen dangers. And even the biggest, most experienced players can get it badly wrong if they go into an M&A with their eyes wide shut.

If you search for good and bad M&As online the Daimler-Benz merger/acquisition with Chrysler back in 1998 is generally at the top of most search engines on how NOT to undertake a big international merger. Despite carrying out all the necessary financial and legal measures to ensure a relatively smooth deal, the merger quickly unravelled because of cultural and organisational differences. Something that neither side had foreseen when both parties had first sat down at the negotiating table.

These days the failed merger of the two car manufacturers is held up as a classic example of the failure of two distinctly different corporate cultures. Daimler-Benz was typically German; reliably conservative, efficient, and safe, while Chrysler was typically American; known to be daring, diverse and creative. Daimler-Benz was hierarchical and authoritarian with a distinct chain of command, while Chrysler was egalitarian and advocated a dynamic team approach. One company put its value in tradition and quality, while the other with innovative designs and competitive pricing.

Indeed, when you cast your eye over the two companies its mind boggling that either car maker could ever have seriously considered an M&A. Neither sets of managers trusted each other and as the two sides started on the long road of organisational integration, key employees resigned, particularly at Chrysler after Daimler started to dictate working processes. What was the cost? An estimated $38 billion.

Unbelievably, the failure rate of M&As – domestic and international – is estimated to be about 70% or more, according to the Harvard Business Review report. This remarkably high number would have most companies probably concluding that organic business development was the better option for growth after all. No organisation would knowingly want to spend so much time and effort simply to fail – and fail badly.

It's worth noting that integrating two companies, along with their staff, distinct corporate and national cultures, IT infrastructure, and financial and legal regulations is something that needs meticulous planning. Without a clear strategy from the very start of the merger process, it's probably doomed to failure. There needs to be transparency between stakeholder groups and both parties need to have the soundest financial and legal advice from professionals who have deep understanding of national and international M&As.

But before everyone shuts up shop and admits their merger blueprint is destined for the waste paper bin, it's worth looking at this in a little more detail. Above all, be positive.

The majority of M&A failures are publicly traded deals, where losses are eye watering and journalists are eager for a good story. Again, any search on Google will highlight countless high-profile merger failures, but it's far more difficult to unearth the thousands of smaller and mid-market privately run businesses that undertake successful deals, which largely go unreported. These smaller, strategic acquisitions tend to have far greater long-term success.

M&As at the smaller end of the market are never going to be risk free, but they're often a successful tool for powering growth for a business within and across borders. All business initiatives involve risks to reap rewards, but careful planning and using the right professionals for the right part of the transaction will help to minimise risk and ensure the deal is a success.

M&As are regulated in countries across the globe – as you'll see in the following pages, all countries have detailed financial and legal regulations regarding mergers. Tapping into the professionals who understand these issues is vitally important and will help ambitious companes take advantage of business opportunities globally. Some of the advantages of M&As include:

- Tax breaks
- An opening in a new market
- Easier access to skilled labour
- Diversifying a company's portfolio
- Better access to a larger market, and not forgetting that
- Merging is cheaper than setting up in a new jurisdiction.

Despite the Covid-19 pandemic, and despite a slowdown in M&A activity globally, all the indications are that corporate strategists remain determined to use M&As as a means to grow their businesses and access new markets going forward.

In these pages, you'll find a wealth of information from professionals in the legal, accountancy and financial sectors who are key to ensuring that an M&A deal is successful, providing all parties seek the right advice. From warranties and indemnities to IP due diligence and deal financing, IR Global's deal making experts answer questions that ambitious CEOs and business development managers need to understand if M&As are to play a key in their future growth and success.

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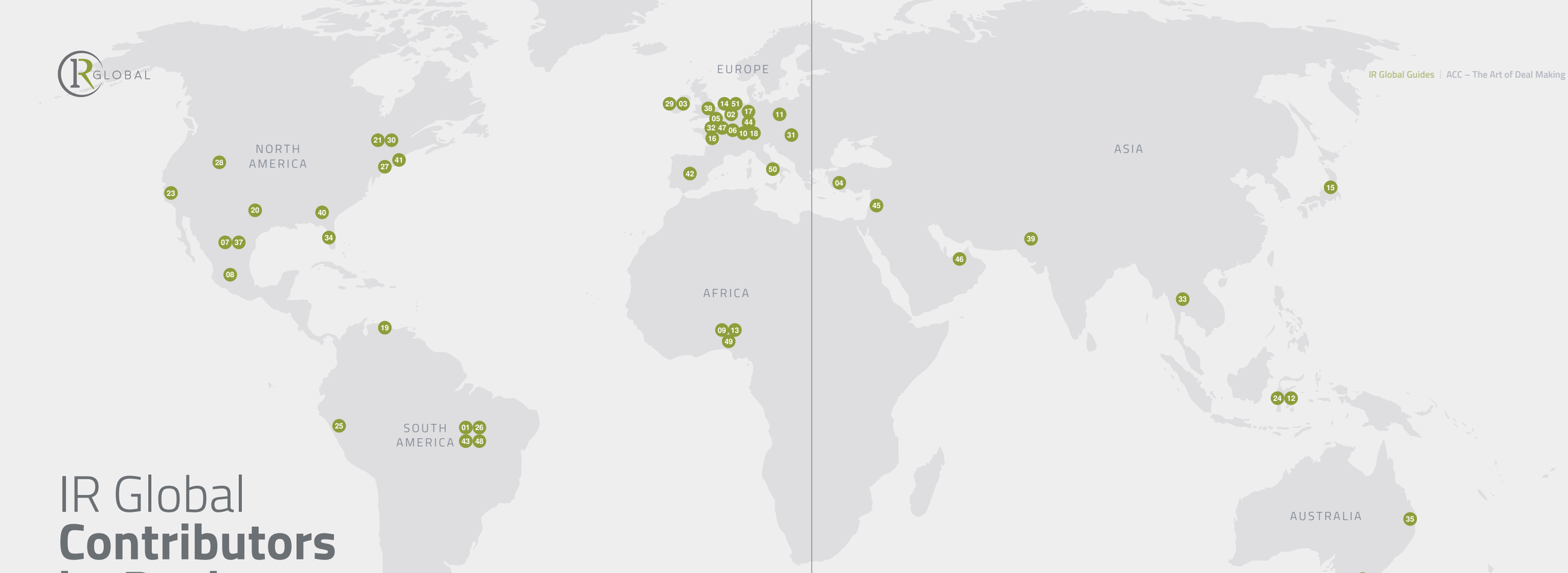

IR Global **Contributors by Region**

M&A Law

Employment

IP

Real Estate

Disputes

M&A Advisory

Tax

M&A Law

IR Global Dealmakers are highly valued members of the network. If you or your clients are looking for acquisition targets, partners, or someone to purchase your business then we offer unrivalled access to a huge cross-border pool of global connections. The Dealmakers involved in the IR Mergers & Acquisitions group are networkers, who help strategically advise clients on their development by creating opportunities, making new connections, and joining the dots.

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Adriano Chaves specialises in M&A, corporate law, foreign investments, technology and data protection. He graduated from the University of São Paulo and concluded his LL.M. at Columbia University School of Law in New York, where he was a Harlan Fiske Stone Scholar.

He is recommended by reputable publications (Chambers Latin America, Leaders League, LACCA, Análise Advocacia) and is co-rapporteur of the task force on B2C General Conditions of the Brazilian Chapter of the Commission on Commercial Law and Practice (CLP) of ICC and a member of its Commission of Digital Economy.

Martim Machado is a founding partner of CGM Advogados and a lawyer with over 25 years of experience representing international companies and their Brazilian subsidiaries in connection with a variety of legal matters in Brazil. He specialises in corporate law, commercial contracts, foreign direct investments and M&A. Martim is a graduate (LL.B.) from the Catholic University of São Paulo Law School – PUC/SP and holds a Master of Laws degree (LL.M.) from Georgetown University Law Center in Washington, D.C. Prior to founding CGM, Martim was a partner at major Brazilian law firms, an attorney with the Inter American Development Bank – IDB in Washington, D.C., and a foreign associate at Mayer, Brown & Platt (currently, Mayer Brown) in New York, NY.

CGM was founded in September 2014 by an experienced group of partners who had already worked together for more than two decades and were joined by other partners coming from reputable law firms. Despite its youth, the firm already enjoys strong client and market recognition and is acknowledged in important international publications and rankings. CGM focuses on solving its clients' issues in a timely, efficient and business-oriented manner, with technical expertise and creativity. The firm has a team of professionals who graduated from leading law schools in Brazil, many of whom have also obtained masters degrees and other qualifications abroad, and have worked outside of Brazil.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

In M&A transactions in Brazil, the sellers' liability is not necessarily or solely tied to breaches of representations and warranties. In fact, representations and warranties are used in Brazil less often as a risk allocation tool and more frequently as a disclosure mechanism.

In a typical Brazilian M&A contract, sellers are usually required to indemnify buyers for any losses resulting from facts or events occurring prior to the closing date, even if such facts or events were known to buyers and there was no breach of representations and warranties. This far-reaching indemnity affords buyers a key, "clear-cut" protection against most of the risks they face in Brazil (particularly labour and tax-related risks), which puts it amongst the most valuable indemnities of the contract.

However, that does not mean that indemnities associated with breaches of representations and warranties do not make their way into transaction documents. Normally, M&A contracts in Brazil also require sellers to indemnify buyers for breaches of representations and warranties. But there is no doubt that such indemnity is less relevant than the more comprehensive indemnity related to losses resulting from facts or events occurred during the pre-closing period.

The fact that representations and warranties play a less relevant role for indemnity purposes does not mean that they can be overlooked in Brazilian M&A transactions. Representations and warranties are also important as a disclosure tool since they compel sellers to reveal information on their businesses. In this context, representations and warranties on employment and tax matters are perhaps the most valuable ones in Brazil. Owing to Brazil's very strict labour laws and complex tax laws, labour and tax problems are frequently not only the most common, but also the most material ones to be dealt with by parties in M&A transactions. Therefore, well-crafted, detailed representations and warranties covering these matters are a must in every M&A contract in Brazil.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

The traditional financing methods, such as private placements, asset finance, mezzanine debt, are available in Brazil in the context of M&A transactions. However, transactions that rely on them are not the norm in Brazil, particularly in the middle market. Leveraged buyouts, which may be more typical in more mature and larger markets such as the US and Western Europe, are not as common in Brazil. That has to do with the relatively small size of most M&A transactions, many of which involve family-owned/controlled companies, and the characteristics of the Brazilian financial market, which is highly concentrated (there are very few large banks operating in the market) and focused on more traditional banking products and services. In view of that, the most common way of financing M&A transactions in Brazil is by implementing payment in instalment schemes and/or earnout arrangements, which must be negotiated and agreed between sellers and buyers on a case-by-case basis.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Private equity players are usually well-capitalized and tend to have more appetite for risk, which makes them more prone to invest in businesses that may not be thriving, but are perceived by them to have great growth potential and be capable of yielding good returns. The Brazilian market has many companies that fit that profile and could benefit from private equity investments. For that reason, private equity has played – and is expected to continue to play – an important role in the context of M&A transactions in Brazil.

Private equity players often acquire minority ownership interests (less than 50%) in the companies in which they invest and sometimes do so through preferred shares and/or convertible debt instruments that put them in a more advantageous legal position vis-à-vis the controlling shareholders. However, they normally seek and obtain economic and political rights (through shareholders' agreements and other means) that are no worse than the ones held by the controlling shareholders, which may have much more at stake. Private equity players tend to interfere in all major decisions and be very active in the management of the companies. Accordingly, the cheaper capital, the expertise, and the credibility that private equity players bring to businesses come with a cost to controlling shareholders: less control.

Furthermore, private equity players operate under investment goals that always contemplate an exit strategy (through an IPO or a sale of the business to a well-established market player). Accordingly, their investments usually have an expiration date. This is not always a problem, especially if the controlling shareholders have similar goals and/or see the private equity players as "medium-term" partners that are capable to leverage their businesses. But in certain situations the involvement of private equity players in the day-to-day management and their different vision of the paths to be pursued by the companies they invest in could lead to tensions and even disputes with the controlling shareholders.

Top Tips – For A Watertight Contract

- From a legal standpoint, a contract will have greater chances of being "watertight" if it (i) takes into account the peculiarities of the transaction (i.e. the characteristics, interests and goals of the parties, and the complexity and materiality of the various risks identified during due diligence) and (ii) translates them into terms and conditions that give the parties the right economic incentives to behave as expected.
- Payment terms, conditions precedent, representations and warranties, closing actions, post-closing covenants (including non-compete provisions) and indemnities (including indemnities dealing with labour and tax issues and provisions regulating the right of the parties in connection with the defence of third party claims) will differ depending on whether the buyer is purchasing shares or assets, or a majority or minority stake.
- M&A transactions are complex and intense and it is natural that, during their negotiations, sellers and buyers will constantly seek opportunities to obtain advantages for themselves in furtherance of their own interests. But this drive must be tamed. The negotiation process is not about winning or losing, but about bridging gaps and building fruitful relationships.

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At Synergy Business Lawyers we aim to solve problems and think in and outside the legal box. We synergize our legal knowledge with understanding your business, on both the national and international level. This synergy adds value to your enterprise.

Educated in Israel, the US and Amsterdam, I am a member of the New York and Israel Bars, and an international lawyer since 1986. I have lived and practiced law in the US for years, based in Amsterdam since 1991, and co-managing our Israel office since 1998.

My experience lies with cross border transactions, helping clients and colleagues bridge the legal culture gaps. I have done transactions and acted for clients in all parts of the world and in numerous industries: technology, pharmaceutical, real estate, energy, finance, various manufacturing and more.

My network of colleagues and friends is widespread, and my practice concentrates on seeking practical solutions in complex environments. I look for the joy of the practice and the position of win-win solutions that bring parties together, while using creativity and out of the box solutions.

Synergy Business Lawyers is a boutique corporate law firm based in Amsterdam. We provide legal services for international businesses in the broadest sense. From real estate and commercial contracts to mergers and acquisitions, from employment law to litigation and arbitration. With a long record in international business law, mainly in the Netherlands, the EU, the US and Israel, Synergy Business Lawyers can assist you in all legal aspects related to international commerce, whether it is hi-tech, green energy, real estate or manufacturing.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

The most important warranties that should always be negotiated into the contract are balance sheet, tax and information warranties. These should be combined with no limit indemnity for any tax claims. These warranties combined with a sound indemnity address the main issues that come up in transactions. Indemnities are the most heavily negotiated part and the heart of the legal issues. Limitations are common practice, and we advise for flexibility according to the importance of the warrantees. Insurance of warrantees may be a good solution in some cases and is becoming more common.

Due diligence is an important tool for assessing whether the transaction should be concluded, to determine whether the economics of the transaction are acceptable and what terms and type of warranties and indemnities should be negotiated. However, relying too much on warranties and indemnities may create a false sense of security. Claiming under warranties and indemnities is not always possible due to time and money limitations that may apply, liquidation or bankruptcy of the seller or other defences potentially available to the seller. This does not make warranties and indemnities not useful – they offer protection and are a good tool for obtaining information from the seller prior to signing the contract.

We emphasise to clients that warranties and indemnities can never replace the value of a well conducted due diligence into the target company and that a buyer must know or learn in-depth about the target he wants to acquire. This means, in addition to well formulated warranties and indemnities, performing comprehensive due diligence that focuses on the legal, financial and tax side, as well as on the commercial side by interviewing management, suppliers and other key parties. In such processes valuable information can be obtained, often information that is not freely disclosed by a seller.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

Financing methods typically used in the Netherlands mainly consist of large tranches of senior bank debt possibly in combination with junior shareholder loans, high-yield notes and/or debt instruments provided by the seller. Other methods of financing, such as mezzanine debt and privately placed bonds, also occur on a smaller scale. An often noted down side of using mezzanine debt is that the providers usually demand a significant piece of the equity that adversely impact your envisioned return on investment and may create a conflict of interests in maximising long- or short-term returns on investment.

The financing market in the Netherlands is dominated and served largely by Dutch banks working with standardised loan documentation and subject to strict know your customer requirements. The financing market can be described as conservative. This means that, especially for foreigners wanting to invest in the Netherlands, it is advisable to prepare well in advance a financing bid and ensure your relationships with the banks and other lenders are established well in advance. This will significantly improve your chances of obtaining financing as swiftly as possible and prevent any unwanted delays in the acquisition process.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

The Netherlands offers a very open and attractive climate for private equity firms. The big international private equity firms are very active in the Netherlands. In addition to all international private equity players, Dutch pension funds are also an active investor in the Netherlands.

The main advantages of using a private equity firm is their ability to execute transactions, expertise and professionalism, connections and proven track record. The main disadvantages are that private equity firms are mainly focused on cashing out over a short period of time and so you have a partner with a different agenda combined with the fact that you have to give up some degree of control.

Top Tips – For A Watertight Contract

- Know the industry and business environment you are dealing with, especially on a cross-border transaction. Consult industry experts on the commercial side and business culture in a new territory. You will save much by asking and learning before the transaction is made.
- Do not dwell on small contractual issues. Make a list of the most important issues that matter most.
- Be fair and transparent. Hiding information or a hidden agenda will eventually be counterproductive and only come back to haunt you. The best protection from litigation is a good and solid relationship developed with the other party. No lawyer or agreement can replace that.

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Gar initially qualified in New York in 2004. Specialising in M&A transactions, with a commercial background as General Counsel in technology and property companies, Gar now advises on optimum deal structures for both buy-side and sell-side. Gar has advised on a wide range of Irish and international corporations, financial recent transactions greater than €1 billion.

Patrick is a very experienced corporate lawyer and is a partner in the firm's corporate team. Patrick qualified in 2011 and, prior to joining Wallace Corporate Counsel LLP in 2018, spent a number of years working in Dublin's largest M&A corporate team. Patrick has advised on several high-profile public transactions in Ireland and regularly advises Irish and international clients.

Wallace Corporate Counsel LLP is a boutique Dublin-based law firm specialising in corporate and commercial transactions. Established by Sean Wallace in 2011, the firm has established a strong following in the corporate/commercial market.

The firm's clients range from start-up enterprises to public companies and cover a multitude of industry sectors, with particular focus in the technology, education, property, retail, food and beverage and health sectors.

Wallace Corporate Counsel LLP advises on the full range of corporate and commercial transactions, focusing in particular on mergers & acquisitions, capital raising (public and private) on the corporate side and joint ventures, trading contracts and licensing transactions on the commercial side.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

It goes without saying that the most important warranties in any transaction are fundamental warranties that relate to title and capacity. Beyond these, the value of a warranty or an indemnity will depend on the nature of the target business and what stage of its life cycle it is in. While certain warranties tend to feature in most warranty schedules, we place a lot of value on general compliance and accounting warranties as most issues that arise result from some failure in these areas. Acquirers in different industries will place increased emphasis on specific warranties applicable to those industries and it is important to understand the nuances of the target's industry when advising your client.

Whether representing a buyer or a seller, WCC start with a broadly similar warranty schedule albeit with different motivations. When representing a buyer, we will invariably add to the warranty schedule and breadth of certain warranties as issues arise during due diligence. When representing a seller in a competitive process, we tend to introduce a comprehensive warranty schedule to our client at the initial stages of the transaction to kick start a thorough disclosure process. We believe the benefits of doing this are numerous in that; (1) introducing a comprehensive warranty schedule facilitates early problem solving and reduces time spent negotiating warranties that are fair and the sellers are comfortable with; (2) it avoids the seller deal team being overwhelmed during a transaction while also tasked with running the business and; (3) it assists WCC to identify any issues that need to be resolved prior to sale or disclosed to the buyer. Our advice is to address any issues as early as possible in the process to avoid any price-chipping further down the process when a seller usually has less leverage.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

Mezzanine finance can be prohibitively expensive, so it is usually only considered when bank debt isn't available, or a borrower doesn't wish to secure tangible collateral. However, mezzanine finance is usually cheaper than raising equity as owners are required to give up less. For these reasons, we often see mezzanine finance complement other forms of financing such as bank debt and private placements when acquiring a business.

Since the onset of Covid, much of the M&A activity to date is being conducted by private equity funds or private equity-backed acquirers that typically finance their deals through debt and equity. There has also been increased activity in restructurings and acquisition of distressed assets, which are mostly financed through a mixture of private investment and debt as well as further asset-backed portfolio sales, financed from international banks and hedge funds.

Asset finance is the most common form of financing of larger deals in Ireland.

When structuring asset financing into a transaction, there are several important legal considerations that need to be considered. Naturally, understanding complex financial covenants and the borrower's ability to meet those covenants is paramount. Where an acquisition is being part-financed by debt and the assets of the target are used as collateral for the leveraged buyout, the target company will be required to approve the financial assistance of acquiring its own shares. This will require the directors of the target to provide a declaration as to the solvency of the target company for the succeeding 12 months; understanding the personal implications of making such a declaration and identifying the correct directors to make that declaration (i.e. existing directors, incoming directors appointed by the acquirer or a mixture of both) are important factors in any such transaction.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

There are several domestic private equity firms in the mid-market in Ireland. However, difficulties accessing debt financing means there are significant opportunities for international firms.

Due to a combination of macro- and micro-economic trends, the private equity sector is set for a significant increase in activity in Ireland.

After the banking crisis in 2008, banks and traditional sources of capital were risk-averse, although they were becoming less so in recent years. Private equity grew in prominence to fill the gap in funding during that time, with PE buyouts accounting for about 20% of M&A activity in Ireland in 2019. A side-effect of the Covid-19 pandemic has been that major domestic Irish banks have suffered losses again for the first time since emerging from the previous recession and look set to become more risk-averse again; this means the role of private equity in backing businesses is likely to increase.

In addition, unprecedented markets coupled with unpredictable events such as Brexit are likely to increase volatility and provide an opportunistic landscape for domestic and international PE funds in Ireland over the next couple of years.

Advantages of financing a deal using equity:

- Equity investor can bring a wealth of experience and commerciality to the business
- Strong potential for sellers to benefit from increased valuation where equity investor is a PE firm
- Target will have access to a healthy balance sheet and follow up funding.

Drawbacks:

- It requires control of a business to be shared. While this has its advantages, it is important to consider who you partner with
- Can be more expensive than debt because of minimum returns equity investor will seek.

Top Tips – For A Watertight Contract

- A comprehensive, detailed and non-generic Term Sheet will provide a roadmap for the parties to negotiate and agree the final contract and reduce the possibility for ambiguity on agreed terms.
- Clarity and certainty of language regarding closing conditions is critical to any deal. As we have seen with the Covid pandemic, circumstances can change drastically and very quickly so it is imperative that a counterparty cannot rely on ambiguous language in a closing condition to avoid completing.
- Simplicity of language and appended worked examples where the contract contains complex commercial provisions, such as earn-out consideration mechanics.
- Obtaining tax advice at an early stage (pre-Term Sheet) is key as it allows the parties to agree and implement any required tax structuring steps from the outset and build the necessary provisions into the agreements; this is more difficult to introduce at a later stage in a transaction.

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Before establishing his own law firm in 2000, Mr Guzeldere worked with some major companies in Turkey, including Pekin & Pekin, Herguner Bilgen & Ozeke and PricewaterhouseCoopers.

Throughout his professional career, Mr Guzeldere has advised a number of local and foreign corporations and banks (such as Citibank, former Turk Sakura Bank) regarding various aspects of Turkish Law. He has drafted and concluded numerous contracts as well as concluding privatisation deals including the block sale of NETAS Northern Electronic Telekomunikasyon A.S.).

Among these are setting up of a Hydroelectrical Power Plant (including Entek Elektrik Uretimi Otoproduktor Grubu A.S.), cross-border electrical energy sale and purchase agreements, merger aspects of BP-Mobil merger, project financing (including Izmit Bay Bridge Crossing Project), acquisitions (including but not limited to the recent sale of certain shares of Cimentas to Cementir) and a number of joint venture projects.

Guzeldere & Balkan is an Istanbul-based law firm offering a wide range of legal services to domestic and international clients since May 2000. It is a full-service law firm which covers all major practices including Corporate and Contract Law, Mergers and Acquisitions, Foreign Direct Investments, Competition Law, Intellectual and Industrial Property, Labor Law, Litigation and Debt Collection.

Our well-equipped team of lawyers has impressive credentials from leading Turkish and international institutions, experience across the spectrum of Turkish corporate and commercial law, and a client portfolio comprising leading Turkish and multinational corporations. As a result, Guzeldere & Balkan offers expertise in the automotive, media & entertainment, fast moving consumer goods, cosmetics, energy and natural resources, telecommunications, and technology sectors, among others.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

The warranties and indemnities that matter most to the sell-side and the buy-side are different from each other. The first and foremost important warranty for the buy side aims to ensure that the target company; (a) has provided all necessary documents during the legal due diligence conducted; (b) not breached any corporate, financial, tax, labour, environmental etc. rules; (c) has a balance sheet which is transparently reflecting the financial standing of the company and; (d) all legal and contractual obligations of the company have been fulfilled.

Finally, we may add, if one of the above is not true, the sellers will be responsible from the losses that may stem from such a breach. One very important task for the lawyer here is not only to make sure that the contractual undertakings are watertight, but also that they are and will be enforceable when necessary.

It has to be kept in mind that it may take years for any tax or contractual breach to surface and when they do, are we still going to be able to reach the sellers to claim compensation or whether or not such sellers will still have any assets that can be seized? For this purpose, if the sell side is no longer a shareholder in the company and if they do not have other businesses or large assets, then the buy side may have to think about certain securities to ensure that their prospective losses are compensated when necessary. Typically, there are less warranties granted to the sell side as the main contractual obligation of the buy side is to remunerate the purchase price of the share that mostly takes place simultaneously with the closing. In such situations, we encourage our sell side clients to gain a better understanding about the mid to long-term business plans of the buy side.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

In terms of financing a deal, acquisition finance from financial institutions is the most common way in Turkey. However, due to the restrictive nature of financial assistance rules in Turkey, debt financing is used on a very limited basis for share sales. Therefore, most of the acquisitions that are structured as share sales are based on equity financing and are in the form of straight equity.

Asset sales transactions often use debt financing structures in the form of senior debt. In a typical debt financing, the senior debt will be in the form of a term loan. In rare cases, this senior debt is combined with a relatively new structure: mezzanine financing. Even if the mezzanine finance is a new term of finance in Turkey, it is expected to be more commonly used in the future.

Additionally, payment-in-kind debt is also one of the preferred finance methods, which is only used in Islamic finance transactions, as Turkey is getting more attractive for southern investors.

With regards to security options, mergers may be disadvantageous compared to an asset acquisition, as the assets of the target cannot be used as security for the financing (with few exceptions), due to financial assistance prohibition. The typical exception is the pledge of shares of the target in an acquisition financing, but the shares are not the assets of the target.

Investors should also be reminded on prohibitions regulated under Article 380 of the Turkish Commercial Code, which regulates the maintenance of share capital and aims to prevent the circumvention of the share buy-back restriction, in which share buy-backs that exceed 10% of the capital are prohibited. It applies when; (i) Shares are acquired by a third party; (ii) Financial assistance is provided in favour of the buyer or; (iii) Financial assistance is provided for the acquisition of shares. This regulation, which creates a material obstacle on leveraged acquisitions and directly affects the future of acquisition financings in the Turkish market, is untested in the Turkish courts and there is no secondary legislation for the application of this provision.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Turkey has been and remains attractive for private equity ("PE") firms seeking to raise funds for investment, despite the economic turmoil that has affected Turkey, where a sharp decline in the value of the lira has fallen more than 30% against the US dollar and an inflation rate above 20%, and after the devastating effect of the pandemic. Private equity money is invested in new companies or startups that have significant growth potential, which contributes to the economic growth of Turkey.

On the other hand, Turkish PE funds are relatively new for Turkish laws. Due to the newly established domestic PE funds, foreign PE funds appear to be more active in Turkish M&As.

The most frequent method of investment for PE transactions in Turkey is to establish a Special Purpose Vehicle ("SPV") in a jurisdiction that is tax efficient, often offshore. These then acquire shares in Turkish companies directly or through a local SPV established by the offshore PE fund in Turkey.

Private equity investing has gained traction due to its history of high returns, which is not easily achieved through more conventional investment options. However, private equity carries a different degree of risk than other asset classes due to the nature of the underlying investments. This includes liquidity risk, since private equity investors are expected to invest their funds with the firm for several years on average, and market risk, since many of the companies invested in are unproven, which can lead to losses if they fail to live up to the early hype.

Top Tips – For A Watertight Contract

- Lawyers may draft watertight contracts and then the clients may find out that the contract is flawless but may fail to serve their needs to be fully secured in the transaction. Therefore, the lawyers try to adopt a 360-degree view of the entire picture. For example, being the lawyer of the buy side, we may fill the contract with all the necessary representations and warranties in favour of the buyer. But then, even years after closing, it may be understood that the target company had off-balance sheet liabilities, which could not be detected during the legal and financial due diligence.
- In certain cases I have even seen bad faith sellers issue promissory notes for post-closing dates that remain a ticking time bomb in the hands of the buy side and create destructive results. signals of the other side in the transaction in addition to ensuring that all legal precautions are duly taken.

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Michiel Pouillon holds a master's degree in law (KU Leuven - 2012) cum laude and a master's degree in financial management (Vlerick Business School - 2013).

Michiel joined Quorum Law in March 2017 and mainly focuses on corporate and commercial law. He advises clients on all aspects of M&A and restructurings. He has extensive expertise in corporate and commercial litigation as well as company valuations.

Michiel is registered as a lawyer at the Antwerp bar and is a native Dutch speaker. He handles cases in English and French as well.

Practice areas: mergers and acquisitions, private equity, venture capital, investments, start-ups, restructuring, shareholders disputes, corporate and commercial litigation.

Quorum is a boutique firm that provides specialised legal services to local and international companies, investors and governments, in the areas of corporate, M&A, PE, VC and tax.

The practice of the firm provides transactional, advisory and procedural services. Clients appreciate our responsive, specialised, effective and dedicated approach.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

The representations and indemnities ('reps and warranties') that are most valuable in an M&A contract depend on the nature of the deal.

In an asset deal, there are mandatory legal provisions providing protection for the buyer against things like hidden defects of the asset. These provisions also apply in a share deal, but do not address the underlying business, only the shares as the scope of said provisions is limited to the object of the transaction.

Hence, as a buyer, you are *a priori* better protected in an asset deal, whereas as a seller you have a priori more limited liability.

The object of the transaction, as well as whether you are on the buy- or sell-side, thus highly influences the reps and warranties' focus.

So-called basic representations are the most important. They address the valid incorporation of a company, the free and clear title to the shares and the capacity and authority of the seller to engage in the transaction.

In a share deal, a buyer expects compliance with applicable tax regulations (through tax representations or a tax indemnity) and a confirmation that the target's annual accounts present a true and fair view. If the company owns real estate, adequate reps and warranties regarding the ownership and state of the building and its compliance with urban and environmental regulations are a necessity.

Other than that, a warranty regarding the conduct of the business (stating that no events occurred that could potentially influence the business negatively and that it has been conducted as a going concern) for the period since the warranted accounts is a must. A final key warranty is that there are no contracting parties of the target that have the right to terminate or substantially alter their contractual relationship with the target company because of the transaction.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

The most common financing combination in Belgium is private equity combined with bank financing. A (whether or not subordinated) vendor loan has become increasingly common as well.

Financial assistance provides the opportunity to effectively make use of a target company's funds, thus lowering the financial impact (and risk) for the buyer. In Belgium, a target company used to be prohibited to advance funds, provide loans or provide security in a view of acquisition of its own shares by a third party. Today, however, financial assistance is allowed if several conditions are met, such as that the company has profits available for distribution (whereby the Belgian law definition complies substantially with Directive 2017/1132/EU) and that anti-money laundering procedures have been complied with (which are substantially aligned with Directive 2006/68/EC on the formation of public limited liability companies and the maintenance and alteration of their capital)). Although these provisions on financial assistance were alleviated as of 2009, they still hamper the structuring of acquisition financing.

A detailed acquisition finance structuring analysis is advised, considering that there are a number of risks and opportunities to be considered from a Belgian tax and company law perspective, such as:

- Belgian tax law does not provide a system of group relief relevant for M&A transactions, but a number of debt-push down techniques (e.g. step by step acquisition, leveraged dividend distribution, downstream mergers, etc.) are still regularly applied in close consultation with the financial institutions providing third party financing for the transaction
- Belgian tax law contains a very broad definition of tax-deductible costs, the specificities of which are filled in by a long legacy of court cases and jurisprudence.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Private equity is widely available in Belgium and is most commonly combined with bank financing or a vendor loan in the event of, for example, a leveraged buy-out as indicated earlier.

The advantages of private equity are that the investor (or in the case of a leveraged buy-out, the selling and reinvesting shareholder) is investing with his own money and has 'skin in the game'. The investment will consequently be closely monitored, thus increasing the chances of a successful investment. Private equity furthermore enables all parties to work towards a fully negotiated agreement, since all parameters can be altered inter partes whereas a financial institution for example will dictate the terms of the investment, thus limiting the possibilities.

The most obvious advantage of using equity is also the most obvious drawback: since the private investor will most likely monitor his investment; this often results in more complex governance agreements with veto rights, a specific quorum for certain decisions etc., often making the negotiations more complex.

Top Tips – For A Watertight Contract

- Create the right circumstances to enter into a deal: a professional contract in a professional process. It is common that an investor wishes to limit its costs for a deal. However, paying attention to the right details before entering into a deal will ultimately be the best investment.
- Drafting a transparent, 'simple' and balanced contract is key. All parties to the table need to be aware of what they are signing.
- Drafting a transparent, 'simple' and balanced contract is key. All parties to the table need to be aware of what they are signing.
- Notwithstanding the above, it is not uncommon that parties enter into more elaborate agreements. Since the principle of consensualism re. contract law is a basic principle in Belgium, this is perfectly possible if all parties understand the content of the agreement (no ambush drafting).
- Make sure the agreement foresees in realistic procedures and terms. It is better to include realistic procedures, such as a procedure for determining the amount of earn-out to be paid and reasonable timing.

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Urs is a partner at CAPELLE Rechtsanwälte. He has more than a decade of experience working on complex M&A transactions, and, due to his dual qualification as a German lawyer (Rechtsanwalt) and English Solicitor, he specialises in cross-border deals. He also has considerable expertise of company and group restructurings, and their tax consequences as well as in insolvency matters.

Urs obtained his diploma in European Law (University of Wales, Aberystwyth) in 1998 and a Bachelor of Law (University College London) in 2001. He completed the first state examination at the University of Passau and the second state examination in 2003 in Frankfurt am Main. He is a specialist English solicitor for business law and tax law, and became a Certified M&A advisor in Chicago in 2016.

CAPELLE Rechtsanwälte has its roots in the Firm of Dr. Capelle who founded his law office in 1949 and has – together with some of today´s partners – acquired an outstanding reputation as a law firm for medium-size and larger companies over more than 60 years. The representation of foreign clients and their German subsidiaries in Germany has been in the firm´s focus since its foundation.

The combination of its manageable size and the lawyer´s individual skills form the firm´s unique approach.

CAPELLE are experienced business lawyers who stand for the highest professional standards in their fields – individually and as a team. Every lawyer is certified in her/his field of practice.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

German law does not distinguish between warranties and representations. Rescission or termination are available for most breaches. However, there is an important distinction between two German law concepts: “Gewährleistung” is a statutory system of remedies, which can be contractually modified.

Some of these remedies are triggered only if the breaching party is negligent (or acting intentionally, which represents a higher level of responsibility under German law), while others are available even where the breach occurs with no negligence.

“Garantie” implies unlimited, strict no-fault liability on the part of the breaching party. Garantie and Gewährleistung can be translated into English as “warranty” and therefore additional wording is strongly recommended in contracts to avoid ambiguity.

Typical warranties refer to: corporate law issues of the seller and the target; the assets, liabilities and earnings of the company, financial statements; intellectual property rights; employment regulations, especially retirement plans and social security contributions; pending or threatened claims or disputes; compliance with laws, data protection, environmental issues; public permits. In addition to negotiating the scope of the individual warranties, buyers will ask for a blanket warranty on the correctness and completeness of the data room or even all pre-transaction disclosures, which sellers reject in view of the broadness of such a warranty.

Sellers try to limit their liability to actual or constructive knowledge of the incorrectness of warranties given, with a specification whose knowledge will be attributed to the selling entity. Attention should be paid to the burden of proof applicable to the prerequisites of a claim or the defence against it, which may be determined by the grammatical details of wording. As the German civil procedure system does not recognise the concept of pre-trial discovery, the proper setting of the burden of proof may be decisive in determining the success of a claim or defence.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

Germany is a very important country and often the engine for the European economy. M&A in Germany is at the same time a very local market but also a global business with international buyers.

According to studies by the Institute for SME Research, around 22,000 companies in Germany are looking for a successor every year. More than half fall back on external succession planning. However, in times of Basel III and economic uncertainty, bank lending is more restrictive than ever before. The payment of the purchase price is becoming a problem for some. A sensible solution in many cases is buyer financing: here the purchase price is paid not only via the buyer's equity and the banks' debt capital (which is sometimes only made available to a limited extent), but the seller also makes his contribution. Part of the purchase price can be paid from the company's current cash flow in instalments or, especially in the case of small companies, based on a pension. Performance-related payments based on certain key figures such as gross profit are also common. Tax advantages can be another plus point for buyer financing. Depending on the legal form of the company and the ownership structure, it can be more than attractive from a tax point of view not to receive the purchase price in one sum. The continued employment of the previous owner or the shareholders via consultancy contracts or the remuneration for their work on company bodies such as the supervisory board are just some of the tax-advantageous options.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Depending on the size of the company, private equity is available in Germany. As a rule, private equity transactions are financed largely by bank loans (so-called senior loan or senior credits). Frequently, the primary lending banks (so-called lead arrangers or facility agents) syndicate the loan for their part to minimise risk. In this way, the borrower's default risk can be partially shifted to other banks within a bank consortium. The term of a senior loan is regularly between seven and nine years. Revolving tranches for working capital can also be included in the senior loan.

In addition to the senior loan, company acquisitions by private equity companies are often financed by mezzanine financing or second-lien loans. In many cases the investment vehicle (AquiCo) is also granted additional shareholder loans by the private equity company to finance the acquisition. The advantage of a shareholder loan compared to a pure equity financing is that it can be repaid in a tax neutral way (profit distributions of the AquiCo are subject to capital gains tax and capital maintenance principles have to be observed). Moreover, the interest expense can be deducted as an expense for tax purposes to a certain extent at the level of an AquiCo.

Partial financing through debt capital is also typical in financing private equity transactions. The reason for financing the acquisition of a company with outside capital is, on one hand, the associated leverage effect. On the other hand, the interest expense associated with the borrowed capital is often tax deductible at the level of AquiCo as borrower.

The term "leverage effect" thus refers to the changing return on equity as the proportion of debt capital increases. The return on equity of a company is calculated by dividing the profit earned by a company by its equity.

Top Tips – For A Watertight Contract

- **Identify each party correctly**
  Include the parties’ correct legal names in the contract so it is clear who is responsible for performing the obligations and whom you have legal rights against if things go wrong.
- **Understand each party’s rights and obligations**
  Unless you understand the parties’ rights and obligations under the contract, you will not know when a party.
- **Have all the terms of the agreement in one place**
  The agreement should be in writing and, as much as possible, contained within the one document.
- **Clear contract structure**
  Make the basic contract structure clear to ensure that if things go wrong, and the parties can’t reach agreement, the agreement governing the relationship provides clear guidance.
- **Keep it simple**
  Use clear and simple language, create short, clear sentences and number paragraph headings.

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Adrienne Braumiller is the founder of Braumiller Law Group PLLC and an innovative force in international trade law. With more than 25 years of experience, she is widely recognized as a leading authority in Customs, import, export, foreign-trade zones, free trade agreements and ITAR compliance.

Adrienne has been involved in every aspect of import and export compliance, from developing compliance programs to conducting audits and assessments, representing clients who are under investigation and preparing and submitting voluntary disclosures. She's also involved in preparing and filing classification requests and licenses, analysing whether specific transactions should be pursued, providing tailored training on specific import/export topics, addressing penalty assessments, and serving as an expert witness in a number of trade cases.

Bob brings over 30 years of advertising and marketing experience to Braumiller Law Group, as well as Braumiller Consulting. He is responsible for all of the various marketing materials distributed to our client base on a regular basis, (as well as potential new clients).

After graduating from college, Bob began his marketing career with US Steel, Oilwell Division, in Dallas, and later started his own advertising business called RD Brewer & Associates. Bob was later recruited by Sabre Corporation as Director of Sales for Virtuallythere.com, the sister site to Travelocity.com. After 3 years with Sabre, Bob joined Braumiller Law Group in 2002.

Braumiller Law Group, PLLC, is a highly respected law firm focused on international trade compliance and proven strategies to optimize global trade business practices. The attorneys and trade advisors of Braumiller Law Group know exactly how to navigate the intricate maze of global trade regulations, and they have a successful track record for helping clients save millions of dollars in compliance penalties. These clients also leverage the expertise and experience of the Braumiller Law Group team to ensure that their global trade operations are legally structured to maximize efficiency and profitability.

What advice could you give potential clients on effective pre-deal planning?

Look carefully at the target's cross-border activities and whether the target has internal controls dedicated to achieving import and export compliance. In our experience, many import and export non-compliance issues are found after the deal is closed. A common issue area we often discover is deficient or incorrect product classification codes for customs duty assessment purposes, triggering not only a change in the regular duties applicable, but also the application of safeguard duties (such as the 25% additional tariff on certain Chinese origin products). These occurrences can result in millions of dollars in liability.

When you think of mergers and acquisitions, what are the highest risk areas that spring to mind?

While companies routinely understand and prepare for liability pertaining to tort litigation, taxes, and contract disputes, the same companies often overlook potential liability for violations of import and export laws. Unfortunately, this can prove to be one of the most expensive oversights made during a merger or acquisition due diligence review, as the penalties for import and export violations can be significant. Consequently, any such due diligence review should include an audit for potential import and/or export liability concerns. While the threat of "buying" import or export violations through a merger or acquisition is not new, the increased risk of acquiring or merging with a company with past violations remains high due to a number of factors, including the ongoing US trade war with China and the increased scrutiny on business with Huawei. A look at successor liability enforcement actions in both import and export contexts should clearly illustrate two critical points to companies: first, that successor liability is a concept that is alive and well in import and export law, and second, that enforcement agencies will not hesitate to employ the concept in issuing penalties for import or export violations.

Is there legal precedent for holding successors liable for the acts or omissions of predecessors in customs and trade cases?

Yes. One of the first cases to address the concept of successor liability in import laws was the 1989 case of United States v. Shield Rubber Corp. In this case, Shields Rubber Corporation was charged with violating several customs laws by removing country of origin markings. Shields Rubber Corporation had not actually performed these acts; rather, its predecessor company had removed the markings. Shields Rubber Corporation had merged with Shields Rubber Corporation II, and the successor thus protested it should not be liable for the actions of its predecessor. However, the U.S. Supreme Court found that the principles of merger law applied, and that the successor was liable for the violations of the predecessor. Even though this situation did not involve a sale of assets, it is important in case law history that it upholds the merger law doctrine.

In another key case, United States v. Adaptive Microsystems, the Court of International Trade (CIT), without even asking whether successor liability applies to import cases, found a company liable for the transgressions of the company it had acquired under the mere continuation principle. In this case, Adaptive Microsystems, LLC went into bankruptcy and was acquired by another company, which ultimately continued Adaptive Microsystems operations with the same name, and with the same employees. Although the board of directors had changed (except for one person, who retained a fraction of the stocks he had in the previous company and his position on the board), CIT found that these facts rendered the company similar enough to the previous company to warrant holding the successor liable under the mere continuation doctrine. As a result, Adaptive Microsystems, LLC was liable to the government for the unpaid duties of the former company.

How likely is CBP to pursue a company under successor liability?

In BLG's experience, there are certain factors that make it more or less likely that Customs and Border Protection (CBP) will pursue a claim under successor liability for import violations. These include variables such as the amount of the lost revenue to CBP (such as unpaid duties), public policy considerations including the type of harm caused by the violation, and the possibility of the violation recurring under the predecessor, to name a few. In one recent case handled by BLG, a successor company was being investigated by CBP. The company had bought the assets of the prior company, and the prior company had then dissolved. According to common law, this would be considered a de facto merger and the successor might be on the hook for paying the lost revenue. However, in this instance, the amount was relatively low such that CBP would spend more pursuing it than they would obtain if successful. In addition, the asset agreement included an absolution of liabilities and debt for the purchasing company. Given the factors of a low dollar amount and the agreement to absolve liabilities, CBP accepted the argument that successor liability would not attach.

How likely is BIS or Department of State to pursue a company under successor liability?

Successor liability is even more commonly seen in export cases. One of the seminal cases in export law is the Sigma-Aldrich case from 2002. In this situation, Sigma-Aldrich Corporation (SAC) and Sigma-Aldrich Business Holdings (SABH) had purchased the partnership interests of another company and transferred the assets to Sigma-Aldrich Research Biochemicals (SARB). Through an investigation after the sale, the BIS found that the acquired company had exported biological toxins without a license. BIS then charged the three Aldrich-Sigma companies with the violations under successor rules. The judge held that all three Sigma-Aldrich companies were liable for the violations of the predecessor company and assessed a $1.76 million fine to settle the charges against them.

What are the top tips to avoid possibly "buying" the customs and export violations?

We recommend taking the following actions, at a minimum, when conducting preliminary reviews:

Exports

- Review export compliance procedures to understand current compliance framework
- Review terms of sale and PO terms and conditions
- Analyze voluntary disclosures (both historical and current) and internal audit reports
- Review CJ decisions, CCATS determinations, and advisory opinions
- Review list of current licenses and agreements, including applications currently pending, and consider whether any need to be amended as a result of the merger or acquisition

Imports

- Review import compliance procedures, including C-TPAT security policies, to understand the current compliance framework
- Review foreign vendor/supplier agreements and PO terms and conditions
- Analyze prior disclosures (both historical and current) and internal audit reports
- Review binding Customs rulings and scope decisions

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John R. Colter-Carswell, the director and managing partner of the firm, has been practicing law in Mexico for more than 20 years and co-ordinating legal activities with outside law firms.

He has been the Legal Department Manager for Mexican conglomerates such as Grupo Pulsar, S.A. de C.V. and Fabricas Orion, S.A. de C.V., where he became involved in a variety of domestic and international legal aspects with respect to business transactions.

John has become a well-known, respected and a well-connected leader among legal, corporate, and government institutions and associations throughout the region. These include the Maquiladora Industry Association, local industrial chambers of industry and commerce, Federal and State Commerce Department, foreign investment governmental agencies, international promotion bank, American and

Canadian Consulates, British and Dutch commercial offices, industrial parks, among others.

Colter Carswell & Asociados is a law firm specialising in Corporate and Commercial Law. With more than 20 years' experience providing high quality legal advice to the most demanding national and foreign clients, the firm has accomplished an outstanding reputation among its competitors by following the principles of ethics and quality. With offices in Monterrey and Guanajuato, the firm is able to cover the most important industrial regions in the country.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

It all depends on how the M&A transaction is structured, but in Mexico the most common warranties are (i) mortgage and (ii) pledge type of warranties. The mortgage warranties are secured by real estate, a piece of land, buildings etc, and the pledge warranties can be secured by share certificates, machinery and equipment and similar assets.

At the most basic level, in Mexico there is normally an intent to negotiate such indemnification terms on the contract to provide the parties to a transaction with a streamlined means of seeking damages for issues that arise after closing. Generally, indemnification provisions address damages arising from breaches of representations, warranties and covenants. However, the buyer will often want to expand the scope of its indemnification protection to address losses that could arise from certain liabilities identified during the negotiation or the due diligence process, which would not otherwise be covered under customary indemnification for breaches of the representation and warranties.

In Mexico most M&A transactions are in the mid-market. To structure this kind of transaction it is customary to have what is called a Practice Management. They will be in charge of all the parties involved including M&A advisors, accountants, finance experts, attorneys and financial institution executives among others. These advisors will follow through all the processes, starting with due diligence and finally executing the agreements.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

The most common kind of financing a deal in our jurisdiction is through a private placement. Funding an M&A though mezzanine debt is not common; the rules are not particularly clear to operate such a deal, but some of these transactions are secured though a foreign financial institutions or venture capitalists.

In Mexico to have access to financing through traditional financial institutions – and for regulatory procedures – the client must have a good credit history, lines of credit and a proven source of repayment. There are strict mandatory requirements, also normally requiring warranties such as mortgage and pledge warranties to be registered and secured in favour of the financial institution during the time of the financing.

Real estate projects such as mixed-use buildings or industrial parks may have better conditions for funding because there are clear rules that involve trust agreements and fiscal facilities. Regarding asset finance, it's often difficult to raise funds for an industrial project, but for real estate projects this can be a good option.

With various alternatives available to finance an M&A transaction, the challenging issue is getting the appropriate mix of financing that offers the lowest cost of capital. Most important is how optimal the financing is and how well it aligns with the goals and nature of the business deal. It's vital to plan the acquisition financing structure to fit the actual circumstance of the project to be structured.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Private equity is available in our jurisdiction. This can be obtained through foreign financial institutions or venture capital institutions. Most have representative offices in Mexico providing adequate financial services to a wide variety of industries. Such private equity groups are used widely for group funds and investment companies that provide capital on a negotiated basis. This capital is primarily in the form of equity, likewise stock or equity certificates.

These private equity groups are usually managed by general partners with well-established corporate finance backgrounds and successful investment track records. Their partners are high-net-worth individuals, endowment and pension funds. They look for industry expertise, the amount already invested, transaction structure preference and return on expectations. But as stated, these transactions are not common because the complexity of the financial structures and terms and conditions.

Top Tips – For A Watertight Contract

- One of the principal steps during the process of structuring an M&A deal is to review the fiscal impact according to the type transaction, such as if the agreement is going to be through a (i) Shares and/or Equity Purchase, (ii) Assets Purchase, (iii) IT Purchase, (iv) Real Estate Purchase, among others or a combination of all of them.
- Conducting strategic due diligence across borders, managing cultural differences, integration across borders and establishing a clear organisational structure and lines of responsibility are difficult but critical to the success M&A deals.
- Comply with corporate organisational laws and corporate governance.
- Liability for layoffs without just cause, among others kind of liabilities.
- Non-compete clauses that may not be enforceable, this is very common in our jurisdiction according to our Constitutional Law.

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Simeon Oyakhilome Okoduwa (LLM, BL, LLB, ACArb.) is a Partner at Alliance Law Firm and heads the Intellectual Property, Media, Entertainment and Technology Practice Group. He is also a key member of the Commercial Advisory/Transactions and Dispute Resolution teams of the Firm where he represents domestic and international businesses and high-net-worth individuals on transactional and regulatory issues. These include capital raising; mergers & acquisitions; intellectual property, media, entertainment & technology; corporate restructuring; debt recovery & insolvency; doing business advisory; corporate governance audit & remediation, litigation and alternative dispute resolution. He is a registered capital market operator and maintains membership of several professional associations including the Nigeria Bar Association, International Bar Association and Nigeria Institute of Chartered Arbitrators. He is Vice Chairman of the Mergers, Acquisition & Corporate Reorganizations Committee, Nigeria Bar Association - Section for Business Law (NBA-SBL). He has authored several publications in peer-reviewed journals.

Gabriel is a Partner in Commercial and Corporate Law, and Dispute Resolution Practice areas in Alliance Law Firm. Gabriel's Corporate and Commercial practice cuts across areas, which include but are not limited to, banking and finance, project finance, capital market, corporate restructuring, equity and asset acquisitions, mergers & acquisition, corporate restructuring, private equity, telecommunications law, regulatory compliance, foreign investments, real estate transactions, labour/employment, intellectual property, energy, environmental, taxation, admiralty and maritime matters and general corporate practice. With his penchant for advocacy, he is also deeply involved in the Dispute Resolution and Arbitration department of the Firm where he has been involved as counsel in various litigations and alternative dispute resolution matters. He manages a large litigation, arbitration and alternative dispute resolution portfolio comprising top end regulatory, commercial, criminal, labour and election matters.

ALLIANCE LAW FIRM is a dynamic partnership registered under the laws of the Federal Republic of Nigeria.

Our mission is to establish a world class, full-service Nigerian law firm distinguished by its premium service.

We incorporate a rich blend of traditional legal practice with the dynamism required to satisfy the constantly evolving nature of business in our result-driven professional services.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

As you know, there are two main types of acquisitions of a limited company, namely a share sale or an asset sale. Due diligence exercises throw up areas requiring warranties and indemnities.

Most valuable warranties in M&A contracts include:

- Warranties relating to the legal standing and compliance status of the company being acquired
- Warranties covering the extent of contingent liabilities to the business could be exposed
- Warranties relating to the reliability and integrity of audited financial statements and the financial position of the company at the time of transaction closing.

Most valuable Indemnities include:

- Indemnity against the crystalisation of any contingent liabilities
- Indemnity against the imposition of regulatory sanctions or fines arising from poor or inadequate compliance standards
- Indemnity for any specific issue about which a purchaser is concerned as a result of the due diligence or disclosure exercises.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

Some of the ways by which deals may be financed in our jurisdiction include the following:

- Exchange of stocks
- Debt acquisition
- IPOs
- Cash payment
- Issuance of bonds
- Loans

In this jurisdiction, a merger or acquisition typically entails the first option, i.e. exchange of stocks. This financing option is preferred because the parties share risks equally, or almost equally.

With respect to raising funding through the debt route, bonds and loans come into play. While bonds enable an easy and quick way of raising of funds through current shareholders or the general public, it may have the drawback of having to await the bond's maturation before it could be utilised for the deal.

Direct debt from financial or other institutions on the other hand may be immediately deployed to finance a deal upon disbursement. However, interest rates are a primary consideration when funding mergers and acquisitions with debt because the costs of funds could quickly skyrocket and increase transaction costs. In an environment such as Nigeria, where interest rates have been in double digit figures for several years, it becomes a highly unattractive proposition for the parties, especially the buy side. Companies are well advised to build up an optimal capital structure before adopting this methodology for deal consummation.

From my experience, the advantages of equity finance include:

- It is a relatively cheap means of sourcing funding as opposed to, for instance, debt finance/bank loans, which require periodic servicing of accruing interest obligations; continuing costs are thus minimised.
- Investors are just as interested in the success of the business as subsisting shareholders and can introduce their skills, contacts and experience in enhancing corporate and shareholders' value.
- Where there are growth prospects and improved earnings, investors are more willing and able to provide additional funding for the business.

Disadvantages include:

- Raising equity finance could be time consuming and costly, while diverting attention, at least temporarily, from core business operations.
- Equity funding usually involves the loss of some level of control either in terms of power to make management decisions, i.e. voting powers, or in shares dilution i.e. smaller share of the business.
- It usually introduces the obligation to observe a higher level of legal and regulatory compliance and provision of regular information to investors which could prove quite cumbersome and costly.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

In Nigeria, investment into PE firms are mostly sourced from insurance companies, pension funds, financial institutions and high net-worth individuals.

In recent years, Nigeria has witnessed a surge in PE investments. In 2019, the African Private Equity and Venture Capital (AVCA) described Nigeria as one of the "most attractive destinations for PE investments. In 2019, PE in Nigeria recorded investments valued N277.64 billion ($767 million) between January and February, 65% of which was recorded on the Cocacola - Chi Ltd deal in 2019. Instructively, in contrast, 2018 recorded N62.27 billion ($172 million) in PE investments, thus making it an almost 345% increase in 2019.[1]" However, this growth could be stunted by the effects of the Covid-19 pandemic.

Top Tips – For A Watertight Contract

In drafting watertight contracts, it is advisable that parties include the following clauses:

- There must be an offer and an acceptance of the critical terms that regulate the rights and obligations of the parties and should, preferably, be in writing
- Consideration that indicates the value exchange generated by each party
- A dispute resolution clause that specifies the governing law and mode of dispute resolution between the parties
- Indemnities and warranties that address some of the concerns which may have arisen from the due diligence exercise
- The proper parties and execution. Parties should ensure that they have proper authority to enter and execute in law.

WICKI

ATTORNEYS-AT-LAW
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As a business lawyer and international industry executive, Balthasar Wicki has a wealth of experience in dealing with phases of growth, conflict and change. He also has extensive management expertise and specialist technical knowledge. Entrepreneurs and companies value his in-depth approach to business management, ability to understand complex economic issues, readiness to take responsibility and willingness to support others.

After his admittance to the Bar in 1993, Balthasar Wicki worked with Hilti Group as a Corporate Legal Counsel and then took on managerial positions in market development at various large industrial companies in India, China and Southeast Asia. When he returned from Asia in 2003, he was responsible for the successful repositioning of a major Swiss NGO/NPO and then, as CEO and co-investor (private equity financed), led a global industrial company through an existential crisis. He returned to work as an attorney in company and commercial law in 2008.

Balthasar Wicki and the experts of Wicki Attorneys-at-Law offer entrepreneurs and companies their extensive knowledge and experience for a new way to access company law during phases of growth, conflicts and change.

The experts at Wicki Partners Attorneys-at-Law have extensive expertise in business management, and adopt an approach based on our wealth of practical experience. The preservation of entrepreneurial freedom, a long-term perspective and the creation of robust solutions are our guiding principles in consulting and crisis management. This practical, understated and in-depth approach offers entrepreneurs, executives and companies the security they require during the turmoil and changes caused by rapid growth and times of crisis.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

In Swiss transactions there is generally a particular emphasis on reps and warranties regarding tax compliance and on hold-harmless clauses regarding later restructuring activities. This is a result of the pecularities of the Swiss tax system, which stipulates personal liability of members of the board for certain types of taxes and dues and may also stipulate follow-up tax effects on the seller depending on later restructuring transactions concerning the target. In Switzerland, an opinion on expected tax effects of a transaction can be submitted to the tax authorities ahead of a transaction, and the tax authorities provide a binding opinion (a so-called ruling) prior to closing. Therefore, a meticulous tax structuring is mandatory in Swiss transactions.

Switzerland being a small jurisdiction, most M&A transactions include significant cross-border aspects. In outbound transactions this might, for example, result in reps and warranties concerning post-closing impairment test of foreign assets and consolidation of accounting records under foreign accounting standards. Representing international buyers, we are regularly mandated with due diligence tasks regarding Swiss assets or subsidiaries that results less in drafting specific clauses than providing a business-based assessment of current and potential future risks and opportunities.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

Switzerland is proud of its liberal financial and banking system. However, the structuring limitations due to tax laws (particularly the regime regarding withholding taxes and regarding re-qualification of tax-free capital gains) influence deal financing considerably.

Two peculiarities of Swiss law influence the structuring of private transactions: other than in neighbouring jurisdictions the identity of shareholders in a privately held Swiss company limited by shares must not be notified to the commercial register, and a transfer of shares does not require a notarial deed. A Swiss company limited by shares (Aktiengesellschaft) is – in the true French sense of the word – a "société anonyme". Combined with tax privileges for holding companies and (in general terms) a regime of tax free capital gains for Swiss residents (if the shares are held personally), this obviously makes a Swiss holding entity an attractive structuring vehicle for cross-border investments.

When talking about middle market deals, the common transaction structure in Switzerland is private placements.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

In Switzerland the PE industry has become far more professional in recent years. There exists a diverse landscape of investors with different strategies and regional preferences. Besides a large base of local PE actors, in recent years large Swiss companies such as Swisscom, Roche and Novartis have started to support young firms directly and we see a constant influx of European and US private equity investors in Switzerland. More than 50% of the total investments were made in the ICT sector.

There is a huge ecosystem of professional associations, state and private support initiatives, technology parks, incubators, business angels associations and institutional investors, which support founders and young firms in different ways, be it with venture or growth capital, buyout funds, or funds of funds.

We are still observing primarily middle market deals in most financing rounds of fast-growing companies (start-ups etc.) and in most succession transactions, private equity investors play a pivotal and fundamental role in Switzerland.

Top Tips – For A Watertight Contract

Drafting a strong contract is equally an art as it is a result of creativity and discipline. In our firm, we value the following principles:

- "Keep it Swiss": We try to resist the temptation to bloat the traditionally concise Swiss contractual drafting style by gradually shifting to a more and more U.S.-influenced drafting language.
- "Resist copy/paste": Strong contracts are a result of true work and must reflect the equitable, intrinsic and fundamental interests of the contract parties. Pasting together template clauses carries the risk of inconsistency.
- "Cross the T's and dot the I's": Form is a very strong indicator of content quality. We strongly emphasise the importance of structuring content, spelling, punctuation and on formal language consistency.

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Robert is the founder and managing partner of Dr Lewandowski and Partners and head of the Warsaw and Wrocław offices. He previously worked for major legal firms in Warsaw and London and has written many legal books and taught university courses in English, German and Polish.

Robert studied mathematics and German philology at the University of Warsaw, before studying law at the University of Mainz and passing the second state legal examination in Mainz in 1998. He enrolled on the list of German attorneys in Frankfurt am Main (2000) and from 2001–2005 worked as a lawyer at Gleiss Lutz in Warsaw, which included a secondment to Herbert Smith in London.

Dr Robert Lewandowski & Partners (formerly Derra, Meyer R. Lewandowski) has been advising clients for more than 15 years in all areas of commercial law. We offer clients legal services at the highest level. We specialise in providing legal services to entrepreneurs and private individuals in the business sector. Our main fields of expertise include M&A, company law, financing, insurance law, real estate law, bankruptcy and restructuring law.

Dr Robert Lewandowski & Partners offers legal advice to domestic and foreign entrepreneurs in local and cross-border cases, based on cooperation with international partner law firms in cooperation.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

Polish civil law has several provisions relating to warranties if both parties are entrepreneurs. However, any warranties may be wholly or partially excluded and modified between the parties.

Within M&A contracts, there can be express warranty clauses made by the seller that differ from statutory provisions. Express warranties are more valuable for the seller as they may rely on them because they constitute a positive representation of the nature, quality, character, use and purpose of certain circumstances that induces the buyer to purchase a company and establishes the buyer's liability. If the warranty is breached the buyer, after notifying the seller of it, may claim damages. For the seller it is important to avoid or restrict warranty liability by asking the buyer to undertake thorough due diligence. In such cases the seller insists on excluding any warranties regarding circumstances the buyer was aware of during the due diligence process. Also, statutory warranties will be denied due to the buyer's assumed knowledge of certain factors. On the other hand, the buyer will want to extend the number and scope of warranty clauses in the contract protecting his/her interests in case of any encumbrances of the purchased enterprise.

Indemnity clauses in M&A contracts create a primary obligation of the seller to protect the buyer against loss, which may occur if the buyer, after closing the deal, is sued by tax authorities or a third party that he/she is not at fault for. In such cases the seller usually reimburses the buyer for any attorney fees and court costs incurred to defend the lawsuit and in the case of losing. From the seller's perspective it is important to limit the scope of indemnity clauses and exclude the duty to indemnify if the loss incurred is due to the buyer's negligent actions.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

There are many ways of financing the purchase of a business and in Poland it is common to use banks and other financial institutions to co-finance such deals and banks may lend money against a buyer's assets (for instance, valuable commercial real estate or through registered pledges over shares). They may also lend money against a business if there is sufficient value to support a loan – for instance, due to its actual earning power. It is common that within private equity transactions, buyers usually invest their own capital (20-40%) and thanks to this they may also influence positively other investors and lenders. It is also still common practice to engage venture capital firms to co-finance a deal. However, it is expected that such venture capital firms would want equity in the company being purchased and to be cashed out in three to five years (exit) if the business is sold or goes public. Private placement is also a means of financing a transaction and, according to Polish Prospectus Law, a placement is deemed a private placement if it is not addressed to more than 149 investors or an unspecified investor.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Poland is still the largest private equity market in Central and Eastern Europe because of its developed capital market and stable banking sector. However, the private equity market in Poland is relatively young compared to Western European economies or the United States. Their portfolios include big enterprises from sectors such as technology, media, medicine, telecommunications and logistics, side by side with medium-sized companies offering innovative products and services (start-ups). Equity holders usually take on higher risk and therefore would like to be compensated for this with higher returns, so the costs of equity are much higher compared to debt financing. On the other hand, the benefit of equity is that funds do not need to be repaid.

Top Tips – For A Watertight Contract

- Understanding each party's rights and obligations within M&A transactions in the light of suggested warranties and indemnities.
- Perform a thorough due diligence prior to making any agreement or commitment to protect you against any surprise encumbrances.
- Include some non-judicial remedies into a M&A contract in the event of a breach the contract. Everyone loses in a lawsuit, so it is best to decide how to solve disputes out of court before any arise.

INDONESIA

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Rio Lassatrio is a founder and partner of LHBM Counsel.

He is a qualified lawyer with more than a decade of practice experience. He has extensive experience in representing and advising international companies in Indonesia. He has advised and acted as an Indonesian counsel related to M&A projects, syndicated financing projects, construction works and complex commercial litigations.

With his qualifications, Rio was listed as one of the Indonesia's A-list of top 100 lawyers for 2020 by the Asia Business Law Journal, named as as Indonesia's Rising Star for 2019 by the Asian Legal Business, and chosen by his clients as ones of Asialaw Leading Lawyers of 2012. He is also endorsed by the Global Law Experts as recommended lawyer in the practice area of M&A.

LHBM Counsel is a solution focused law firm in Jakarta, Indonesia.

We aim to provide practical solutions based on unique facts and interest. Our commitment is to understand your business and industry so that we can prioritise your interests. Our lawyers are nurtured in some of the largest, complex and most notable transactions in diverse industries. This allows us to have expanded network, exposure and trust.

Our practice focuses primarily on corporate and M&A, banking and finance, capital market, and commercial dispute resolution.

QUESTION ONE

Which warranties and indemnities are most valuable as part of an M&A contract in your experience? Do you have a process that helps to formulate an effective schedule for either buy or sell-side clients?

In M&A transactions, there is a certain risk about some facts, matters or circumstances that would be uncovered once the transaction has been completed, which, if known from the beginning, would likely have caused the buyer/seller to reconsider the terms of the deal.

Warranties and indemnities (W&I) are designed to manage the risks associated with the transaction through a contractual framework. The W&Is are important because they cover specific and different matters. The more detailed the W&Is, the more accurate the risks could be mitigated. However, in practice, no matter how they are drafted, W&Is are only as good as the financial strength of the indemnitor. Hence, it is safe to minimise the risks and adjust the price and to realistically reflect the risks, rather than solely relying on W&Is that may have to be enforced through litigation.

In practice, these W&Is may be considered in drafting the definitive agreements:

a. assets (including title to assets and encumbrances), material contracts, licenses and the target company's business operations
b. financial accounts and records
c. compliance with laws and regulations
d. employment matters (including any employment liabilities or claims due to the transaction)
e. disputes/litigation matters
f. tax matters
g. intellectual property rights
h. accuracy of information
i. breach of any obligation of the seller
j. any failure to obtain, maintain or secure any necessary licenses including any necessary consents from, or to file necessary notifications to, any third parties (including any governmental authority)
k. Material adverse effect.

In a nutshell, to formulate an effective schedule in an M&A transaction one must understand the business objective for the transaction and be fully committed to abide with the agreed timeline. Preparing a detailed deal structure is also important, otherwise it would create uncertainty which could delay the transaction timeline.

QUESTION TWO

What methods of financing a deal are most common in your jurisdiction, for instance private placements, asset finance, mezzanine debt? What advice can you provide around structuring debt into a transaction?

Payment by cash either generated through debt or equity is the most common method to finance M&A transaction in Indonesia.

Other forms of financing, such as asset finance, is also possible but the law requires it to be assessed by an independent assessor and to go through several procedures after the closing of a transaction, which makes it less popular compared to cash payment.

To structure debt into a transaction, it is critical to contain risk through risk assessment and careful structuring of loan documents. The risk assessment involves the prediction or estimation of cash flow returns of transaction and maintaining a balance of low debt-to-equity-ratio as this will show how the company's financing is proportionately provided by debt and equity.

Careful structuring of loan documents plays an important part since the company (as borrower) needs to determine what kind of assets will be used as collateral for the debt. The company also needs to know in what condition or situation the loan documents can trigger an event of default and put them at risk, especially when using different types of assets as collaterals. If a guarantor is involved, additional issues concerning the scope and limitations on remedy will arise and must be properly structured and understood.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Private equity is still not yet widely available in Indonesia. Private equity funds are usually set up outside Indonesia's jurisdiction, and then subsequently invested directly into the Indonesian target company.

Private equity transactions are generally in the form of an M&A transaction and therefore subject to Law No. 40 of 2007 on Limited Liability Company. If the target company is a public company, then such transactions will also be subject to Law No. 8 of 1995 on Capital Market and regulations issued by the Indonesia Financial Services Authority. To date, there are no specific regulations that regulate private equity transaction in Indonesia.

In general, equity funding can be derived from unused dividend that was allocated in a special reserve fund of a company or by issuing new shares or selling existing shares.

With that said, the main advantage of using equity financing would be that no repayment is necessary, as it does not involve repayment of a loan or interest to the lender. Financing using equity also does not consider a company's creditworthiness rating, especially if the company has a poor credit history or lack of a financial track record.

On the other hand, the main drawback of equity financing is giving up some control over the company if the source were through issuing new shares or selling existing shares to an investor. The investor may structure in some way to obtain control over some of the company's strategic business decisions, and with the dilution of shares ownership it means that existing shareholders will have to share profits with the new investor.

Top Tips – For A Watertight Contract

- **Make sure it is written clearly and be specifics**

  Try to make it simple and avoid using ambiguous phrases that could be interpreted in different ways by different people. Having specific wordings could avoid different interpretation.

- **Precisely outlining the parties' rights and obligations**

  Each party must have a clear understanding of their rights and obligations under the contract. This should include the understanding of a party's rights to end the contract.

- **Consult with an experienced transactional lawyer**

  The most important thing is to find and consult with an experienced transactional lawyer to make sure that you have cover all the legal bases, which will then protect you from potential problems in the future.

Employment

Employment issues have many facets from engaging and retaining employees to dismissals and various disputes which inevitably arise. IR Global members are unique in that they offer both corporate advice to international businesses and individuals with complex or sensitive employment law issues. They offer a global service and work across borders to ensure that each issue is handled efficiently in accordance with the laws of each relevant country.

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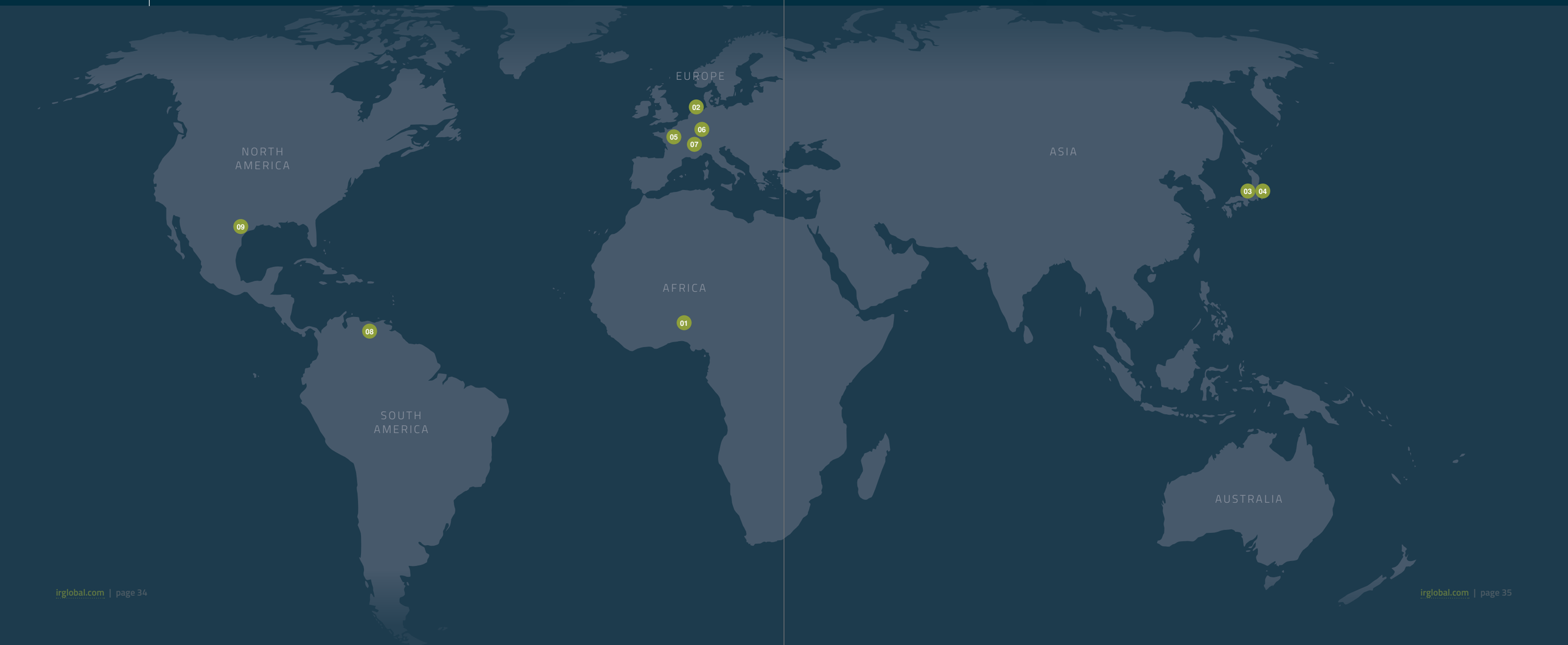

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Titi' Awe is a Legal Practitioner and the Managing Partner at Stalwart Legal, a full service millennial law firm located in Lagos, Nigeria. She is a reputable legal practitioner who has a long experience in commercial law. Titi' Awe specialises in several areas of law including dispute resolution, mergers and acquisitions, real estate, construction transactions, investment financing, debt recovery, land, family and succession. She is conversant with negotiations of contracts and has vast experience in property-related legal issues. Titi' Awe has sat on several boards as a director and as company secretary to the board. She has advised several international clients on various Nigerian and international transactions.

Stalwart Legal Practitioners was established with a vision to build a timeless institution, with parallel standards to the best law firms in the world. Our goal is delivering a positive social impact to society and establishing the firm as the employer of choice for top lawyers across Nigeria. Our firm is focused on protecting our clients' interests and using sound judgment and innovative tools to mitigate or eliminate their business risks. As such, we continuously improve our people, processes and strategies to achieve our goals. Stalwart Legal provides legal solutions to large corporations, governmental bodies as well as small and medium enterprises (SMEs).

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Harmonising employment practises and culture after a merger or acquisition is critical to the deal's success because a lack of harmonisation can result in the loss of key employees and, as a result, customers. Section 96(3) of the Federal Competition and Consumer Protection Act provides that in the case of a large merger, the primary acquiring company and primary target must each provide a copy of the notice of that merger in the prescribed manner and form to:

a. any registered trade union that represents a substantial number of their respective employees; or

b. the employees concerned or their representatives, where no such registered trade union exists.

This is to ensure employees are put on notice on the intentions of the merging companies. We advise the following in harmonising employment practices:

Employee retention: Under Nigerian law, employment contracts are personal in nature, so they cannot be transferred from one employer to another without the employee's consent. Therefore, what is most common is absorption – the target company simulates the acquiring company's culture.

Communicating with employees is a fundamental part of a successful integration. Use different communication channels (emails, intranet, etc) to keep employees from both companies informed at all times as lack of communication creates uncertainty, leading to lower employee engagement levels. Answering questions builds transparency and trust.

Cultural Survey and assessment tools can be used to measure the culture of an organisation, but these can be time consuming, and the heat of deal-making usually precludes the opportunity for this. The most widely used approach to managing cultural issues is to define a set of desirable cultural norms and then encourage employees to adopt these.

Change management: Creating a change management team with employees volunteering to be the liaison officers between, management and other cadres of employees helps communicate the change.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

It is essential to determine if the target company is part of a union. Where the target company is part of a union, Collective Bargaining Agreements (CBAs) between the union and the employer typically exist. CBAs usually include clauses imposing an obligation to consult with the unions in the event of restructuring and make provision for the length of notice required, as well as sanctions for failing to consult with the union.

Nigerian law does not provide for severance pay. Therefore, it is up to the employer and employee to agree it in the employment contract. Many employment contracts provide that upon termination or resignation, employees shall be entitled to a certain amount of severance pay and other benefit schemes and redundancy pay. These payments are usually borne by the target company. Therefore the acquiring company should review the employment contracts to ascertain if payments become due upon termination or resignation and where they do, the acquiring company must ensure that the target honors the payments before the conclusion of the deal, to reduce payouts and financial burden post-termination.

When there is an M&A, employees are usually left at the mercy of the acquiring company, which may decide to layoff workers, terminate their existing employment contract and pay them off or retain them with welfare packages less favourable than employees had with the target company.

Our law imposes an obligation on every employer with five or more employees to contribute to its employees' retirement savings account under a pension fund scheme with an administrator of their choice. An acquiring company will be required to continue such payments.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

Employee retention is considered the fundamental tool that triggers organisational growth, survival and performance. Retention incentives have long been considered an antidote for potential employee attrition during a merger or acquisition. Most M&A financial models include a retention plan line item, and the cost that is included as employee retention is often considered part of the "cost of the deal." Financial remuneration alone will not rebuild long-term employee trust. The company must regain employee trust. Otherwise, once the retention incentives are paid, employees may consider other employment opportunities. Subsequently, the retention incentives, if not extended or renewed, might have only created a temporary stability. Employers need to retain their employees because they need to retain their intellectual capital, the client relationships that have been fostered and the business focus that allows the organisation to continue to operate effectively. Retention of senior management, however, can create a more conducive environment for the employees on the lower cadre, and further create trust sand stability in the new organisation.

In order not to lose key talents and senior managers, the acquiring company can take steps to retain talents. Examples include:

a. Executives can be selected before closing or immediately thereafter. Managers then can be selected by executives, considering targets and the future state operating model.

b. Retention bonuses can help to keep people on board during difficult transitional months. Retention programs add to integration costs, but is usually more cost-effective than recruiting new personnel.

c. Uncertainty around roles and reporting lines is one of the most commonly cited frustrations leading to attrition after mergers. Making clear personnel decisions and communicating them definitively can reduce the risk of losing top performance employees who became frustrated with uncertainty.

Top Tips – To Keep Your People Happy During The M&A Process

- Communicating with employees about the changes that will be ongoing and what is to be expected upon full transition. Also create a channel for employees to communicate and ask questions, as it gives them reassurance.
- Create a change management initiative. More attention must be paid to the human side of the deal.
- Undertake a culture audit to help with merging the cultures of the companies to ensure a smooth transition post-deal.
- Retention incentives are an important part of any merger or acquisition.
- Understand the needs and goals of critical employees so retention efforts are well-aligned to those individual needs.

NETHERLANDS

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Rachida is co-founder of SAGIURE Legal. She advises international companies and investors focusing on transaction work, restructurings, internal investigations, employee consultation, collective/individual dismissals, trade union negotiations, global mobility and expatriate matters. She is recognised for her business oriented and pragmatic approach to employment matters, always putting the company's business interests first without losing attention on the human factor. Rachida's commercial no-nonsense attitude and ability to translate complex legal concepts into simple and pragmatic solutions has earned her longstanding roles as trusted advisor of a vast variety of clients.

SAGIURE Legal is a law firm based in Amsterdam and specialises in matters at the interface of employment and labour law and corporate law. The team of experts at SAGIURE Legal has strong cross-border experience and expertise, advising multinational corporations and entrepreneurs with a workforce in the Netherlands or those planning to enter the Dutch market as a gateway to Europe. Through a network of best friend firms representing some of the best legal minds in the legal field to match their quality standards and as a member of IR Global, SAGIURE Legal has proven to be a competitive alternative to international full service firms since its inception.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Although decisions to embark on M&A deals are generally based on commercial and financial calculations and models, the reality is that the human factor can make or break any deal regardless of how good it looked on the numbers alone. Studies show that one of the most important causes of deal failure is cultural and employment practices integration. Identifying commercial, financial and legal risks in the due diligence phase and strategising towards the mitigation thereof post-closing is a – if not the – key element of any M&A deal. The human factor and its impact on the success of the deal is not often enough qualified as a key element in the early stages of deal preparations. One of the reasons for that is probably that securing successful integrations of cultural and employment practices comes with a set of challenges of its own – one of them being time constraints. It is difficult to grasp culture and practices in models and it takes time to understand the human dynamics that form a company's implicit culture. In the high pace and pressured reality of the deal-making process attention on the integration of culture and employment practices consequently often falls off the priority list, despite it being a key factor in a deal's success. Any company that is engaging an M&A deal is well advised to factor in the human element at an early stage. Make sure that the project team includes an HR representative at strategic level and include employment law experts who can work closely with the corporate law team.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

Planning and timing start from the end goal and then work backwards. This also applies in relation to the question of how to incorporate collective labour agreements, employee benefits and pension scheme provisions into the deal making process. The legal implications towards these important employment conditions are dealt with differently in an asset deal versus a share deal. For instance, if the intent is full integration of all employment terms and conditions post transfer/closing, an asset deal may be your best option. Any challenge though can be solved, and one can work towards any preferred end-goal in any structure but make sure to consider your options beforehand. Firstly, if you want to harmonise employment terms and conditions, make sure to do it as soon as possible. If feasible, start working on harmonisation and the potential need of a reduction in workforce before the actual merger/effective date of the deal. The outcome thereof can impact the terms and scope of the transaction and consequently the purchase price too. Secondly, it is crucial to determine how and if the works councils and/or trade unions are involved and to factor in reasonable time to follow the legal formalities of these consultation processes, primarily as part of the deal making process, but clearly also in view of a smooth integration roadmap after the deal is done. Companies that approach harmonisation not only from a legal and financial angle but also integrate the human aspect and the impact on employee engagement tend to achieve their goals more effectively with minimal pushback.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

From a business and investor's perspective a transaction is typically perceived as a positive matter. From the employees' perspective it is often experienced as a highly uncertain and threatening ordeal. It is important to acknowledge these differences in perception and to put in the effort to gain the employees' buy-in and support for the transaction. One of the tools to retain key employees (and their knowledge and customer relationships) is offering them a retention plan to secure a good level of business value and business continuity.

Having experienced several M&A processes and retention plans in practice, the costs of these plans related to their benefit is not rarely out of balance. In hindsight, it often appears that too many employees are qualified as 'key-employees', and the duration of the retention period is often too long. Selecting the key-employees is not an easy exercise, but despite the pressure of the deal-making process it needs to be done with a realistic analysis of the business needs and the notion that money alone does not create true employee loyalty or commitment to the new organisation's goals. It will require effort and (human) attention towards the overall staff to secure their trust and a willingness to provide assurances about job security and a clear vision on the shared future goals that at minimum the critical employees can commit to. Although there is no one-size-fits-all solution because different deal structures call for a different approach to retention schemes. Best practice retention plans typically focus on a very small group of employees – generally senior management and critical employees in the business/product line – and apply for one year maximum.

Top Tips – To Keep Your People Happy During The M&A Process

- Communicate proactively. Employees want to know where they stand. It is better to under-promise and over-deliver than the other way around.
- Take employee input – individually or through consultation bodies such as the works council and trade unions – and their interests seriously. Implement fair and transparent processes during the deal-making process and post-merger integration, including grievance procedures.
- Appoint a senior HR professional dedicated to coordinate and manage the cultural integration process. Factor in enough time (i) to analyse the current cultures (ii) prepare a communication plan and (iii) strategy towards the desired culture and practices post-closing.
- Ensure that top management is visible and approachable during the process and post-closing. Prevent a war on power by introducing shared standards for both legacy companies in terms of leadership, decision-making, company values or branding, remuneration policy and key business units or segments.

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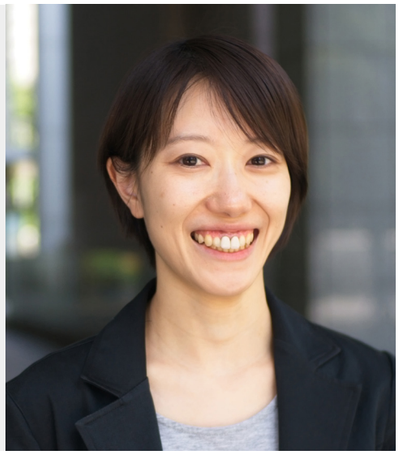

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Makoto Ohsugi's practice covers general corporate matters and commercial transactions, M&A and commercial transactions, labour and employment, disputes on international and domestic commercial transactions including international commercial arbitration procedures, and labour disputes (mainly acting for employers). He is also qualified as CFE (certified fraud examiner).

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Ayuko Nemoto's practice focuses on domestic and international corporate alliances (M&A, JV), venture support businesses and other corporate issues. Ms. Nemoto also has broad experience in Japanese commercial, corporate and employment law issues and litigation, as well as regulatory issues in the pharmaceutical, healthcare, regenerative medicine and medical devices.

At Sonderhoff & Einsel our attorneys, foreign law attorneys and judicial scriveners are a multilingual team of legal professionals who have a deep understanding of doing business in Asia, Europe and the US. In the past few years, our law practice has tripled in size and added attorneys with experience at top global firms including a US-based international firm, a UK magic circle firm, as well as the top five Japanese law firms. We provide our clients with the personalised attention of a small firm coupled with our broad experience of dealing with cross-border transactions.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

The major issue that often arises in a merger or acquisition in Japan is difficulty in restructuring the labour force of the target Japanese entity. Japanese employment law is very protective of the employee when compared to other jurisdictions. Dismissal of employees requires "cause" in Japan, which means that at-will employment does not exist and legitimate grounds for dismissal are required. For example, the mere lack of ability or poor performance are not deemed as legitimate grounds, and the company is required to give the employee an opportunity to improve his/her performance. Further, the change of shareholders is not cause for dismissal nor does it allow for change of employment conditions. Therefore, a foreign investor should expect to retain most (if not all) of the target's employees – Japanese companies are often resistant to deals where a foreign investor is going to perform significant restructuring. If the investor plans on restructuring the company and determines that certain employees should be terminated, the investor should consider severance packages for such employees as it will likely be difficult to terminate their employment contracts after closing.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

As mentioned above, M&A deals do not allow for a change of employment conditions, such as a change of collective bargaining agreements, employment benefits, and pension scheme provisions. Therefore, after the closing of a merger, there are often two employment conditions: those of the acquiring company and those of the target. Given the difference in employment conditions, the post-merger integration (PMI) process is substantially important to harmonise these employment conditions. Therefore, a key best practice for a foreign buyer during the due diligence process is to carefully review the Japanese target company's employment conditions so that the buyer can prepare for the PMI process and understand which employment conditions could potentially be changed or not.

Generally, existing collective bargaining agreements, employee benefits and pension schemes of the Japanese target company cannot be changed post-merger to the detriment of the employees, so if through due diligence the foreign buyer, for example, discovers employee benefits that it considers excessive, it should try to reflect such high costs in the purchase price of the target company. Otherwise, the buyer would only be able to recognise such unexpected costs during or after the PMI process is completed.

For example, where the target company has its own retirement allowance scheme that the buyer would like to abolish, but the buyer does not address this issue prior to closing in the SPA, it will be practically difficult for the buyer to abolish the scheme after closing because it would need to obtain each employee's consent for it. Further, to obtain the employee's consent, the buyer would generally have to pay out the retirement allowance of the employees of the target company, which would result in additional costs. In this regard, the buyer needs to consider and reflect such additional costs into the purchase price of the target.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

Given the lack of labour mobility and seniority-based labour system in Japan when compared with other countries, there is less need for incentivisation, such as retention agreements in M&A deals as most senior management are expected to remain in the company even if it is purchased by a foreign entity. However, post-closing covenants and conditions, such as "key person" provisions, are often used to ensure that certain key individuals remain in the company for a certain period of time after closing, and, if not, a certain additional payment would not be received or a liquidated damages amount would be imposed.

Top Tips – To Keep Your People Happy During The M&A Process

- Understand that although the decision process for Japanese companies may be slow, once a decision is made, a smooth and efficient transition process can be expected. Realistic schedules for closing a deal need to be set as Japanese companies operate on a consensus basis and often a substantial amount of time is focused on due diligence and documentation.
- When negotiating the deal terms, focus on communicating with the deal "coordinator" – the individual who arranges meetings, circulation of documents, etc. Although this person generally isn't the decision maker, working closely with them will help obtain quicker responses and decisions on key issues.
- Retain a local attorney or advisor early in the negotiation process who can explain business and cultural differences between Japan and the buyer's jurisdiction to avoid any misunderstandings. Many Japanese companies are sensitive to foreign buyers and investments and a culturally appropriate approach is essential.

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Admitted to the Bar in 1997 and founder of Galion, Lionel Paraire has a DESS de Droit des Affaires and a Magistère-DJCE (Masters in Business and Tax law) from the University of Montpellier.

He worked for six years with Cabinet Jeantet Associés, then worked at the firm Baker & McKenzie, and then Mayer Brown where he became Of-Counsel. Lionel has been senior lecturer at the University of Paris XII in Labour Law and European Labour Law. He is a member of Avosial, EELA (European Employment Lawyers Association), ANDJCE (Association Nationale des Diplômés Juriste Conseil d'Entreprise) and IBA (International Bar Association). He is also senior lecturer at the University of Montpellier I (DJCE).

Galion specialises in employment and labour law with a faithful client base of national and international companies. Lionel Paraire established the business more than 10 years ago with the vision of offering a comprehensive solution to complex employment law needs. The practice has since grown to a team of four, with three lawyers.

Loyalty and equality are watchwords at Galion and an important part of our culture and ethos. Our close-knit team of lawyers treat their clients in the same way, taking pride in finding the best solutions.

We advise companies in the industrial, banking, insurance, new technologies, consulting services and medical or veterinary sectors.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Of all the challenges encountered during an M&A transaction, dealing with cultural differences between organisations and integrating people (and everything they deem important) is the biggest one. If these issues are not identified and managed properly within the allotted timeframe, it can lead to wasted time, missed synergy, and, in some cases, decreased value. According to HR professionals, it is the management of change and integration of the corporate culture that, among all people issues, require increased attention during M&A transactions.

Countless questions undoubtedly come to mind, whatever the position held. From the employer's side: how to prevent key employees from leaving the company? How to keep staff satisfied? How to clearly explain the implications of the transaction? From the employees' side: who will become my boss? What will my salary be? Will I keep my company car? If these questions are not considered nor answered, trouble and uncertainty will grow, which can have a negative effect on the target's value.

Moreover, for a merger or acquisition to be a commercial success, HR teams will be asked to be familiar with the rules and practices specific to the target, especially when the target is in a different country.

A deep and broad analysis of the target through a human capital (HR and employment law) due diligence as well as a clear communication with all stakeholders, including employees – old and new – prior to, during and after the M&A process, will be helpful.

To bring success to the M&A transaction, it's necessary to:

- Quickly identify the targeted culture and ensure key employees follow a common objective from the start
- Decide quickly what the company will become and communicate as clearly as possible on that
- Follow-up any progress of the transaction and celebrate each step once completed.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

In France, corporate reorganisations have no impact on an employee's social security insurance coverage and pension benefits. Only additional pension benefits, when implemented at the level of a company or a group, may be put at risk. Harmonisation actions may be required post-deal regarding employees' welfare and health insurance schemes.

Otherwise, the situation will depend on the legal source of the collective status. A collective bargaining agreement is entered into between one or more employee representative trade unions and one or more employer representative organisations. It can be binding on the employer whose line of business is covered by the agreement. A collective company agreement is signed by an employer and, in principle, trade union representatives present in the company. Collective rules may also come from atypical agreements (signed with elected staff representatives) or common practices. Except if the acquirer applies a different collective bargaining agreement, the contemplated transaction will not have any impact on the applicable collective bargaining agreement. On the contrary, a merger or an acquisition through TUP transfer legally implies an automatic termination of collective agreements on the date of transfer, a continuation for a maximum period of 15 months and a mandatory negotiation to harmonise the employees' collective status. The law now authorises the initiation of negotiations even before the corporate reorganisation becomes effective, which may be, in some circumstances, a useful tool to facilitate the integration of the transferred employees in the new employing entity.

Human capital due diligence will be then critical to identify the legal sources of the collective status, as well as the main interlocutors for the negotiation, to analyse the current collective status and to build bespoke new collective rules.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

A merger or acquisition is challenging from an HR perspective: workforce mechanically increases while means remain the same or even decrease in order to reach the financial objectives expected from the synergy. It is essential to the success of the transaction to keep the employees – old and new – happy and dedicate enough time to making sure they feel fulfilled. The people of the acquired company have spent time and energy building and growing something that they believe in. It is then important to understand that value, encourage that passion and build something even stronger together.

The human capital due diligence will provide relevant information about the target's corporate culture, its structure, processes, the key people – and not only the top management. The M&A process leads to a large amount of stress for employees, who then need to be reassured and understand the goal of the transaction.

Key people of the acquired business should be identified as early as possible and be adequately incentivised to assist with and support the acquisition and subsequent integration actions.

There are many ways to drive motivation, including team activities and goal setting. Incentivisation and/or retention will be different depending on the business sector, the company's culture, etc. It could be attractive compensation packages, which include salaries, of course, but also bonuses, paid time off, health benefits or retirement plans, recognition and rewards systems or flexible working arrangements.

In a challenging time, keeping staff as informed as possible is more than helpful, as is making big announcements face-to-face, either individually or in group meetings, and making sure that enough time is allowed for questions.

Top Tips – To Keep Your People Happy During The M&A Process

- **A due diligence specifically dedicated to human capital (HR and employment law) is essential:** Yet it is often underestimated. It consists of learning quickly about the target's corporate culture, its structure, processes, the key people – not only top management – the different ways of working and the management of perceptions and emotions. It is more than a financial analysis of employees' compensation and benefits.
- **Team working is crucial:** Beyond online data rooms, being able to meet face-to-face with the target, or meeting with team members in a war room can create an environment more conducive to open communication and lead to additional insight.
- **Not only integrate but transform:** Human capital due diligence provides the benefit of working with industry-leading professionals and external advisors and receiving their knowledge. It is then time to go forward and transform the new entity. Integrating the target's employees leads to questioning one's own culture and structure.

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- Born in 1968
- Attorney at Law since 1996
- Certified specialist in Labour law
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Practice Areas: Labour law, Corporate law and Commercial law

Education and professional experience:

- Universities of Munich, Augsburg, Regensburg (Ph.D.) and Paris-Assas (Licence en Droit)
- Attorney at Law with an international law firm in Munich, Germany
- Founder of ACURIS Attorneys at Law

We offer individual legal advice with the greatest commitment, always aware of the responsibility for each individual mandate. Strategic thinking, high legal quality, specialisation and many years of experience in the legal areas covered as well as a special understanding of complex economic relationships form the basis for successfully asserting the interests of our clients.

If the processing of a mandate requires expertise beyond the legal areas we cover, we have close contacts with leading law and tax firms in Germany, Europe, the USA, and many other countries.

Our independence from an international association enables us to involve those law firms that, in our experience, are best suited to the individual case.

Our clients include domestic and foreign, including listed companies, entrepreneurs, family offices, corporate bodies, and executives.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Every corporate transaction requires the definition of a transaction structure, which raises a multitude of tax, civil, public and labour law questions. In cross-border transactions, special consideration must also be given to the cultural conditions in the target company since a workforce willing to cooperate is important for successful post-deal integration.

The optimal transaction structure must be determined for each case. Three models are available: a share deal, asset deal or a merger.

In a share deal, the operational structure remains intact. If working conditions are changed post-deal, these can be implemented through amendment agreements, but require the consent of the respective employees. The pronouncement of change notices to change working conditions meets high legal hurdles and is only successful in exceptional cases.

In an asset deal, the conditions for a transfer of business within the meaning of § 613a BGB (German Civil Code) are usually met. Accordingly, the labour law acquis is transferred to the new legal entity. The conclusion of amendment agreements for the harmonisation of working conditions after the transfer of business becomes effective. However, the treatment of works agreements and collective bargaining agreements become more complicated during a transfer of business. In principle, rights and obligations become the content of an employment relationship between the new owner and the employee by legal norms of a collective bargaining agreement or a works agreement through a transfer of business. A change to the disadvantage of the employee is not permitted before one year after the transfer. However, this does not apply if the new owner already has collective bargaining agreements or works agreements with corresponding regulatory content. This exception is important for the harmonisation of working conditions.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

Collective bargaining agreements, employee benefits and claims from the company pension scheme give rise to labour costs that must be examined closely in the course of due diligence and calculated on the basis of their relevance to the purchase price of the company. Any intervention in these claims before or during the acquisition must be carefully weighed up with a view to preserving the corporate culture of the target company and employee motivation. Harmonisation measures implemented at the wrong time are likely to cause more harm than good. An exception is made for claims from the company pension scheme. In contrast to a share deal, in an asset deal claims of active benefit recipients (pensioners) and employees who have left the company are not transferred to the new legal entity in accordance with § 613a BGB. Risks could be minimised by restricting the transfer of only the claims from the company pension scheme for active employees. These risks relate to the question of whether and to what extent provisions made in previous years can cover the actual claims of employees. In view of the steadily increasing average life expectancy of the population and the zero interest rate policy of the European Central Bank, this is by no means certain.

With regard to the commitment to collective bargaining agreements, it should be noted that after the takeover of the target company the acquirer should examine its possible membership in an employers' association. As an alternative the change of an employers' association, a resignation from an association or also a so-called membership without being bound by collective agreements should be discussed.

In summary, harmonisation measures should always take into account the employees' acquis. A deterioration of the acquis regularly leads to unrest among employees and promotes the change intentions of qualified employees.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

Special cash payments can be made in connection with an M&A process by the target and the acquiring company.

Often, in connection with the sale, owners of family businesses are prepared to give the employees a portion of the sales proceeds as a thank you and special award for past performance. When structuring such an ex gratia profit participation, tax and social security law questions arise which, depending on the disbursement by the target company before the transaction is completed or by disbursement by the former shareholders, have to be answered differently, but cannot be discussed in more detail here.

In addition, the target and the acquiring company should agree to compensate employees by granting special bonuses for the special workload that regularly arises during M&A processes. In addition, employees in key positions should not only receive a special bonus, but should also receive a retention bonus so that they do not use the professional uncertainty associated with the M&A process for professional reorientation, but remain committed to the company and use their know-how for its growth and the success of post-merger integration. Finally, in addition to the above-mentioned cash benefits, an attempt could also be made with employees in particularly sensitive positions to agree a so-called post-contractual non-competition clause against payment of compensation for a period of leave in order to avoid switching to competitors, at least for a limited period of time.

In a challenging time, keeping staff as informed as possible is more than helpful, as is making big announcements face-to-face, either individually or in group meetings, and making sure that enough time is allowed for questions.

Top Tips – To Keep Your People Happy During The M&A Process

- The acquiring company should consider all personnel costs, including the company pension scheme, when determining the purchase price.
- When harmonizing the working conditions, consider whether these must be realised at the time of the acquisition. An M&A process always triggers worries and possibly even a career change among the workforce – especially key employees. In our opinion, the priority should be the success of the post-merger integration, which is accompanied by respectful treatment of the target company's corporate culture.
- As long as the target company is not a restructuring case, the harmonised working conditions should not lead to a deterioration of the social acquis of the employees, at least not for the duration of post-merger integration. Additionally, the performance of employees during the M&A process should be rewarded by granting bonuses and key employees should be retained through retention bonuses and development prospects in the new group.

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Only the combination of expertise, experience and competence leads to sustainable solutions.

Main Practice Areas: Employment Law (Corporate, International, Expats), Contract, Trade and Company Law, Negotiation (management and tactics), Mergers & Acquisitions (M & A), Dispute Resolution (Litigation and Arbitration), Public and Private Employment Law, Life Sciences, Intellectual Property (IP) Rights and Licenses, School and Education Law.

Experience

- Partner (since 2005)
- Head Section Law of an International Chemicals Group
- Legal Advisor to Human Resources and Pension Fund of an International Phar-maceutical and Chemicals Group (1997-2000)
- Legal Advisor Pharmaceuticals Division (1991-1995)
- Legal Advisor Industrial Divisions (1989-1991)
- Member of the Board of several SMEs
- 14 years of living abroad on three continents (USA, Europe and Japan)

Education

- IN-BOARD (Insead Alumni Association Board Training) 2016/2017
- Certified Global Negotiator, HSG (2013)
- Insead IEP F/S (2002)
- Bar Examination Basel-Landschaft (1990)
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We listen to clients' concerns carefully. As a business law firm, we advise and re-present their companies and them as entrepreneurs in all matters concerning business and commercial law. Due to our broad industry experience – especially in pharma, life sciences, chemicals and suppliers – our clients will obtain strategic and tactical advice.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Generally, relations between employers and employees are good in Switzerland. Open and candid discussions with the employees or employee representatives (where there is an elected body, which is not always the case) are the rule and highly recommended. Employment laws in Switzerland in general are liberal, but there are certain minimum standards that need to be observed. As in many European jurisdictions, employees enjoy a certain level of protection from termination in specific circumstances (illness, accident etc.).

Similar to the European Transfer of Undertakings Directive, Swiss law has incorporated these principles. In a merger or asset deal, all employment relationships will automatically transfer to the acquiring entity based on mandatory law. Terms and conditions of the existing agreements will continue with the new employing entity. Employees have the right to object to the transfer. In this case, their agreements will be considered terminated based on the legal notice period (which may be shorter than the contractual one).

Mandatory provisions of collective bargaining agreements may be applicable, depending on the industry. These also automatically transfer and will remain in force for one year post closing.

Any subsequent changes the acquirer would like to make to existing Swiss employment agreements or their terms in order to harmonise them with overall global corporate policies, will require the consent of the employees concerned. This is usually not an issue, where the new terms are more beneficial for the employees. Alternatively, the changes may be implemented by giving the employees notice under the existing agreements and offering new agreements with the new terms at the same time. Should a large number of employment agreements be so effected, mass dismissal rules may be triggered. In this case, prior consultation with the employees or employee representatives and the involvement of the state labour office will be required, before any decision is made.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

By instrument of mandatory law, collective bargaining agreements which the target entity has entered into will automatically transfer to the acquirer and will remain in force for one year. It is good practice to involve the employee representatives at an early stage prior to negotiating with the unions for an extension of the collective bar-gaining agreement.

Under Swiss law, pension schemes must be in the form of a legal entity separate from the employing entity. They are usually in the form of a foundation. This may be either in the form of individual foundation established by the employing company, or a collective foundation, often established and administrated by large insurance companies. The relevant pension scheme of the target company will be headed by a Board of Trustees with an equal number of both employee and employer representatives. A target company will, by law, have entered into an affiliation agreement with the pen-sion scheme. Where a company has set up its own foundation, this affiliation agreement is very often not found in the form of a written agreement, but a conclusive one. In an asset deal or merger, the affiliation agreement will often need to be terminated and a new one entered into by the acquiring entity with a new pension scheme. Based on recent case law by the Swiss Federal Supreme Court, this requires consultation with the employees prior to the termination of the affiliation agreement. This process must be incorporated in the transaction schedule.

In addition, an asset deal or merger may trigger a partial liquidation of the pension scheme. If the pension scheme is underfunded at this time, it is recommended to negotiate a solution on the level of the principals of the transaction agreement.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

Even more important than the financial aspects are the motivational factors. Keeping individuals informed and engaged throughout the process with clearly stated goals is critical. Where senior management is involved, they should feel that they are a relevant part of the merger process and truly incorporated into the acquirer's global development policies, so voluntary retention is easier to achieve. My experience as in-house counsel and outside counsel has confirmed this. A transaction-related bonus with parts paid out in the course of the transaction process as well as post closing has worked well, particularly when combined with written recognition from the CEO or the Board of the contribution provided by the individual and the increased workload sustained during the transaction and integration process.

Retention agreements with a staggered bonus paid in set intervals combined with shares or options to the acquiring entity and a penalty in the case of early termination are also good possibilities. The actual implementation will much depend on the goals to be achieved and the existing incentive plans in place with the target entity.

Please note that for publicly listed companies, special rules apply that are more restrictive.

Top Tips – To Keep Your People Happy During The M&A Process

- Early on, maintain strict confidentiality and limit the number of persons involved to avoid anxiety in the company.
- Keep employees informed and engaged as far as possible.
- Elaborate and explain the process, the goals and the next steps; provide a clear plan on the path forward.
- Use the consultation process to understand employee and managers' concerns and address these early on. Provide context and explain your decisions.
- Celebrate goals achieved.

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Francisco is a partner at Ponte Andrade Casanova. He studied at Universidad Católica Andrés Bello - Caracas (1977) and qualified as a Master in Regional Planning, Cornell University, (1983). He has been a professor at Universidad Central de Venezuela, and speaker on insurance, social security, and pensions. Francisco has been a member of the boards of Banco Exterior, Venezuelan Chamber of Insurers and Venezuelan Association of Private Equity (Venecapital); President of the Social Security Sub-commission of the Venezuelan Federation of Chambers of Commerce and Production (FEDECAMARAS). He is a member of the Committee on Safety, Hygiene and Environment of the Venezuelan American Chamber of Commerce and Industry (VenAmCham).

Ponte Andrade Casanova was established in 2005. Its founders are Ignacio Andrade, Francisco Casanova and Ignacio Ponte. The firm is recognised for the excellence of its legal services, counting on professionals with more than 40 years of professional practice. It maintains an excellent relationship with law firms in other countries, which allows it to offer a bilingual, comprehensive and universal service. The firm's clients are national and foreign companies from the banking, insurance, industrial and commercial sectors. Ponte Andrade Casanova has participated in the formulation of laws and regulations and in judicial processes that constitute landmarks in Venezuela.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Mergers and Acquisitions (M&As) are delicate and usually prone to conflicts between the merged/acquired workforce and union. However, these processes could also provide the perfect opportunity for companies to evaluate their current practices and change them to improve their business.

In Venezuela, M&As are a type of "employer substitutions". In general terms, employer substitutions cannot affect individual relationships and collective bargains. Moreover, these processes cannot negatively affect the worker, and must be notified to the employees, the unions, and the labour authorities. If the employee considers the employer substitution to be inconvenient, he/she may request the termination of the relationship and the payment of the benefits and indemnities.

To take full advantage of M&As from an employment standpoint in Venezuela, companies should:

- Have adequate employment relations/human resources counselling. These are key to implement proper measures to harmonise previous and future work conditions and integrate employee benefits. This is especially important when the merged company takes the previous company's employment programmes, practices and liabilities that could affect its budget. For this reason, careful planning is required to mitigate risks and post-merger conflicts.
- Create integration strategies that balance administrative burdens and employment benefits. These strategies must consider a wide variety of aspects such as, but not limited to, salary, pay scale, initial budget, previous employment programmes intended to cover employee needs. Full knowledge of the new business is pivotal to understanding what is required to cover these expenses and cost-effectively.
- Clearly communicate their strategies and measures to prevent tension among the employees. For example, individual approaches or personal guidance with each employee might be useful to make them fully aware of what their new work conditions and benefits are post-merger.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

Venezuela's legislation changes rapidly, unpredictably, and generally favours the workers, possibly making contractual benefit unlawful or unavailable, or a new benefit could be required by law. In any case, M&As cannot negatively affect employees or unions. Currently, collective bargains (CB) remain in effect for three years, which could be modified by the parties. Thus, the employment lawyer must advise employers to remain competitive in the labour market while not negatively affecting their cost structure.

Because of this, the ideal bargaining solution is to implement a clause that grants the right to the employer to change benefits, being able to add, modify, replace, or discontinue plans during the term of the CB. If unions do not approve this, employers could propose measures that affect particular benefits (e.g., health insurance). Finally, always seek to incorporate wording that allows employers to address routine administrative matters.

Another alternative is implementing a reopener clause, which comes into play when certain conditions are met. Another option is a reopener clause under which employers and unions negotiate benefits cost annually. Employers should ensure that the new benefit schemes, such as multi-employer health and welfare of pension plans, comply with applicable laws and regulations, and not affect the workers and employers.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

A huge exodus of talent from Venezuela is a problem that significantly affects the survival of companies. According to a 2018 survey, 45% of Venezuelans left the country due to the economic crisis, 25% due to the low chances of change in Venezuela, and 15% due to personal insecurity. About 2.3 million Venezuelans left the country in 2017-2019 seeking better conditions elsewhere.

Due to the departure of Venezuelans, companies have had to seek financial, human and technological solutions for an organization's operational sustainability. Specialists in employment relations/human resources are essential to create strategies to keep employees in particularly critical roles such as senior management. In the current circumstances, priority is given to short-term compensation, especially non-monetary compensation. Likewise, a competitive salary is offered, preferably with a portion in foreign currency. Flexible training plans and policies are also part of the offer with variable remuneration schemes such as retention bonuses or extended health coverage in critical and susceptible positions such as technology, finance, key operations managers.

Companies should implement strategies to:

- Improve business emotional intelligence and human awareness, both for the employer and the employee.
- Understand, simplify, and automate the processes ensuring quality, service and profitability of the company or organization.
- Strengthen the recruitment and selection departments and flexibility in working hours as a retention strategy and the promotion of innovation as a constant motivation strategy.

Top Tips – To Keep Your People Happy During The M&A Process

- Provide individual and personal guidance to each employee – this will be useful to make them fully aware of what their new work conditions and benefits are post-merger.
- Clearly communicate the company's workforce and benefit integration measures to prevent tension among the employees.
- Improve business emotional intelligence and human awareness, both for the employer and the employee.
- Understand, simplify and automate the processes ensuring quality, service and profitability of the company or organization.
- Strengthen the recruitment and selection departments and flexibility in working hours as a retention strategy and the promotion of innovation as a constant motivation strategy.

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Jessica is an Employment law expert, with niche expertise in non-competes (drafting, negotiating, and litigating). She also works with foreign businesses to keep them out of U.S. litigation. In November 2020, she had claims against a French parent company dismissed for lack of personal jurisdiction Jessica is personable and strategic, she loves the best plan for each client, whether it is a sticky termination or planning a trial strategy. Jessica takes pride in working closely with executives through acquisitions, whether it is crafting their own executive agreement or advising the company on risk.

If Cravath and Skadden are expensive high-end classics, like a Bentley or a Maybach, then FisherBroyles is a Tesla — new, exciting, and game-changing. Its widely distributed 265-plus lawyers and support staff haven't reported to an office since 2002, when founders deemed a physical office dispensable.

Modern technology enables so much to be done remotely, and thus removing the need for lavish offices that require inflated client fees.

Traditional law firms may be pivoting to sustain performance since Covid-19 essentially padlocked their offices indefinitely months ago, but at FisherBroyles it's been very efficient cloud-based business as usual. Furthermore, as the firm closes in on $100 million in annual revenue, it stands to become the first non-traditional law firm to crack the Am Law 200, most likely this year.

QUESTION ONE

What advice can you offer international clients on harmonising employment practices and culture following a merger or acquisition in your jurisdiction?

Designing the new culture before the deal is closed is key to a successful (merged) business. This is something that is often overlooked, but is so important to create harmonious, productive workplace following the deal.

The good news is, creating the new business culture is work for the business leaders, not the lawyers. Designing a culture involves vision-casting and designing the personality and mission of this newly merged business. In the absence of designing a culture on the front-end of a deal, it is likely that after the merger there will be two competing cultures that are at war inside the business. Fiefdoms, unproductivity, turnover, and employment lawsuits usually are also predictable results.

If the buyer is a larger business, acquiring a smaller business, there is often an assumption the smaller business will adopt the buyer's business culture, personality, and priorities. If that is the intention, then a plan is needed to communicate and execute the culture shift. Without this planning, Human Resources, Managers, and Executive Leadership will likely inherit new (often consuming) duties of fixing problems (stemming from the people) of the acquired business.

For example, imagine a couple entering their second marriage, each with children from a prior marriage. The wife has raised her kids with a growth mindset, private Montessori education, and the children always had a voice in the family. In contrast, the husband was a former military officer. He believes children did not have a voice in the family, but instead should do what they are told. The wife decides to let her new husband set and enforce the rules of their newly blended family, but she fails to communicate this plan and new way of parenting to her children before the two families merge. Ideations of mutiny, betrayal, being misunderstood, and unvalued would be expected outcomes.

These same reactions arise after a business merger. Businesses are more than P&L statements. Businesses are dependent on people for success. If you goal is to create a new, larger, more productive business post-deal, then making culture a priority is essential.

QUESTION TWO

Do you have a best practice for incorporating collective bargaining agreements, employee benefits and pension scheme provision into the deal making process?

Obviously, every deal is different, depending on the size and type of business and the structure. For the buyer in a transaction, it is imperative to have a deep understanding of the collective bargaining agreements and benefit plans. These plans and their nitty-gritty details (that most of us don't care to understand), could greatly affect the terms and the value of the deal.

A best practice for a buyer is to engage separate U.S. Employee Benefits counsel to advise the buyer and assist in deciphering the plans of the acquired business (and their impact in the future). This should be a lawyer with deep expertise that is not part of the law firm that is handling the deal. The large firms that handle big deals (e.g., Jones Day, Kirkland & Ellis) will have a benefits counsel on the deal team with a deal-centric focus. A buyer is well served with separate Benefits Counsel advising them through the deal, someone often in the trenches of drafting, creating, and litigating benefit plans (health care, pension, equity 401K, ERISA plans). This employee benefits expert will be familiar with the ins-and-outs of plans, the issues that lead to risk or litigation, and be able to spot issues that will affect the buyer in years 1, 2, and 3 after closing of the deal. This additional up-front expense will save you in spades in the coming years after an acquisition.

QUESTION THREE

Incentivisation and retention of senior management is important to ensure stability and continuity post-deal. Any examples in which you have achieved this effectively?

When businesses want to keep key employees, they have to take actions to show they mean it. This ties into the importance of defining culture, so the employees have some sense of what to expect in the face of change.

I have had great success in drafting CEO agreements for the CEO that will continue to run the business post-acquisition. For executives, important terms to entice them to stay include generous equity and vesting schedules, aggressive bonuses that are tied to business success, and authority to lead. Additionally, agreeing to reimburse the executive $5,000-$10,000 in legal fees related to drafting and negotiating the new employment agreement have proven to be great incentives that ease the negotiation process.

Top Tips – To Keep Your People Happy During The M&A Process

- Communicate (with boundaries). Depending on the size of your business, the amount of employees, and the varying levels of employees, there are many shades of grey here. Not telling employees anything until after the deal closes is probably not advisable. Plan the communication and its stages to all employees and share according to the strategic plan.
- Do not make promises to your employees. Unless you are willing to kill the deal over a specific term (that may be very important to one employee) that in the grand scheme of the deal is not very important, it is prudent to not make promises.
- Create a deal inner circle. Make sure the inner circle understands with clarity they cannot chat causally about their deal frustrations. Likewise, communicate with employees who may become aware of the deal (who are not part of the inner circle), such as IT professionals.

IP

IR Global's Intellectual Property group has member firms in 60+ jurisdictions around the world. The group offers unrivalled sector expertise and knowledge, so whether your focus is in Biotechnology, Computers, Electronics or Pharmaceuticals, we have leading Intellectual Property experts who understand the specifics of the IP practice area and the field in which you operate.

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Elizabeth S. Dipchand regularly advises corporate clients on in-depth intangible asset management. This includes IP prosecution, licensing, and transactional work with a particular emphasis on assisting SMEs. In addition to IP management, Elizabeth is an experienced Canadian IP litigator having practiced for many years at the IP litigation groups of prominent Bay Street law firms and regularly coordinates multijurisdictional enforcement efforts.

Dan Pollack has a broad practice that includes copyright, licensing, new media and entertainment law with a focus on helping creators maximize the value of their work. Before joining Dipchand LLP in 2018, Dan operated his own law firm, served as General Counsel for a content licensing agency and as in-house copyright enforcement counsel for SOCAN (Canada's leading performing rights organization), and practiced in the IP litigation groups at multinational law firms in Canada and the United States.

Nestled in the heart of downtown Toronto, Dipchand LLP is a boutique law firm focused on Intellectual Property, Corporate Law, Franchise Law and Litigation.

Dipchand LLP's commitment to cultivating strong relationships with our partners and clients result in tailored, strategic advice to guide ventures of all sizes through Canada's dynamic legal landscape. Our clients come from a wide range of industries, from biotech to photographers, all heavily relying on innovation and their intellectual capital to succeed both in Canada and abroad.

QUESTION ONE

What is your best practice approach to IP due diligence as part of the deal making process? E.g. Schedule of IP and establishment of transferable ownership rights?

The prominence and wealth of innovative companies whose value mainly derives from intellectual property has exponentially increased this century. The complexity of the transactions that these innovative clients are now engaged in – from M&As to co-ventures – is compounded by the IP that makes these companies so valuable. With the importance of IP due diligence increasing dramatically, effective IP diligence should start well before the deal appears on the horizon.

Implementing IP diligence is not limited to merely listing assets but involves taking a tailored approach informed by factors specific to the deal and parties. These strategy considerations generally include:

- Industry.
- Operational territories.
- Nature of the parties.
- Transaction/deal structure (share, asset, license, venture).
- Transaction timeline.
- Access to critical people and information.

Regarding the nature and status of the IP, essential considerations include its genesis, development, ownership, exclusivity, registration, jurisdiction, third-party leverage, and carve-outs, not to mention the most critical issue: the materiality of the IP to the business moving forward. Understanding the deal context allows us to craft efficient IP diligence strategies to focus resources on what's essential rather than checking items off a list. In brief, we want to identify the asset and how it is protected (patent, trademark, copyright, industrial design, etc.), if it is registered/unregistered/registrable, and its importance to the transaction.

At Dipchand LLP, we strongly believe in the comprehensive management of both registrable and unregistrable intellectual capital and intangible assets in Canada and globally – namely, their identification, acquisition, maintenance, management, and enforcement. Active management of these assets ultimately streamlines IP due diligence. However, even in situations where this groundwork has not been laid, significant efforts should be devoted to IP due diligence underlying the transaction as it will form the basis of effective IP management moving forward. It's never too late to start!

QUESTION TWO

Which methods of valuing patents, trademarks or trade secrets are most common in an M&A deal in your jurisdiction (e.g. cost, value or market approaches)? Any examples?

Valuing IP in Canadian M&A transactions involves sound judgement and collaboration. Legal counsel is predominantly responsible for IP due diligence, which forms the basis for the valuation by Certified Business Valuators (CBVs), making the collaboration between counsel and CBV critical. Given that most of our clients operate in multiple jurisdictions, this exercise is usually not limited to Canada nor registered rights.

The ephemeral nature of intangible assets compounds the typical challenges of valuation. Registered rights – patents, trademarks, copyrights – are a common starting point in the valuation process to identify what you can legally exclude others from doing. This process will also examine the client's intangible unregistered assets to determine their value, which are generally more difficult to quantify than registered rights. However, note that copyright registration is not required in Canada for potentially crucial assets such as software.

The two common approaches to valuation – quantitative and qualitative – both seek to determine advantages that the client's IP confers over competitors. In the M&A context, quantitative analysis predominates. The three quantitative approaches applied in Canada are similar to many other jurisdictions, namely, the cost approach (IP value measured by development expenditure), the market approach (IP value measured by recent comparable transactions between independent parties), and the income approach (IP value measured by potential future benefits/revenue).

Ultimately, it is the nature and type of often overlapping IP assets (i.e., brand, technology, artistic, data/trade secret, etc.) that will impact this choice. For instance, a technology that is expensive to develop may have an inflated valuation using the cost approach where the market cannot support substantial future revenues. Conversely, the technology may be challenging to value from a market perspective if it is unique without transactional comparables. There is no one size fits all approach for valuing IP in an M&A transaction.

QUESTION THREE

What warranties and indemnities do you recommend putting in place to ensure IP value is fully preserved?

Canada is a common-law jurisdiction that has inherited the principle of caveat emptor where, absent a warranty, the buyer bears the risk in a transaction. This principle holds true in transactions relating to IP and intangible assets. Similar to other jurisdictions, the Canadian "warranty" concept encompasses the promises or guarantees regarding the transacted IP and any latent deficiencies. "Indemnity" provisions govern the damages arising from third-party claims involving a breach of the warranties.

The very nature of intellectual property and intangible assets adds a layer of complexity in crafting warranties and indemnities into these deals. On the one hand, a buyer's interest should be focused on obtaining the thing or right that was the subject of the contract. But when the items at issue are intangible, it becomes critical to include warranties and indemnities focused on the fundamental aspects of the IP in question. Such warranties most commonly relate to ownership (including ideation, creation, development, acquisition and assignment), registration status and territory, non-infringement, encumbrances, validity and enforceability, legal disputes, and the waiver of moral rights for copyrights. The related indemnity commonly holds the buyer harmless against any third-party claims arising from breach or deficiencies of such warranties before, during, and potentially after the contract's termination.

Conversely, the seller should be wary that their warranties and indemnities do not stray beyond the scope of what is reasonable or reasonably known about the assets. To this end, the warranty language should not be "absolute" but should be drafted to limit their scope to the seller's knowledge, best efforts, and/or what the seller ought to have known. Further, it is essential and common to limit the seller's direct liability in the case of a breach or deficiency of a given warranty.

Top Tips – To Accurately Establish IP Ownership Process

- **Don't Dismiss Unregistrable Intellectual Capital** – All intellectual property and intangible assets should be identified at the outset regardless of the registrability to determine their importance which will dictate the acquisition, leveraging and enforcement strategy.
- **Chain of Title** – records, contracts and documentation that clearly evidences the ownership of intellectual capital at all stages of development from conceptualization through to commercialization, including use by clients and other third parties.
- **Materiality of IP** – Identify the critical IP that is key to the company's operations, revenues and competitive advantages in order to ensure focus on its management and further development is maintained.
- **Considered Registration Strategy** – Just because you can, doesn't mean you should. A considered registration strategy focuses resources on the IP and intangible assets that underpin the company's success now and in the future with a focus on the forest rather than cultivating trees planted in the wrong place.

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Mark Millward is a commercial, technology and intellectual property lawyer with more than 20 years' experience working with SMEs, global corporations, multi-industry conglomerates and government in the UK, Europe, Hong Kong and Australia. Mark's legal expertise covers every stage of the product lifecycle from R&D to IP, procurement and long-term contract negotiations for finance, retail, logistics, healthcare and IT clients.

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Eliza Low is a corporate and commercial lawyer who helps multinational corporations, entrepreneurial business owners and family-owned companies realise their investments and execute strategic acquisitions both locally and globally. Eliza has achieved favourable outcomes for clients on a full range of corporate matters including global carve outs, domestic M&A transactions, IPOs and corporate restructures across industries from IT to energy, FMCG and industrial.

mdp Law is a boutique corporate, commercial and intellectual property law practice based in Melbourne, Australia. mdp Law provides clients with forward-thinking advice and commercially driven solutions, from startup to maturity and beyond. Our multi-disciplinary team of legal specialists have global, top tier backgrounds, commercial expertise that covers every stage of the business lifecycle, and a network of international associates.

QUESTION ONE

What is your best practice approach to IP due diligence as part of the deal making process? E.g. Schedule of IP and establishment of transferable ownership rights?

It is essential to ensure the deal team engages specialist IP counsel at the earliest opportunity. In many instances IP rights underpin the target's business operations. For example, in the production of consumable goods, brand/trademarks are the lynchpin for successful sales, technology companies rely on copyright to protect their source code and manufacturing companies often rely on the monopoly afforded by patents.

Once the nature of the business and the jurisdictions it operates in have been identified it is advisable to create a schedule of all IP owned or licensed to or from the business that allows it to operate effectively. The structure of the schedule generally focuses on the most significant IP first.

The schedule should contain at least:

- Description of IP owned
- Details of IP licensed to or from a third party
- For registrable IP, such as a trademark, details of the registration or application number, relevant dates and jurisdiction
- For non-registrable IP, such as copyright, a detailed description of the asset (such details cannot be obtained from public registers)

Where "licensed" IP has been identified, further due diligence is required. Often the licence agreement terms can obstruct the sale. The licence agreement may prohibit transfer of the licence or termination rights may exist in the event of the sale. The purchaser should also be mindful of the duration of the licence and that the description of the IP is accurate.

For technology companies, in particular, copyright is the key protection for valuable source and object code. Where the target asserts ownership of copyright, due diligence should confirm that code has been developed by employees rather than third party providers. In the latter case, verification will be required to ensure that express written assignments of copyright are in place.

QUESTION TWO

Which methods of valuing patents, trademarks or trade secrets are most common in an M&A deal in your jurisdiction (e.g. cost, value or market approaches)? Any examples?

In the context of an arm's length M&A transaction, the purchaser will most likely focus on two financial components.

The purchaser's advisors will scrutinise the balance sheet from a finance and accounting perspective. IP needs to be capitalised appropriately and in the case of intangible assets, businesses in Australia may attribute separate values for "identifiable" assets such as patents, copyright and trademarks and "non-identifiable" assets such as goodwill. The financial, accounting and tax specialists to the M&A transaction will consider the notes to the accounts to understand the valuation methodology that has been applied (such as acquisition cost or market value). In this context they will normally consider whether the valuation methodology applied is in accordance with the Australian Accounting Standards Board recommendations and other relevant authorities including the Australian Tax Authority and the Australian Securities and Investments Commission. This analysis will not involve the lawyers assisting in the transaction.

From a commercial perspective, the IP's value is driven by the market, i.e. what does the market think the relevant asset is worth. The arm's length purchaser attributes a value that it is willing to pay for the relevant IP. Whilst the balance sheet is relevant in the context of the transaction, the purchaser is unlikely to be guided or bound by it. Instead, the purchaser will make a calculated commercial decision on how significant the IP is in the context of the relevant business being acquired. For example, in respect of registrable rights such as patents and trademarks, the purchaser will consider how long the monopoly protection will last for and thus what its value is from a commercial perspective.

QUESTION THREE

What warranties and indemnities do you recommend putting in place to ensure IP value is fully preserved?

The preservation of IP value post-completion is supported by the warranties and indemnities contained in the transaction agreement. The purchaser should be mindful that the seller will initially present minimal assurances to the purchaser. From the purchaser's perspective, extensive warranties and indemnities should be sought.

Warranties

The following warranties are recommended but will need to be tailored to the transaction and the nature of the business. Often greater protection is required for a business sale:

- The schedule of IP sets out accurate details of all IP owned or used in conducting the business
- The purchaser will acquire all legally effective IP rights necessary to conduct the business
- The IP does not infringe any third party rights and to the seller's knowledge, no third party is infringing the IP used in conducting the business
- All IP is either owned or appropriately licensed
- The IP owned is not the subject of any security interests
- For registrable IP applications (e.g trademarks), no 'objections' have been raised by the examiner/third party
- For unregistered rights, such as copyright, which has been developed by the target, that the IP has either been created by employees of the company or developed by a third party but effectively assigned
- There is no dispute "on foot" in respect of any IP
- Where IP is not owned by the seller there are appropriate licences in place which will survive completion
- No IP has been licensed to third parties other than in the ordinary course of business.

Indemnities

It is open for the parties to agree whether a seller provides a general indemnity to a purchaser for any breach of warranty, otherwise, indemnities are typically only included to deal with specific issues identified as part of the due diligence process.

Top Tips – To Accurately Establish IP Ownership Process

- In respect of registrable rights such as patents and trademarks, implement independent verification of ownership of those rights by undertaking relevant "searches" of ownership/title and registration details (registration number, jurisdiction and duration of the registration/monopoly) with the relevant intellectual property governance authority such as IP Australia.
- In respect of non-registrable rights, such as copyright, which have previously been acquired by the target company, ensure that such rights have been successfully transferred and documented. Verify contracts to ensure there is an effective assignment which is compliant with law and accurately and comprehensively describes the IP.
- Verify that IP developed by the target company has either been created by employees of the company or, where developed by consultants or other third parties, that an adequate assignment/transfer agreement is in place.
- Seek warranties/assurances of ownership from the seller as part of the sales transaction agreements.

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Brian Buss provides intellectual property solutions including: valuation, profit apportionment, expert testimony, economic analysis, and transaction advisory services for businesses, IP owners, attorneys and licensees.

With core skills in valuation, profit apportionment and financial analysis, Brian Buss leads strategic consulting and expert testimony assignments focused on intellectual properties and intangible assets, including trademarks, copyrights, patents, publicity rights, trade secrets, brand assets and technology assets.

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Doug is a Certified Licensing Professional (CLP), a Google Analytics Certified Individual (GAIQ) and is a current member of the INTA Right of Publicity Committee. Doug has been a named expert witness on 75 cases, deposed 20 times and has provided trial testimony 5 times. Doug specializes in calculating damages for copyright, trademark and publicity rights cases, as well as social media, Internet and defamation disputes.

Nevium specializes in intellectual property valuations and expert testimony. We provide the IP community with a visionary approach to calculating and communicating the financial impact of trademarks, copyrights, patents, brands and intangible assets.

For C-level Executives and In-House Counsel we provide IP valuation and portfolio strategies with a focus on connecting IP to financial performance and using IP to increase profits. For IP litigators we provide expert damages testimony that combines our knowledge of Internet and social media analytic tools with accepted methodologies and concise narratives.

QUESTION ONE

What is your best practice approach to IP due diligence as part of the deal making process? E.g. Schedule of IP and establishment of transferable ownership rights?

Valuation of key intangible assets should be a component of any due diligence process. Today's businesses rely on intellectual property (IP) and intangible assets to generate financial performance, with intangible assets typically accounting for a larger portion of overall enterprise value than tangible assets. An IP valuation improves deal making by providing both seller and buyer a clear picture of the key assets that drive financial performance. With an understanding of the relative values of key tangible and intangible assets, buyers can focus their due diligence on the key assets that will be acquired, and sellers can clearly present and communicate the financial and economic benefits of the assets they have built and developed.

Identification and valuation of key intangible assets at the seller will also focus overall due diligence efforts. Using valuation as a component of transaction due diligence enables transaction advisors to focus on how the most important assets at the target contribute to revenues, cost savings, profitability, and cash flow. As the buyer will become the owner of the seller's IP, a clear understanding and measurement of how that IP generates sales, profits and cash flows is essential in review and execution of any business transaction.

QUESTION TWO

Which methods of valuing patents, trademarks or trade secrets are most common in an M&A deal in your jurisdiction (e.g. cost, value or market approaches)? Any examples?

The process of valuing IP and intangible assets typically involves one or both of two calculation methods: the relief from royalty method and excess earnings methods. Both methods indicate the portion of profits achieved by the party using the IP that is contributed by the IP asset.

The relief from royalty method values IP assets using the context of a hypothetical negotiation where the IP user pays a royalty to an unrelated IP owner in an arms-length, willing buyer, willing seller IP license transaction. The relief from royalty method typically relies on benchmarks license agreements involving comparable assets. The amount of hypothetical compensation the IP user would be willing to pay, and the IP owner would be willing to accept, is forecast over the remaining useful life of the IP asset and future amounts are discounted to a present value using a discount rate reflecting the required rate of return for the subject asset. Essentially, this method provides an indication of the financial compensation one party would be willing to pay to use the subject IP asset. The amount of compensation, typically a royalty on financial performance, is an indication of the portion of profits expected to be achieved by the IP user that are derived from use of the IP asset.

Excess earnings methodologies focus on quantifying the impact of the IP asset on the party using the IP asset. For business transactions, excess earnings methods provide an indication of the profits achieved by the seller from its ownership of IP. In other words, if the seller owns and uses a recognized brand, an excess earnings methodology indicates the portion of total profits achieved from contribution of the brand assets. Excess earnings methodologies quantify how and when the IP asset is providing pricing power, driving increased sales volumes, and/or reducing costs. For example, a strong brand may not result in high price points or increased unit volumes but can be valuable if the brand reduces the business's overall marketing and advertising expenses.

QUESTION THREE

What warranties and indemnities do you recommend putting in place to ensure IP value is fully preserved?

With advance planning and evaluation, a seller should be able to warranty ownership of its key assets. Equally important, the seller should also be able to warranty ownership of "complimentary" intangibles. For technology assets, complimentary intangibles can be code, test results, trade secrets and other assets that complement and enable use of patented technologies. For marketing assets, complimentary intangibles can be domain names, social media pages, marketing procedures, customer lists and other assets that complement and enable use of registered marks and copyrights.

Through IP valuation buyers and sellers will identify those IP assets that provide the greatest contribution to total enterprise value. Thus, pre-transaction, sellers should confirm ownership of both the key identified IP assets and their complementary intangibles. This process of bundling IP and complementary assets enables more effective and transparent warranties.

Top Tips – To Accurately Establish IP Ownership Process

- For IP valuation, do not rely on only one valuation methodology. Valuation analysts should utilize multiple calculation methodologies and reconcile the differences indicated by each calculation.
- For establishing IP ownership in evaluating marketing assets such as trademarks, brands and copyrights, confirm ownership of domain names and social media sites. At too many businesses, domain name registrations and social media creation were outsourced, and management often assumes these assets are owned by the business. Its never too early to check, confirm and ensure website domain names and social media pages are properly owned by the business.

INDONESIA

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A co-founder of K&K Advocates, Risti has broad expertise in the IP area. She has more than 20 years' experience providing assistance for Indonesian and foreign clients in a variety of IP projects. At the firm, Risti leads the IP Prosecution Team and oversees the Commercial IP practice group.

Admitted as IP consultant in 2006, Risti has handled prosecution of trademarks and geographical indications, industrial designs, copyright and patent; and enforcement of IP rights as well as led IP commercial projects, including providing advisory services with respect to franchising, licensing, distributorship, consumer protection, antimonopoly, as well as issues relating to media and data protection/privacy.

Established in 2011, K&K Advocates is widely recognised as one of the prominent law firms in Indonesia, with its main focus on IP. Currently, K&K Advocates consists of five partners, 24 associates, one foreign off-counsel, patents attorneys, and a number of paralegals and supporting staffs. We have strong and dedicated teams to handle both IP prosecution and non-contentious matters, and we have now expanded the practice to also cover general litigation and corporate technology matters.

Our client portfolio extends to cover a diverse range of industries, among which we have been continuously assisting a number of multinational clients on different matters in Indonesia.

QUESTION ONE

What is your best practice approach to IP due diligence as part of the deal making process? E.g. Schedule of IP and establishment of transferable ownership rights?

a. Prioritising the Objectives. This is important to understand the significance of the role IP plays behind the deal, and helps ensure that the due diligence is focused on the particulars of the deal and happens in a timely fashion.

b. Schedule of IP: Preparing an IP schedule that contains a complete and accurate list of all domestic and foreign IP applications and registration. An IP schedule is a crucial part as a base to define, examine and analyse the value of the intellectual property by examining the strength, scope and enforceability of the IP, the ownership rights surrounding the IP and the future potential to be derived from the IP.

c. Ownership and Status of IP: Ownership is often one of the first issues explored in an IP due diligence investigation since it can be a deal-breaker. Therefore, it is important to verify the following information:

- the status and validity (accuracy of the disclosed information) of all IP assets.
- the security interests and assignment clauses of the license agreements (i.e. who are the inventors? Did those inventors properly assign the IP rights?).

QUESTION TWO

Which methods of valuing patents, trademarks or trade secrets are most common in an M&A deal in your jurisdiction (e.g. cost, value or market approaches)? Any examples?

To date, there are no applicable regulations and institutions able to assess the value of intellectual property in Indonesia. However, based on developing practices, as intellectual property is categorised as an intangible asset, an IP owner may appoint a Public Appraisal Service Officer (KJPP) to carry out the assessment.

In general, IP assets can be valued based on the following approaches:

a. Income Approach

- The income approach determines the value of an asset in which the valuer, in this case KJPP, will assess the revenues earned by using the IP within a certain period. This valuation technique also converts the amount of potential future income and expenses by using such IP in business activities.

b. Market Approach

- The market approach determines the value of an asset based on the selling price of a similar asset. In practice, KJPP will study the most recent sales of similar assets and make a comparation between such assets. Since each asset being valued may not be identical, various adjustments possibly required.

c. Well-Knowness of IP (especially Trademark)

- For instance, if the mark was considered as well-known, the fair price assessed by KJPP is within the range of + - 5-7.5% of the valuation. Meanwhile, if the brand is not well-known, the fair price is in the range of + - 2 to 5% of the valuation.

We have conducted internet searches where we found several cases that are publicly accessible. There are several cases, one of which is the purchase of PT HM Sampoerna by PT Philip Morris Indonesia for Rp. 18.5 trillion or US$5 billion in 2005; and valuation data on a trademark license agreement between PT Sepatu Bata Tbk and its affiliate Bata Brands S.A. which data can be accessed through the website of the Indonesia Stock Exchange: **https://www.idx.co.id/StaticData/NewsAndAnnouncement/ANNOUNCEMENTSTOCK/From_EREP/201807/89edd1bf56_9fb2b56cac.pdf**

QUESTION THREE

What warranties and indemnities do you recommend putting in place to ensure IP value is fully preserved?

a. To make sure that the IP is being used properly (to avoid non-use claim – for trademarks). Improper use of the IP may result in the loss of such IP rights.

b. Have all IP data well documented – determine all the IP assets of the business, where the assets are located, the license and renewal terms. These must be properly documented.

c. Establishing a good practice of signing a non-disclosure agreement – this allows a company to share its intellectual property with others without unduly jeopardising that information and, at the very worst, these provide insurance that legal action can be taken if the information is leaked.

d. Keep the information confidential – it is important to keep the idea/invention confidential until it is protected. For instance, if we intended to obtain a patent or design protection, we need to safeguard and maintain secrecy of such information until we have filed the application (i.e. public disclosure may result in the immediate loss of invention patentability unless a patent application has already been filed).

e. Adequate security system – sensitive IP assets should be managed only by those with a need to know. Limit the number of copies of sensitive IP and strongly encrypt and control who has access to specific information.

f. Closely monitoring competitors and IP infringement – it is important to always keep an eye out for anyone who may infringe IP, as this can negatively affect market share and quickly jeopardise the IP value and reputation.

Top Tips – To Accurately Establish IP Ownership Process

- Conducting IP searches prior to filing
- Have a clear consensus of all parties involved in anything IP-related
- Monitoring the progress of IP applications (until registered)
- Register the IP, and make sure to put clear identification if having it published
- Regular market checks – for potential conflicting trademarks and IPs
- Proper underlying agreements, when contracts are involved.

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PERU

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Alejandro Castro is the Managing Director of Union Andina Intellectual Property Solutions. He is in charge of national and international relationships, providing strategic counsel for the management team and legal department. His practice focuses on trademarks, unfair competition law, advertising law, patents and plant varieties. Likewise, he has experience on cross-border IP litigation issues, specifically on trademarks. Alejandro represents national and international companies on different aspects of their IP assets within a broad range of industries.

Union Andina Intellectual Property Solutions has more than 25 years in the legal market managing portfolios of trademarks and patents nationally and in Latin America. Time has allowed us to represent cases of different legal nuances, which is why we have the legal expertise to achieve the most creative and efficient solutions. We are currently legal representatives of several international companies. Similarly, we have strong relationships with leading European, Asian and US law firms.

QUESTION ONE

What is your best practice approach to IP due diligence as part of the deal making process? E.g. Schedule of IP and establishment of transferable ownership rights?

An essential element before starting an IP audit is entering into a confidentiality agreement that protects the interests of the parties by revealing sensitive information in the negotiation process. In this contract, both the receiving and the discloser party will try to define the elements involved under the concept of confidentiality, the protection mechanisms such as the penalties for breach of obligations, the possibility of applying to court to claim compensation for damages, and determine the term of the contract.

Likewise, if part of this confidential information is considered secret it will be governed by our Andean Community Intellectual Property Regime and National Law and taken as an industrial secret. In this case, in addition to the previously mentioned protection mechanisms, the holder shall have the right to file a complaint with the Commission for Repression of Unfair Competition.

On the other hand, the most relevant IP rights are distinctive signs, patents, copyrights, and industrial secrets. As part of the audit we identify the number of rights involved, the ownership, the validity, the existence of licenses; as well as the existence of contentious procedures and administrative burdens associated with each right.

In the case of distinctive signs and patents, a fundamental step is to verify the resolution granting exclusive rights. In particular, we focus on the description of the classes and the claims granted for distinctive signs and patents, respectively. In this way, we validate whether these rights are in fact in accordance with the terms and objectives of the negotiation.

Copyright and industrial secrets deserve particular attention. For the former, the identification of ownership and paternity will depend to a large extent on the assignment contracts and the physical or digital supports, including blockchain certificates, that allow verifying the creation date; as well as the registration certificates registered with the competent authority, which is optional in our jurisdiction.

QUESTION TWO

Which methods of valuing patents, trademarks or trade secrets are most common in an M&A deal in your jurisdiction (e.g. cost, value or market approaches)? Any examples?

Of the 3 valuation methods, the most reliable is the one focused on the market. However, its execution basically depends on access to information or reliable data of similar transactions. Thus, identifying transactions on patents, trademarks or software that have characteristics that are very similar to the asset to be valued is complex in Peru because it is a jurisdiction where the number of transactions on intangible assets is minimal, and the majority of legal entities are closely held corporations.

Notwithstanding this, the most used valuation method in mergers and acquisitions in Peru is the discounted cashflow approach. In particular, to determine the income attributable to the brand, the royalty saving method is usually applied, for which it will have to take into consideration royalties from other similar brands under the same category of the relevant industry, using a national or international database.

However, in the case of patents and copyrights (software) it will be important to consider the term of validity of IP Rights:

1. Patents: 10 years for utility models and 20 years for patents of invention. In both, the term of protection is counted from the filing date of the application.
2. Copyright: life of the author plus 70 years after his/her death.

Because the licensing of patents and copyrights (software) is less common in the Peruvian market, it will be important to take into consideration other approaches such as the Monte Carlo method that allows generating a series of possible expected values in different probable scenarios, the Real Option Method or the Binomial tree model.

QUESTION THREE

What warranties and indemnities do you recommend putting in place to ensure IP value is fully preserved?

In Peru, the value of Intellectual Property can be ensured by 2 means: administrative actions and legal actions to request compensation.

Thus, Intellectual Property in Peru is regulated at an administrative level making it possible to request precautionary measures, initiate actions for infringement and request corrective measures in the market. These administrative measures have the function of guaranteeing IP Rights. It is important to point out that the administrative authority does not have the power to order compensation. Therefore, it will be necessary to apply to the Judiciary once a consensual resolution is obtained at the administrative authority.

Regarding this last aspect, it is important to point out that in order to calculate the compensation, whether under a contractual or extra-contractual liability regime, it will be important to determine the consequential damage (economic losses on assets), loss of earnings (profits not received due to the damage) and moral damage (possible also for legal persons).

We emphasize that in the FTA concluded with the United States, Peru has specifically committed when it comes to copyright infringements, related rights and trademark counterfeiting. The infringer pays the right holder the profits obtained attributable to the infringement and when determining the amount of compensation, judicial authorities shall consider, inter alia, the value of the infringed-on good or service, according to the suggested retail price or other legitimate measure of value submitted by the right holder.

One of the outstanding points by the Peruvian State is to establish or maintain pre-established damages, which shall be available on the election of the right holder as an alternative to actual damages with respect to infringement concerning copyright or related rights and trademark counterfeiting.

Top Tips – To Accurately Establish IP Ownership Process

- It is important to consider the Andean Community market and analyse the IP Rights status in Colombia, Ecuador, and Bolivia. This will provide a deeper insight when facing any regional negotiations and the chance to identify any roadblocks that could impact the operation.
- For sales/acquisitions of Intellectual Property Assets among companies of the same business group, transfer pricing should be spotted right away. Peruvian Law is aligned with the OECD recommendations, making the complying process reasonable and predictable for companies, ensuring the value of the IP asset within the operation.
- It is relevant to analyse if there is any co-ownership. This fact could delay negotiations because to transfer an IP asset as a unit all co-owners must agree on it. Another related issue is that each owner is entitled to an “ideal quota” and can assign it to external parties without consent of the other co-owners, making it harder to negotiate.

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Karin Klempp Franco, partner at Barcellos Tucunduva Advogados, provides legal advice on intellectual property, information technology, privacy and data protection, corporate law, commercial contracts and M&A to a range of international clients. LL.M. in International Economic Law (University of Cologne, Germany), Ph.D. in Commercial Law (University of São Paulo Law School, Brazil), Professor of Law in Intellectual Property, Contracts, Corporate Law, ADR/Arbitration and Privacy and Data Protection at University Facamp, Brazil. She's a registered mediator, arbiter and specialist at several Brazilian dispute resolution centres specialising on intellectual property. Recognition: Chambers Latin America, Chambers Global, Leaders League, Best Lawyers, Análise 500 Advocacia.

Established in 1954, Barcellos Tucunduva Advogados has tried and true experience in business law with a work ethos based on seeking practical results for the client. The firm is distinguished by its professionals' high level of qualification and excellence in their work that aims to find the best solution for clients' specific needs. The firm has been ranked in several national and international – most recognised firm lists for numerous years.

QUESTION ONE

What is your best practice approach to IP due diligence as part of the deal making process? E.g. Schedule of IP and establishment of transferable ownership rights?

Intellectual property can dramatically increase the value of a company and turn a medium-sized company into a leader. In certain circumstances, the IP itself is the reason for a deal, for example when the target has built a reputation or developed a cutting-edge technology. Hence, there is no doubt about the importance of identifying the main intangible assets of the target company and if they are sufficiently protected.

The scope of an IP-oriented due diligence must include information related to the target's IP according to a checklist prepared by the support office. This includes a schedule of registered and pending trademarks and patents, copyrights, software and algorithms, if there are any existing IP license agreements and supporting assignment documentation, and lists of registered domain names and relevant unprotected know-how and trade secrets, among others depending on the company's core business.

Understanding the core business and technology employed for its activities is paramount for the IP due diligence. The due diligence team must analyse the information and documentation provided and conduct additional checks and searches as applicable to ensure the information is complete. It is important to establish sufficient evidence of ownership of IP, which may be tricky for long-acquired rights and for technology initially developed by one of the shareholders that was incorporated in the company´s business, for example. The search in a due diligence is for risks and threats to IP ownership, use and enforceability. The report compiles the risks that may be found, as well as mitigation and asset management suggestions, like the execution of IP assignment instruments, non-compete agreements and royalty-free license agreements recognising a factual situation. Losing the registration of a trademark or patent, or the right to use certain technology can make a business unfeasible and end a buyer or investor's interest in a target company.

QUESTION TWO

Which methods of valuing patents, trademarks or trade secrets are most common in an M&A deal in your jurisdiction (e.g. cost, value or market approaches)? Any examples?

Despite the practical difficulty in valuing intangible assets due to the range of variables affecting their worth, there are some common strategies in Brazil for their valuation to lessen future uncertainty and the discrepancy of results. The main methodologies used for Brazilian deals are based on expected income, market value and/or costs for development. In income-based methodologies, the asset value is a function of how much the rightsholder could reasonably expect to receive upon licensing the IP to a third party, on the profit necessary to attract an investor, on the capitalisation of future profit flow premiums attributable to IP or on the profits earned by the use of the IP itself. When based on market value, the methodologies use the profits derived from exploitation of the IP or its expected turnover in certain market conditions. Finally, the cost-based valuation methodologies start from an estimate of the amounts and resources invested in the development of the asset. There is, however, no one correct or preferred methodology. The choice relies on the parameters used by the company to calculate the values of its assets, context and specificities of the case at hand, which may deem one or more bases for valuation more adequate than others. Other than that, in Brazil it is very likely for market researchers, analysts and rankings to base their conclusions on information of profitability of the company and the contribution of certain intangible asset to these numbers (i.e. income-based methodologies). For example, according to the Brazilian version of the BrandZ ranking, the most valuable Brazilian brand is "Itaú" (finance), currently valued at US$8.2 billion, according to Kantar based on Bloomberg data.

QUESTION THREE

What warranties and indemnities do you recommend putting in place to ensure IP value is fully preserved?

Other than due diligence accompanied by specialised lawyers to validate the IP information sent by the target company, it is important to accommodate the risks of the deal through appropriate documentation. Representations and statements of responsibility of the target company on the lawfulness of the IP, its validity and absence of disputes regarding ownership is a must-have. The company should also be queried to sign-off registered IP rights, such as trademarks and patents, in a separate document to expedite annotation of the assignment at the Brazilian Patent and Trademark Office to the acquiring company. The company and their shareholders, if feasible, or owners should also be bound to specific duties to compensate the new rightsholders in case of a dispute arising for ownership of rights or a suit to invalidate their registration, as well as any other risks found out during the due diligence. Non-compete, non-solicitation and specific confidentiality duties may also be helpful to ensure the protection of the value of intangible assets, especially when dealing with know-how and trade secrets.

Top Tips – To accurately establish IP ownership process

- Know which IP is subject to protection through a registration process (patents and trademarks), through secrecy (trade secrets), or upon simple creation and use (copyrights and trade dress).
- Clearly establish the chain of assignment of rights from the developer(s) all the way through the present rightsholder since most kinds of IP require written agreements and annotations for full effect of the assignment.
- Keep in mind that written agreements are needed for a company to fully own the copyrightable works of their employees, even if the creation of copyrightable works is included in their job description.
- Be active in the protection of the trademark and patent portfolios, registering all appropriate variations of the trademarks for all applicable goods and services, and all relevant additions to patented inventions.
- Keep trade secrets confidential and use nondisclosure agreements, clear labeling of confidentiality and adopt information security best practices.

Real Estate

IR Global's Real Estate members are not just content to be part of the industry but lead it through innovation. Their cross-border offering covers Real Estate from conveyancing and notary services through to large deals across a range of sectors. They identify projects for investments in their own jurisdictions and have invaluable contacts with investors and funds, making them indispensible to clients.

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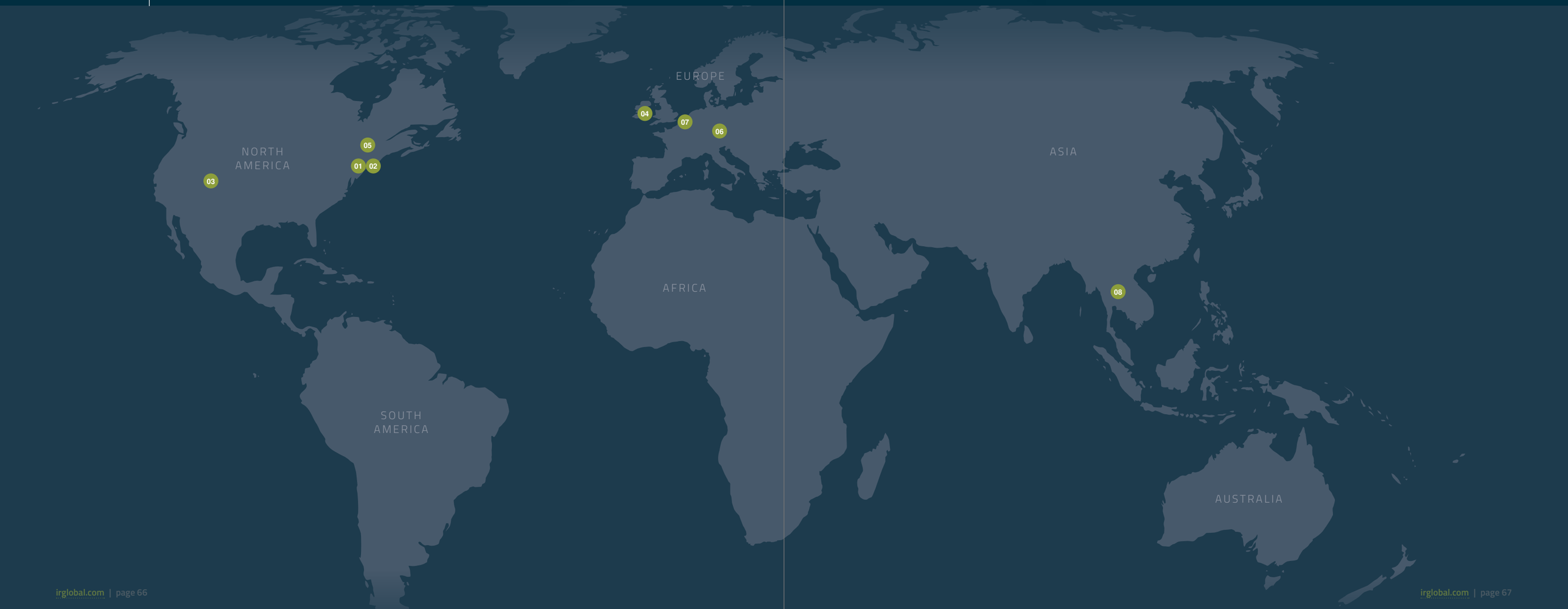

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Michael E. Lefkowitz is Managing Member of Rosenberg & Estis, P.C. and a leader of the firm's Transactional Department. Over the past 20 years, Mr. Lefkowitz has been involved in many aspects of the firm's activities, including litigation, appeals and administrative law. Mr. Lefkowitz specialises in representing clients in commercial real estate transactions. His focus for many years has been representing lenders and borrowers in completing financing transactions, and workouts of loans on troubled assets.

Richard L. Sussman is a member of Rosenberg & Estis, P.C. and a leader of the firm's Transactional Department. Already an experienced transactional attorney, during Mr. Sussman's tenure at the firm his knowledge and experience have solidified his status as a skillful and highly valued practitioner. For Mr. Sussman, the goal is creativity, creating solutions to complex problems toward the goal of achieving the objectives of his clients. Mr. Sussman has had no shortage of opportunities to engage in creative solutions.

Founded in 1975, Rosenberg & Estis, P.C. is widely recognised as one of New York City's pre-eminent real estate law firms. R&E provides full-service representation and advice in every aspect of real estate, from performing due diligence and evaluating financing, to handling joint ventures, acquisitions and leasing, construction and design team agreements, property tax exemptions and abatements, land use and zoning matters, Real Property Income & Expense (RPIE) filings, co-op and condo offering plan filings, distressed situations and bankruptcies, as well as the litigations and negotiations which sometimes ensue when deal-making.

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

Typically, in a cross-border real estate transaction the foreign investor knows little about the locale in which they propose to invest and looks to counsel to help them to understand the market, local laws, regulations and customs.

New York City has a myriad of complex laws that impact real estate and must be understood and accounted for to minimise risk and maximise return. These include: a complex system of residential rent regulations, the manner in which various classes of real estate assets are assessed and taxed on the local property tax level, and various tax incentive programs that can greatly enhance value in exchange for providing a benefit to the community (e.g. affordable housing, building community facilities and/or providing capital upgrades to municipal facilities). Legal regulations instituted because of Covid-19 have also greatly impacted the market. While these are 'temporary', it is impossible to predict how long they will stay in place for. Significant examples that have restricted the rights of owners include a moratorium on evictions (even for non-payment of rent) and prohibiting pursuing guarantors of leasehold obligations. While protecting tenants, they handcuff owners in a manner that can have ripple effects through the economy – consider, for example, the impact of decreased cash flow on the ability of owners to pay mortgages and real estate taxes.

We also do more than simply provide legal advice. NYC (as well as the New York metro area) is a broad and diverse real estate market. We are intimately familiar with the various markets and sub-markets in our jurisdiction and the local laws, regulations and customs. We have done transactions in most of them and provide advice on market trends, competing developments, the lenders acting within the market, etc.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

Some considerations are unique to the client:

1. Consider how the proposed investment fits into the client's portfolio. Does it align with other assets, or does it have unique characteristics? If the former, the client should be able to boost return by taking advantage of economies of scale.
2. Where is the source of the equity for the investment? If the equity comes from a recently sold property, can the funds be part of a 1031 'like-kind' exchange? If so, the value to the client may well be higher than to another investor.

Other considerations are more general:

1. Is the asset occupied? An unoccupied asset creates the possibility of demolition/construction or gut-renovation, which can create value. If the asset is occupied, what are the occupants' rights and what is the cost/benefit of a possible buy-out?
2. What is the zoning applicable to the asset? For example, if the asset is an older office building and has a handful of tenants, would it make sense to vacate the building and re-adapt to residential or hotel use? This can be a short-term proposition, or a medium/longer-term possibility where the asset is re-sold at a profit.
3. Is the asset fully built, or are there excess development rights available? In NYC, these rights are valuable in multiple respects. They can be used in the property by adding a penthouse or adapting space to generate additional cash flow. Alternatively, the rights can be sold to an adjoining property and used within a 'combined zoning lot'. These development rights are valuable – sales in certain areas have reached upwards of $US600 psf. Many invest without considering this possibility, nor do banks typically account for these rights in property valuations. Knowing these rights exist when negotiating can be used to a savvy purchaser's advantage.

QUESTION THREE

What Tax-Efficient Vehicles Can Be Used To Hold Real Estate In Your Jurisdiction? Any examples of deals you have structured in this way?

Debt Structure vs. Equity Investing

There is benefit to foreign investors to structure investment in US real estate as debt versus equity because they can avoid becoming a US taxpayer. We recently completed a project for a European client that made its investment as a mezzanine loan. Using this type of structure avoided the investor needing to be a US taxpayer and therefore be subject to withholding and payment of US income and capital gains taxes.

Real Estate Tax Exemption

To combat a housing shortage for lower income families and make market rate development economically feasible in New York, a developer building a certain number of affordable units can obtain an exemption from paying real estate taxes. There's exemption for the period of construction (not to exceed three years) and – dependent upon certain facts and limitations – 35 (and possibly 40) years on the assessed value of improvements. In exchange, you commit 30% of the apartments in your building to affordability restrictions for lower income individuals for the life of the benefits.

Opportunity Zones

Opportunity Zones are a community development program established to encourage long-term investments in low-income urban and rural communities The program provides a tax incentive for investors to re-invest their unrealized capital gains into Opportunity Funds that are dedicated to investing into Opportunity Zones. State governors can nominate up to 25% of their state's qualified census tracts for inclusion – these are largely lower income areas in need of investment opportunities.

It's lucrative for investors who have had substantial capital gains subject to US capital gains taxes from the sale of assets such as stocks, a business or real estate. Investors can defer tax on any prior gains until the real estate asset is sold or exchanged if the gain is reinvested in an Opportunity Fund.

Top Tips – To Optimize a Real Estate Portfolio

- **Know the Law**

  Prior to and during the Covid-19 pandemic many jurisdictions implemented law changes that inhibit a landlord's ability to increase rents and enforce leases and related guaranties. These measures impact real estate values as they diminish rent collections; thus investors must have knowledge of law changes to invest wisely.

- **Anticipate Change**

  Covid-19 has intensified changes in retail and has caused dramatic effects in the office and hotel sectors. Those who saw the writing on the wall have diversified from retail to other asset classes and are well positioned for growth. One must anticipate continuing changes resulting from the pandemic in the retail, office and hotel sectors.

- **Go Green**

  Tenants are looking for locations that provide green initiatives such as LEED (Leadership in Energy and Environmental Design) certified buildings, solar power and green design. Owners can receive tax incentives and abatements by implementing solar or wind energy elements.

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Torben Welch is the head of the Messner Reeves Utah office and is licensed and practices in Utah, Colorado and New York. Since 2002, he has handled complex real estate, business and commercial transactions worldwide, providing practical "solutions oriented" operations and general counsel services to help achieve client's business goals. Primarily serving clients in the real estate, lending/banking and tech industries, Torben understands successful representation requires deep legal knowledge combined with business and industry oversight, making him an excellent partner for any client needing comprehensive legal representation.

Messner Reeves provides a full range of legal services to a diverse group of clients from Fortune 500 companies to individual entrepreneurs. We are as excited about working with small business owners as the largest corporations because, for us, it's all about maximizing potential. We develop the legal strategies that can help propel the minor operation to the next level or the next 10 levels – whether that means doubling in size or becoming a worldwide, publicly traded enterprise. With offices in Colorado, New York, Nevada, California, Arizona and Utah.

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

Local market intelligence is crucial to enable the prospective purchaser to gather information and determine whether or not a specific asset – or even the geographical location – is valuable to the company's goals. A local real estate agent and attorney who has previously worked on assets in the area is important to acquire such information that will make an acquisition viable.

This information gathering is most effective before negotiations with the other party begin. It is important that the prospective buyer asks its agent to go beyond the typical "sales" function in a transaction and assist in collecting as much information as possible about the asset: tenant mix, parking issues, deed restrictions or covenants, etc. An agent should be able to provide valuable insight as to whether or not an asset is underperforming or defective in some way and explain why a national tenant may have chosen a different site over this one.

However, reliance solely on a real estate agent in such pre-contract phase is misguided. Critical aspects of local market intelligence (including the impact local building, zoning and codes, operating ordinances, deed restrictions or covenants, etc.) are often missed or overlooked in the pre-contract phase. This will save significant amounts of cash and time that may needlessly be expended once the asset is under contract. On several occasions, clients have approached me to conduct a preliminary review or public record documents and related information. In doing so, we have discovered long-standing title defects that are not correctable or restrictions that would render the property unfit for the client's intended use. By spending a little bit of time early on, the client was able to avoid a significant waste of time and resources that would have been devoted to the contract process.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

Value is king in real estate deal-making. A standard industry practice to determine value is the appraisal, which attempts to value an asset. In most cases, the appraisal is viewed by a prospective purchaser as the way to convince a lender to utilize the asset as collateral for the acquisition price. But appraisals often fail to address non-quantitative aspects of the asset that may make it more valuable to the buyer.

Nevertheless, the standard appraisal should be viewed as an estimate of value that could be correct so long as certain assumptions remain. A wise buyer uses the real estate appraisal as a starting point to drive business decisions about whether the acquisition is in the company's best interests. That the appraisal supports the valuation the lender is looking for may not make the asset truly valuable to the buyer.

Buyers should identify aspects of the asset that will add value to the company's business and not to the asset: is the location close to the buyer's suppliers, vendors and customers? Is there sufficient square footage to relocate several operations which will reduce overheads and increase cash flow? Are overall acquisition costs low, which will net some equity that can be utilized in a refinance across the portfolio in the future? Are there adjacent parcels that may be available to acquire in the future? Is there a tenant that will take possession of the space that makes the valuation ideal?

A buyer must look at these items in addition to an appraised value to determine whether or not valuation is accurate. If a buyer asks "how does this asset increase the value of my business?" instead of "is this appraised value accurate?" then the buyer can better assess the risk of the acquisition in relation to the company's overall goals.

QUESTION THREE

What Tax-Efficient Vehicles Can Be Used To Hold Real Estate In Your Jurisdiction? Any examples of deals you have structured in this way?

There are a variety of entities in which to hold real estate, some of which are designed to limit liability (limited liability companies, series limited liability companies) and others that are designed to maximize tax benefits for investors by controlling how income from the properties are treated (i.e. earned, investment or passive income – each of which are taxed differently). Generally speaking, most real estate assets will be held in a separate special purpose entity formed as either a limited liability company or an s-corp, which is a corporation whose income is passed through to the individual shareholders for tax purposes.

Regardless of the type of entity structure, tax deductions available to business and real estate owners have been the principal way to lower taxable income related to the asset. These deductions include property taxes, property management fees, capital improvements, etc. Furthermore, certain economic conditions can likewise create passive losses which are deductible.

Top Tips – To Optimize a Real Estate Portfolio

- **Have a Plan.**

  Understand what types of real estate fit into your entities' core strengths and seek properties that match that. For example, if your internal operations are streamlined to handle multiple tenants, a few large warehouse buildings with single tenants may create excess internal operation expenses.

- **A "good deal" doesn't necessarily mean "low price."**

  Ensure you are evaluating aspects of the property beyond the price. Research the asset before starting negotiations – check tenant mix, parking regulations, tax status, etc. Ensure there are termination rights during the due diligence period. Ask questions of the property manager.

- **Be forward thinking.**

  Treat real estate assets as a true asset that can be traded when necessary. Keep your eye on the "flip" – does the property have characteristics that a future buyer will want? If the market adjusts, will the property still have value that can easily be sold?

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Hugh Clohessy is the principal in Clohessy & Co. Hugh advises lenders, companies, partnerships, pension funds, investors, developers and private individuals on the acquisition, development, leasing, financing, construction and disposal of commercial property. Hugh is a member of the Irish Society of Insolvency Practitioners and provides advice across a spectrum of insolvency and restructuring matters. Hugh is also regularly retained to act in resolving high value commercial disputes relating to property and construction.

Clohessy & Co are a leading private client law firm providing a wide range of legal services across specialist practice areas. The firm specialises in the areas of property and construction, real estate finance and commercial dispute resolution and acts and advises in relation to all types of property related transactions. The firm is retained by specialised real estate lenders, developers and investors in relation to all aspects of real estate transactions ranging from site acquisition to construction finance to acquisition and disposal of multi-unit investment properties.

We build long standing relationships of trust with our clients who benefit from high quality and robust advice and our extensive experience. Our clients, many of whom have worked with us for a number of years and through generations, trust us and we ensure that our clients can count on us particularly when challenges arise.

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

Understanding the local economic and political market is essential when considering whether to invest in real estate. Foreign direct investment has been a huge driver in the Irish commercial property market in recent years. In 2019, the IDA reported that Ireland was perceived as a stable, competitive, secure and pro-business country, with the fastest growing economy in the Eurozone. Whilst FDI remained resilient in the first half of 2020, Covid-19 is expected to slow down investment in commercial property in the second half of 2020, though market commentators are still optimistic. Interestingly, residential property seems to have been less affected with sales pipelines remaining strong. An issue in Ireland at the moment is the number of units in construction which still lags behind demand.

Considering the local tax regime is also paramount. The tax treatment of the transaction can vary hugely from jurisdiction to jurisdiction so it is important to take advise from local tax advisors in relation in corporate income taxes and transactions duties.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

Getting a reliable and robust appraisal of an asset is crucial before agreeing of terms for a deal. Asset valuation is very important for transactions involving acquisition, disposal, investing and lending. Valuations are prepared by specialists using market knowledge, transactional data and of course, market comparables. Depending on the type of transaction, the development potential of the assets in the portfolio might also be a key consideration.

Typically, valuations and commercials are agreed before the transaction reaches "legals". However, it is not uncommon for issues to be uncovered in the course of legal due diligence that will affect the value of a property. These matters may not have been apparent to the valuation specialist and they will only come to light once the terms have been agreed. Rectifying title issues often require applications to the land registry which can in some instances take considerable time to be processed so in order to progress the deal parties might agree to revise the valuation placed on the asset to take into account the title defect and risks associated with it.

The key point here is that once you have received your valuation and proceed to agree the terms of the deal ensure to mark all documents as "subject to contract".

QUESTION THREE

What Tax-Efficient Vehicles Can Be Used To Hold Real Estate In Your Jurisdiction? Any examples of deals you have structured in this way?

The Irish Collective Asset-Management Vehicles or ICAVs have become one of the most popular vehicles for holding real estate in recent years. ICAVS are regulated investment vehicles as opposed to traditional company structures. ICAVs can exist as standalone funds or as an "umbrella structure" with segregated liability between sub-funds. ICAVs are particularly attractive to US investors because they are able to elect their classification under the US "check-the-box" taxation rules. This allows an ICAV to be treated as a partnership for US tax purposes, and so avoid certain adverse tax consequences for US taxable investors. This is in contrast to the status of the Irish public liability company, which was the most popular structure before ICAVS, which is not able to check-the-box for US tax purposes giving rise to potential treatment as a Passive Foreign Investment Company.

In addition to tax efficiency, there are a number of other aspects of ICAVs that attracts investors to the structure. ICAVs are regulated by the Central Banks of Ireland and are required to have a board of directors. ICAVs are also required to appoint a depository who is responsible for the provision of the safe custody of the assets of the ICAV and any sub-funds.

We have seen the ICAV structure used on a number of deals involving Irish real estate particularly those relating to social housing, which is a very active market in Ireland at the moment.

Top Tips – To Optimize a Real Estate Portfolio

- Communicate with your lawyer as soon as you anticipate any disputes with tenants or third parties. Take legal advice early to clarify your position and develop a strategy as an effective way to quickly bring matters to a conclusion.
- Engage the services of a property management agent who has the expertise and market knowledge to manage your portfolio. Effective portfolio management involves a broad spectrum of disciplines including financial reporting, occupancy management, and operations so making sure that you have the right advisors to help you protect the value of your asset is essential.
- Deal with and try to work with tenants where possible. Covid-19 has brought about an almost unprecedented situation where usually reliable tenants, of all sizes, have either had to close operationally or have been forced to seek rent reductions or rent breaks.

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Jayson Schwarz is the founder and senior partner of Schwarz Law LLP. In over 40 years of practice he has acted for clients that are multi-national corporations and small and medium sized businesses. The bulk of his practice is devoted to solving puzzles. Whether it is organising a land acquisition and the necessary financing or assisting in a complex estate planning scenario, Jayson excels in out of the box solutions, creative thinking, that lead to economic success, tax savings and personally satisfying the needs of his clients.

Experience in the real estate industry on a personal level is bolstered by his close relationships with many of the largest builders and land developers in Ontario. Jayson has been a member of BILD (the "Building and Land Development Association") for many years; has lectured for the Ontario Government Tarion Warranty Program to new homebuyers; is the resident real estate legal writer for numerous magazines with many published articles and is often asked to quote by National publications, and television on real estate matters.

Under his aegis the firm has been involved in many international commercial transactions involving various American, Caribbean, South American, African and European jurisdictions.

Schwarz Law LLP is a boutique firm with a long reach. It is a firm capable in truly assisting its clients to achieve their desired results. The firm acts as commercial real estate financing counsel, for such institutions as the Bank of Montreal and Meridian Credit Union.

For anyone wishing to invest in joint ventures or be involved at the simplest or most complicated level of real estate transactions in Ontario, Schwarz Law LLP and Jayson Schwarz are the perfect partners to assist any client, in the structure, acquisition and closing of their transaction.

Schwarz Law LLP prides itself on its ability to not only provide the ordinary services of processing a real estate transaction but the fact that it truly functions as counsel for its clients, both domestic and international. We act as your legal quarterback, ensuring you have the most accurate and up-to-date information, as you determine the direction in which you wish to proceed. In this regard we have invited Claude Boiron, Real Estate Broker, author, university instructor, and expert on the Toronto market, to assist in providing the answers to the following questions:

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

Covid-19 has thrown a wrench in the real estate market, not only in our own backyard but on an unprecedented global scale. The uncertainty that comes with a global pandemic has presented both novel challenges but also new opportunities in real estate. Local market intelligence, or having boots on the ground, especially in cross-border real estate transactions, is the only way to navigate these muddy waters.

Local intelligence is critical to understanding the nuances of the marketplace. In Toronto today, the impact of Covid-19 has been felt across the market. Only industrial sales and leasing were spared. Sales of commercial and residential condominium units, the pricing and leasing of retail, office and residential condominiums and freehold apartment properties have dramatically slowed. This leads to tragedy and thereby opportunity. Local market intelligence is critical to locate the opportunities.

Claude's Quick Tip: Speak to a Real Estate Broker who is born and raised in Toronto. No matter how sophisticated the buyer, we provide vital knowledge. Our clients have included the CEO of a large Canadian bank, and a businessman who sold his tech company to Microsoft for nine figures. There is a tremendous advantage in working with someone who can marry local product and market knowledge with business and negotiating acumen.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

The right law firm will open the right doors, enabling a client to connect with the appropriate team on all matters of due diligence to achieve an accurate valuation.

Claude's Quick Tip: Talk with the guys who have "boots on the ground". We pride ourselves on the right broker will be down-to-earth, approachable, professional constantly in-tune with the changing market trends and realities. I regularly tell my clients that "we have our finger on the pulse of the market".

Once you get a real feel for the market and the particular type of real estate you need and the market realities we would recommend retaining an AIC, AACI or CRA appraiser, all recognised by the Appraisal Institute of Canada to appraise the purchase once under contract. This will confirm your price and assist in obtaining financing. Contemporaneously, we would be introducing you to the appropriate VP real estate at the financial institution of your choice to move the ball along. Finally, we would recommend an accounting firm with cross border tax experience to assist in holistic planning.

QUESTION THREE

What Tax-Efficient Vehicles Can Be Used To Hold Real Estate In Your Jurisdiction? Any examples of deals you have structured in this way?

Foreign residents have available – in Ontario – the ability to hold real estate either directly or through a corporation. It depends on whether you are an individual or a corporation, the value being invested and whether the investor resides in a jurisdiction with a tax treaty with Canada, to avoid double taxation. There may be an ability to use a Nova Scotia ULC, which allows for flow through, taking advantage of your jurisdiction to lower tax payable. As an example, a C Corp in the US would create an S Corp subsidiary which would then use the ULC to hold the property avoiding double tax particularly if you are a US resident.

In many cases, again depending on complexity of the investor structure and jurisdiction of residence, the most tax efficient method, considering all scenarios mentioned above, will be to set up a Canadian or Ontario company to hold the property.

In every case Schwarz Law LLP will assist any investor in identifying these issues and bringing in the top tax professionals to assist in structuring to minimise tax and maximise protection.

Top Tips – To Optimize a Real Estate Portfolio

- **Choose the right properties:**

  Focus on the type of real estate you want to invest in and follow through with laser-like focus. This will allow you to gain product knowledge in a specific asset type and class, and to apply any lessons you learn to future purchases.

- **Size Matters:**

  It may be better to have fewer properties where you can add value and generate higher returns. Be strategic, patient and wise

- **Reassess:**

  It's important to re-evaluate your portfolio regularly to ensure you aren't holding onto lemons, divesting of losing properties is just as important as focusing on higher performance properties to maintain a healthy portfolio.

- **The right Professionals:**

  Don't work with the first "professional" you come across. Interview each one, carefully. Ask about his/her applicable experience, and which strengths and connections are being brought to the table. Has that professionals extensively bought, sold, and invested in the type of property you're interested in?

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Andrea Vasilova is a partner of Vasil & Partners Law Firm, specialising in corporate, commercial and real estate law. She has been an attorney since 2003, when she was admitted to the Slovak Bar Association. She began her career in 1999 as in-house lawyer for IPEC Management Ltd, one of the biggest property developers in the Slovak Republic. She was an associate lawyer with business consultancy firm ES Partners Ltd for two years before joining Vasil & Partners in 2004.

Andrea also graduated from the Economic University in Bratislava in the faculty of General Economics, specialising in finance, banking and investments. She has a doctor of law degree in commercial law and traffic policing from the Police Academy in Bratislava.

Vasil & Partners is an umbrella name for a law firm specialising primarily in corporate and commercial law, international tax law with the formation and management of onshore and offshore companies in various jurisdictions.

The firm is also a multi-family office providing solutions for protecting and growing family assets, family succession and wealth transfer planning, tax compliance and tax planning.

The firm represents high net-worth individuals and their families, entrepreneurs, professionals and businesses of all sizes on a discrete basis, offering comprehensive advice on matters related to their tax affairs, business transactions and real estate with focus on cross-border issues. Vasil & Partners works closely with associates in onshore and offshore locations and has extensive experience in coordinating overseas advice and the creation and administration of tax-efficient structures for its clients.

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

Local market intelligence is important for effective cross-border real estate transactions and domestic real estate transactions in general. Our society is an information society whose main pillars are information technology. This has become the growth potential for almost of every organisation or entity and is important on every level of management. There is a growing need for comprehensive and systematic access to information that cannot be achieved without the use of new information technologies. Also increased activity in individual sectors of the real estate market have brought with it the growing demands for information on individual aspects of the real estate market, from the immediate actors (i.e. the contracting parties of the real estate transactions) to the various relevant institutions and analysts.

The real availability and reliability of the necessary data is not always ideal. Therefore, it is necessary to use the services of reliable providers or partners that are engaged in the analyses of information about the real estate market. The request on local market intelligence was a part of real estate transactions before Covid-19 as clients wanted to make the correct decisions about their transactions on the basis of all available and relevant information.

When helping clients to search for investment in real estate we engage a real estate agent or a real estate agency with a high credit score to analyse the client´s requirements on their investment using local real estate market intelligence. There are very few international companies with their local branches in Slovakia that focus on local commercial real estate partners that provide high quality analysis of the local market.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

The price of real estate is determined by a number of economic, social, political and demographic factors. The most important is GDP, interest rates, population growth and disposable income. In addition to these macroeconomic factors, the price of real estate is also affected by factors related to the type of specific real estate. This includes locality (according to the location of the village, city, district, neighbourhood, street etc.); the location of the property (floor, view, brightness, flat land etc.); availability of the local services and the civil amenities (work, hobbies, culture, restaurants etc.); safety and security, transport connections, traffic and parking availability, civil engineering networks (water, gas, sewerage, public lightning); noise level, amount of greenery; layout of the property and legal defects (burdens, existing tenancy, the land under the building owned by other person or entity etc.). Psychological aspects on the part of the seller are also important.

The most common tool and the key element to value real estate is to ensure clients have a comprehensive valuation of the real estate in question by a professional expert. A Decree by the Ministry of Justice (No. 492/2004 Coll.) on determining of the general value of the assets and its Annex. No. 3 regarding the value of the real estate and buildings is the legislative framework for determining the real estate. The price of real estate determined by an expert is often lower than the market price, but it is a good starting point for negotiations about transactions, whether on sale or purchase of the real estate.

QUESTION THREE

What Tax-Efficient Vehicles Can Be Used To Hold Real Estate In Your Jurisdiction? Any examples of deals you have structured in this way?

Within the framework of tax obligations by both parties of the transaction, obligations regarding income tax are decisive. All parties need to consider two aspects. On the seller's side there is a question as to what extent the revenues from any sale will be taxable. For the buyer the issue is to what extent will it be possible to apply the paid purchase price for reducing future tax obligations?

Other relevant questions are the tax deductibility on transaction costs on both sides. There are no special tax efficient vehicles in the Slovak tax system that can be used to hold real estate in Slovakia. But there is no real estate transfer tax nor inheritance and donation tax, thus the transfer of ownership of real estate is burdened only by relatively negligible fees for notaries on signatures and for registration in the real estate registry. The income from the sale of real estate is exempted from tax after five years of ownership (the natural persons) or after five years from decommissioning (the legal entities) if the real estate was booked in the firm´s property. Hence, this vehicle is more advantageous for natural persons than for the legal entities.

Top Tips – To Optimize a Real Estate Portfolio

- The client should know what kind of real estate they are looking for and what amount of investment they are going to invest into the real estate.
- To carry out research and analysis of the real estate market.
- To diversify their real estate portfolio (and the investment portfolio, in general) to diversify the risk of the investments.

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Koen De Puydt heads the business law and public law department and is responsible for all real estate/construction law and intellectual property matters.

Koen De Pudyt graduated in 1998 with a degree in Communication Sciences (VUB), while he worked for the independent music magazine RifRaf as a journalist. After his studies, he continued his career as a music journalist with De Standaard and Studio Brussel. At the same time, he obtained his Licentiate Degree in Law, specialising in Public Law at the VUB (2002). In 2009 he obtained a Master of Business Law at the University of Antwerp.

Our strengths...

Helping businesses to start up and providing support during their operation is our mission as this allows us to help entrepreneurs realise their dreams.

What does this entail in practical terms? Setting up a brand new business or a branch or re-structuring, taking over or selling a company is complex and we can help with the funding required for this. In addition, contracts tailor-made to your business, negotiating these contracts if necessary, with a win-win situation for all parties. Also purchasing and selling real estate, perhaps with the appropriate real estate planning, employing personnel, attracting expats, and proper management of social matters and managing all of your intellectual property rights.

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

The alienation of real estate has become a very formalistic affair in Belgium. A great many laws relating to real estate, such as the provisions on spatial planning, are from the public order, which means that it is impossible to derogate from these rules. Regardless of how international the transaction may be, it is impossible to get around these matters because they can have a huge impact on the value of a real estate portfolio.

Of course, this is not only the case in Belgium, which means that this type of practice has to take place in every country where property is located. The difficult thing about Belgium is that there are three regions that have their own legislation on rent, spatial planning, environment, soil pollution – Flanders, Wallonia and the Brussels Capital Region.

The most remarkable example of this we have with concerns the sale of an industrial site to a foreign player. The buildings on this site were partly located in Flanders and partly in Brussels. It was necessary to make an evaluation in order to conduct an exploratory soil survey. Because of the different regulations in the two parts of the country, no investigation had to be carried out on the front part of the site (located in Flanders), while an investigation was imposed on the rear part of the buildings (located in the Brussels Region). The main difficulty is to explain these absurdities to an international client.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

There are many formulas for valuing a real estate portfolio. From the real estate agent's point of view, "location, location, location" will be the most important element. For the financially responsible, return on investment is of great importance. For a lawyer, the wish of his client is a crucial element.

If the client is the future acquirer of the property, we will need to know what the client wants to do with that property. Depending on the wishes of the acquirer, we can check whether the property fully complies with the rules in order to exercise the function that the future owner wants to excercise. This means reconstructing the legal status of the property. We need to find out the whole process that the property has gone through: for what purpose was it erected? Was it built in accordance with the original permit? Have any subsequent alterations been made? Were these adjustments subject to permit requirements? Were the correct permits submitted and obtained?

What should not be forgotten is that in such a legal due diligence always three different aspects need to be considered. Firstly, there is the actual execution of the construction works. Has the building been built as planned? Secondly, it needs to be verified whether the real estate is in accordance with civil law. Is there, for example, a deed of division? Is it in accordance with the current state of the property? Finally, there is the administrative law component. Is the nature or the destination in accordance with the use of the property? Has the property been constructed in accordance with the permit(s)?

Without the evaluation of these three elements and the possible cost to solve the problems, it is not possible to reach a proper valuation of a real estate portfolio.

QUESTION THREE

What Tax-Efficient Vehicles Can Be Used To Hold Real Estate In Your Jurisdiction? Any examples of deals you have structured in this way?

The nature of the property, the size of the portfolio and, of course, the wishes of the (future) owner are crucial in answering these questions. There is no single panacea. Every solution we propose will have its advantages and disadvantages. When we really talk about a large portfolio, we certainly have to mention the RREC or Regulated Real Estate Company.

A RREC is as a public real estate company with a unique REIT status. It's subject to firm legislation with a view to the protection of its shareholders and financiers. The status provides financiers and private investors with the opportunity of having access in an even-handed, cost-effective and fiscally transparent manner to a diversified property portfolio. It is the legislator's goal to guarantee optimum transparency about investment properties and ensure the pay-out of maximum cash-flow. The investor on the other hand will enjoy multiple benefits.

However, this company form is highly regulated and supervised by the FSMA. It is still unloved, but since the amendment of the law in 2018 it has become much more flexible than before.

Top Tips – To Optimize a Real Estate Portfolio

- Regular legal check-ups of the portfolio are essential, not only to detect problems in response to changing regulations, but also to identify any opportunities
- Follow-up and the automation of this follow-up are of crucial interest. Not only do problems such as non-payments have to be dealt with quickly, but structural problems (e.g. with permits, errors in execution, etc.) are also more easily solved if they are detected promptly.
- When it comes to new projects, do not concentrate on what the rest of the market is doing. Dare to set your own course.
- If Covid-19 has taught us anything, it is that diversity of your portfolio is indispensable in the real estate sector. Spreading your risk must also become the new standard in real estate.

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Robert is a U.S.-licensed attorney who has been working in Southeast Asia for more than 20 years. He has extensive experience in advising a wide range of clients on transactions involving real estate assets of all types and classes. Robert regularly advises multinational corporations, institutional investors, private equity funds and entrepreneurs on a broad range of matters including hotel and resort development, F&B and lifestyle, residential development, industrial acquisitions, mixed-use property development, project restructuring, agricultural and recreational development. In the context of these transactions, Robert advises buyers, sellers, owners, operators, developers, equity investors and lenders.

Robert possesses in-depth knowledge of the local and regional real estate markets, and assists clients with navigating the complexities and nuances of real estate transactions in Thailand and the region.

Blumenthal Richter & Sumet (BRS) is a full-service law firm that helps leading international and domestic companies to expand into new markets, grow their businesses and navigate increasingly complex regulatory frameworks.

For more than 40 years, we have built a reputation for providing international standards of legal service, harnessing insightful local knowledge and operating to the highest degree of integrity at all times. Our licensed Thai, European and U.S. attorneys are client driven and focused on helping you achieve your goals. Working as a team, we strive to deliver the right outcome and tackle not only your legal issues but the factors affecting your industry.

Our experience in the automotive, manufacturing, infrastructure, construction, transport, mining, chemicals, technology, media, telecommunications, real estate, hospitality, oil and gas, coal, renewables, insurance and pharmaceutical industries gives us the market perspective to understand your needs.

QUESTION ONE

How important is local market intelligence to effective cross-border real estate transactions, in your view, particularly in the current Covid-19 market? Any examples of how you have helped clients using expert insight into your jurisdiction's real estate market?

Covid-19 has impacted each of the real estate sectors differently and the approach to transactions should be adjusted accordingly. In addition to the varying impact on different sectors, the various regions of Thailand will likely experience their own recovery trajectories, which will to some degree dictate transaction acquisition strategies and timing. As an example, tourism accounts for approximately 20% of Thailand's GDP, and with strict controls on inbound travel, tourism-related assets are bearing the brunt of the impact despite government-sponsored stimulus geared towards increasing local demand. That being said, not all regional markets are created equally and particular attention will need to be paid to developing domestic and regional travel trends as the tourism markets attract and cater to types of travellers, some of which are demonstrating more robust demand. Strong local market intelligence will help in identifying those asset classes by region that will be best positioned to retain value and trend to profitability.

While the more obvious strategy will be to attempt to predict when a sector will bottom out, it may be a more prudent approach to proactively determine if a real estate asset can be repositioned to take advantage of anticipated market trends. Given the longer term negative impact on real estate assets of all types in Thailand, we do look at recommending that there be a heightened level of focus put towards understanding accruing liabilities and how this may affect the asset acquisition/disposition process, pricing and in the worst-case scenario create post acquisition risk as it relates to creditors

As the market tightens with respect to being able to access financing to support operations, we have assisted clients with developing asset repositioning strategies which principally involves determining the feasibility of converting the use of an asset in full or in part and taking applicable permits, building control restrictions, zoning regulations and so on into consideration. As a second stage of the analysis, we look at creating value extraction opportunities as a way for our clients to supplement financial requirements. As an example, we look at the feasibility of converting hotel inventory into long-term leasable or saleable assets, where the clients can retain the asset as inventory through leasebacks in the short term and with a call/put option to allow for the future repurchase/sale and reincorporation of the asset in the core inventory. The essence of the transaction is the segregation of permissible use of a portion of a structure or project (hotel inventory in this case), while maintaining the ability to opt the asset in or out of the hotel inventory pool and remaining legally and contractually compliant.

QUESTION TWO

What are some of the key elements involved in achieving an accurate valuation for a real estate portfolio prior to the deal making process?

At this stage, asset valuation has become a bit of a guessing game. We would typically rely on a combination of a comparable analysis, going concern analysis and replacement cost appraisal in considering asset price. However, there has not been a sufficient level of transactions in any sector to rely on a comparable analysis. A going concern analysis may be more appropriate, provided the agreement can be made on the treatment of 2020, and the anticipated 2021 and 2022 performance. Here, the assumption is that the markets will return to normality by year-end 2022 and, therefore, adjustments to price should be limited. For those unwilling to glance into that crystal ball, we tend to focus on the replacement cost appraisal to establish a baseline for the asset price. Regardless of the methodology or rationale applied, it is key to accept that we will remain in an unpredictable investment climate where upcoming transactions will involve real estate assets struggling to break-even or survive for the matter. Therefore, valuations should consider carrying costs, short- to mid-term changes in supply and factors likely to affect the asset class recovery timetable.

Finally, as the market continues to react to Covid-19 and the downstream implications become clearer, it is more important than ever to understand a seller's motivation as we would expect future real estate transactions to allocate a material premium to risk management through portfolio diversification, building of cash reserves and reduction of carrying costs in the short- to mid-term.

Top Tips – To Optimize a Real Estate Portfolio

- It is key to consider current and anticipated increases of short-term supply within each real estate sector. An attempt should be made to predict the short-term impact that Covid-19 will have on each sector and the relative price elasticity of demand. In the short term, the ability to survive and prosper will depend on the ability to reposition assets alternately and liquidate and redeploy capital. Given the current level of uncertainty, asset liquidity should be a key consideration.
- Secondly, those real assets that are more heavily geared towards the domestic market should be prioritized as we have seen that they have been less exposed to policies related to travel. In the short term, these will be more stable positions to take, but this will likely be expressed in the price.
- Thirdly, government policies related to supporting recovery should be considered. Government stimulus programs may create opportunities for acquisitions, disposition or organizational restructuring.

Disputes

The IR Global Disputes groups was formed to revolutionise the way cross-border disputes are resolved and to provide high quality, affordable and experienced legal counsel who work together as one seamless legal adviser. This helps you resolve your dispute quickly, efficiently and effectively. We provide a full cross-border disputes service with niche sector expertise offering ADR, mediation, arbitration and litigation services. Additionally, we offer specialist knowledge in product liability, white collar crime and investigations.

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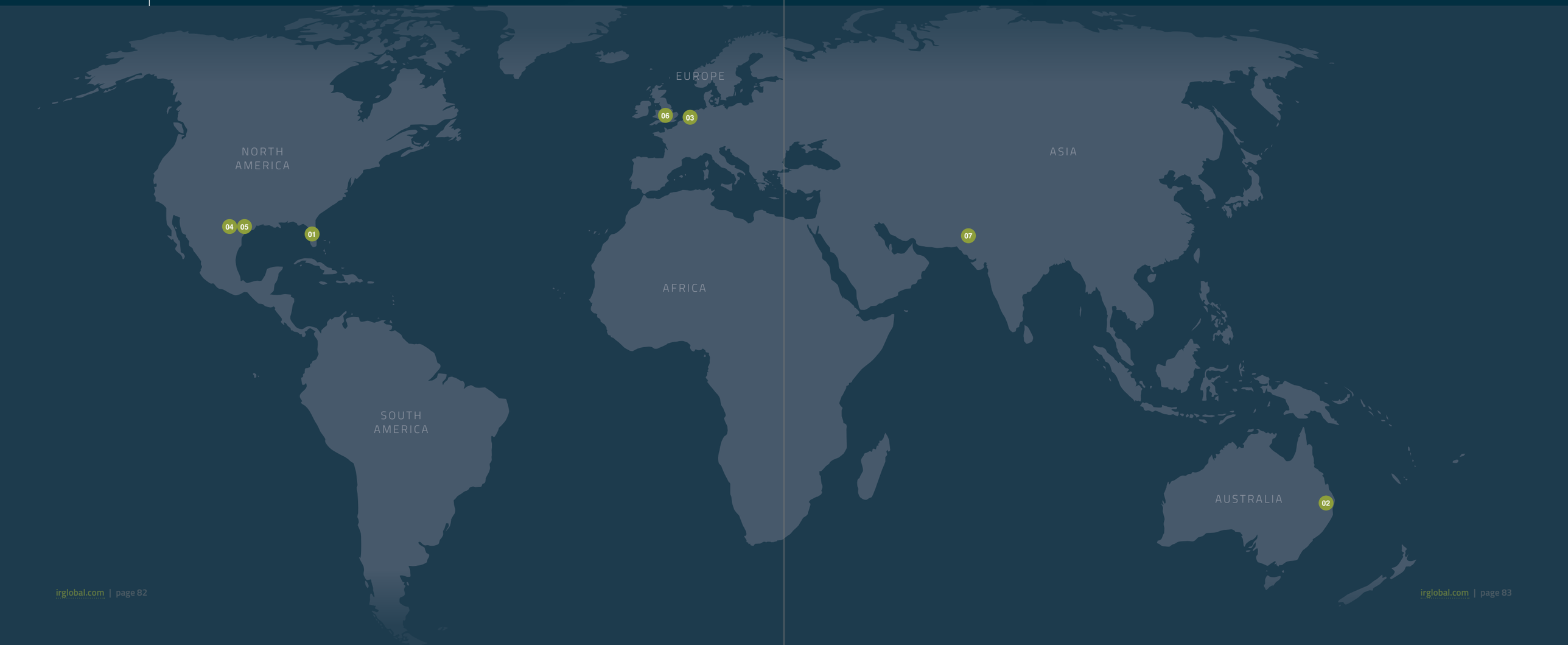

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Upon graduating from Georgetown University Law Center in Washington, D.C., Harry Payton began a successful career in commercial litigation in Miami, Florida. Harry is Board Certified by the Florida Bar in Civil Trial and Business Litigation, an accomplishment of less than 100 Florida attorneys statewide. He is recognized for his high standards of professionalism, including the highest "AV Preeminent" rating from Martindale-Hubbell for more than 30 years. Since 2005, he has been named in Florida Super Lawyers as a top-rated business litigation attorney. Harry was an active participant in the initiative Managing Litigation as a Business. He was a leader in the American Bar Association's effort to create a uniform system of billing and budgeting, which serves as a platform for assessing the productivity and efficiency of outside counsel and law firms.

Payton & Associates, LLC is a boutique law firm located in Miami, Florida that specializes in complex commercial litigation. The firm represents clients in both state and federal courts, as well as in arbitration proceedings, throughout the State of Florida. Typical cases include breach of contract, shareholder derivative actions, international trade disputes, commercial foreclosures and leasehold disputes, misappropriation of confidential business information, business torts such as fraud and misrepresentation, conversion, defamation, and enforcement of non-compete agreements. The firm provides the highest caliber of services at the highest level of professionalism.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

The most common post-closing disputes sometimes vary with the economy. In a good economy, post-closing disputes are over substantive matters, warranties and representations. This is because the parties are truly seeking to get their benefits from the bargain. In a bad economy, the typical post-closing dispute is over payment. This often leads into spurious defences such as "the product is not as represented to us."

In recent legal lore, fraud claims seem to be more common than they were a decade ago. This stems from the more liberal view of the bench as to what constitutes fraud. In Florida, there is no duty on a buyer of something other than real estate to perform due diligence. A buyer can rely on the representations of the counterparty so long as the buyer does not know the representation is false or its falsity is obvious. The requirement of "justifiable reliance" has been eliminated in Florida as an element of the buyer's proof of fraud.

There is another aspect of fraud that is frequently found among the pleadings in commercial litigation and that is promissory fraud. Fraud typically cannot be predicated upon a future event. The classic definition of fraud is a false statement of existing material fact, knowingly made with intent to deceive, reliance by the representee proximately resulting in damages. Promissory fraud is a promise to do something in the future with no intent to perform that promise when it was made. As one can see, it is relatively easy to plead promissory fraud: Mr. Jones promised Mr. Gordon that he (Jones) would (do something) on a given date in the future. At the time Mr. Jones made the promise, he had no intent to perform it. That is a statement of promissory fraud that will carry all the way to trial.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

One of the effective ways to minimize disputes or aid in the enforcement is to have an experienced commercial litigator review the contract before it goes final. Experienced litigators are sensitive to terms, provisions and concepts that may likely be the subject of dispute. This is particularly true in instances where the parties are in a unique industry or the transaction is unique. Most commonly we see provisions understandable to the drafters and parties, but not to the public at large. Regarding those provisions, I tell the drafter to write as though he wants an eleventh grader to understand what is being said. Many times that flushes out the arcane language or provision and results in simplifying the contract.

To avoid the fraud claim regarding representations and warranties, or to minimize the filing of such a claim, the business manager and the experienced commercial litigator should have a dialogue concerning the importance of each representation and warranty, how a default can occur and how the risk can be minimized. Reps and warranties are the minefield in a commercial contract.

One way to avoid litigation is to provide arbitration as the exclusive remedy of the parties with a well thought out agreement for arbitration applying the rules of evidence, applying the appropriate organic law, limiting discovery so that arbitration does not become another forum for litigation and requiring mediation of any dispute before arbitration. If care is taken and attention to detail is paid, the resolution of disputes before they get out of hand is well worth the time it takes and the cost of drafting a comprehensive dispute resolution provision. I am a proponent of carefully crafted, detailed provisions for ADR in preference to institutional formats.

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

In the event of a post-closing dispute, in-house counsel should immediately obtain the commitment of the division manager to a full and prompt investigation of the dispute, identifying all persons who have information and informing all custodians of electronic and hard copy data of an internal litigation hold. Acquire and assemble all relevant documentation and make a back-up copy that is secured. Promptly establish the objective: whether to seek an early resolution; admit liability and defend on the issue of damages; defer and deflect for as long as possible; or other objective. Is the approach to dispute resolution the iron fist in a velvet glove, reflecting the character of a good citizen, or win at all costs and bury the opposition? Counsel must have management buy-in at the most appropriate senior level of the course to pursue. The culture of the organization will be influential in determining the overall strategy to employ when a post-closing dispute arises.

Designate one employee, be they in-house counsel or a manager, to coordinate with outside counsel; to coordinate events; to research facts; respond to discovery; determine the availability of witnesses and the like—be the "boots on the ground."

With the foregoing information, outside counsel should prepare a litigation budget for non-cookie cutter litigation (the "one offs"), with the understanding that at best its accuracy is less than 50%. The benefits of preparing an early budget are that it requires planning and identifies issues, witnesses and documents.

In the area of reputational damage, it is imperative to get on that story immediately and pull out all stops to investigate.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- Teach the lawyer your business before the dispute arises. That way counsel can frame the dispute more precisely when it occurs (Most lawyers I have talked to will not charge their client for an introduction to the business.).
- Have outside counsel review a draft of the agreement(s) midway in the drafting process and again before closing.
- Consider early mediation, even before a complaint is filed or a demand for arbitration is received. Provide for early mediation even before arbitration and write it in the deal documents.
- Consider the pros and cons of arbitration (which may be right for some but not all disputes). For those disputes that are considered arbitrable, direct counsel to develop a detailed and creative use of arbitration limiting witnesses, limiting discovery (number of depositions and controlling production of ESI). Write a detailed plan of arbitration and do not simply adopt an institutional arbitration agreement.

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As JCL's managing partner with more than 30 years' experience, Jim leads the firm's strategic direction, which focuses on effective and efficient problem resolution. He is a recognised leader in commercial litigation and insolvency law and is widely respected within Queensland's legal community.

The firm was established because Jim is passionate about achieving positive outcomes for clients and providing real value for money. Since JCL's inception, Jim has consistently adopted a pragmatic, direct and confident approach to skilfully navigate his clients through complex legal matters, with unwavering commercial results.

Jim's has served as the Queensland State Chair of the Insolvency and Reconstruction Committee of the Business Law Section of the Law Council of Australia, Queensland State Chair of the Insolvency and Reconstruction Committee of the Queensland Law Society and the National Chair of the Insolvency and Reconstruction Committee of the Business Law Section of the Council of Australia.

James Conomos Lawyers was established by James Conomos in July 1992 as a boutique legal firm offering specialist expertise in commercial litigation and insolvency. The firm came into being because James is passionate about achieving positive outcomes for clients and providing real value for money.

Since then, James has pursued his desire to help younger lawyers learn the art of law and problem solving. Through his mentoring, James has shaped a team of capable and ambitious lawyers who will adeptly solve your legal problems within a realistic time frame.

Based in modern offices in the heart of Brisbane's central business hub, our team has now grown to a total of 15 staff. Expertly guided by Director James Conomos, you can rely on us to tackle any commercial issue you throw our way.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

In business transactions, 'post-closing' disputes can derail or delay completion of a transaction.

These disputes increase costs by causing delay and often ending in court requiring judicial interpretation to resolve a legal issue. This often results in relationship breakdown and negates the benefit of the transaction in the first place.

Delay, cost escalation and in particular uncertainty are the hallmarks of post-closing disputes. They arise not just in M&A transactions but also in respect of other agreements/transactions.

Common examples of post-closing disputes are:

- Uncertainty or lack of definitions
- Calculation disputes
- Ambiguity of language.

Disputes can be costly if they end up in county and potentially can have had disastrous consequences for the seller, apart from the costs wasted in the proceeding.

Often, 'post-closing' disputes are finely balanced, but the damage done to relationships and the costs to the parties does not justify the risks and issues at stake. Greater care needs to be taken initially to properly minimise likely conflict in clear drafting and working hard to resolve any disputes. Also, appointing experts or arbitrators to resolve issues rather than relying on the judicial system might also minimise both costs and time delays.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

The task faced by in-house counsel in seeking to avoid post-closing' disputes is often a function of the complexity of the transaction, calculations and sometimes even data issues.

Trying to avoid these disputes is almost impossible unless there is good will on both sides, which often there is not. A few suggestions for in house counsel are:

a. Ensure agreements contain clear and precise definitions for all key terminology

b. Sometimes, in very complex transactions, including sample calculations to explain how the parties intend to make calculations will avoid or minimise dispute

c. Ensure that all key terms and phrases are clearly defined to avoid uncertainty

d. Don't be rushed. Preparation is key and taking time to carefully consider consequences is critical. Don't be afraid to consult with a dispute lawyer, whose focus is often different to that of an in-house counsel in drafting key terms. The time spent in careful drafting and consultation will minimise and reduce or minimise areas of later dispute

e. Avoid reliance on incomplete data whether by buyer or seller. Proper review of financial documentation before a transaction becomes unconditional will avoid disputes as will minimising any oral representations.

The key is preparation and certainty as well as clear drafting to avoid or minimise the impact of any dispute.

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

Often in the haste to snare great opportunities when they arise, key details often get overlooked and in-house counsel are left to pick up the pieces. This can result in time-consuming and costly litigation. Litigation also has a funny way of highlighting other deficiencies and nasty surprises when parties are desperate to exit an agreement or vary key terms.

The keys are preparation, certainty and consultation.

To avoid or minimise disputes or areas of disagreement, it is critical to consult experienced advisors early in the process. These advisors can guide businesses through due diligence, identify common challenges and minimise uncertainty about the possible consequences of a transaction.

Litigation is costly on many fronts, not just financially. Disputes impact on time, relationships and increase the risk of a poor outcome.

In-house counsel need a strong advisory team to minimise uncertainty and dispute because the costs associated with litigation can dampen even the best deal.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- In Australia, the role of an in-house counsel is treated no differently from any other lawyer in that broadly speaking, all lawyers have three core ethical duties: to the court, to their client and to obey the law.
- In-house counsel can also be liable for breach of duty as they are considered to be an officer of a company.
- Firstly, a strong advisory team is essential, including access to external dispute lawyers and where necessary other expertise.
- Secondly, careful preparation is essential, including involving external disputes lawyers in good time. Be proactive not reactionary and external disputes lawyers can assist in that respect.
- Thirdly, in-house counsel should consult external disputes lawyers to explore the best mechanism to resolve key issues in agreements including expert determination, arbitration or sometimes court intervention. Having a clear understanding of each mechanism from an external dispute lawyer perspective is critical to drafting an appropriate agreement.

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John Wolfs is a thoroughbred entrepreneur and founder of Wolfs Advocaten. He has worked as an attorney for 27 years, initially for leading firms in Washington DC and Rotterdam, the Netherlands before founding Wolfs Advocaten in the Netherlands 17 years ago. John is well known for his creativity, specialist (sector) knowledge and top quality service he provides. He is proactive, pragmatic, constructive and able to analyse situations quickly. John often lectures in the field of (international) trade law, (international) commercial law and litigation. In his private time, John playing Golf and (marathon) running.

With offices in Maastricht, Amsterdam, Venlo and Roermond, Wolfs Advocaten specializes in legal solutions for entrepreneurs not only in the Netherlands, but also abroad. Wolfs Advocaten covers all areas of (commercial) law and specializes in corporate advice and litigation, labor, IP, (international) trade law, (international) transport and logistics, customs, and insurance law. Wolfs Advocaten is known for its balanced, dynamic team of approximately 20 attorneys, lawyers and support staff. Its approach is characteristically solution-oriented. By being pro-active with its clients, and having the courage to be creative, the firm is able to provide tailored, top-quality services to multinational quality companies.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

The most common post-closing disputes in my practice relate to the fulfilment of guarantees given and attempts to undermine an agreement entered into. I will explain this on the basis of two practical examples.

A common warranty provision in various agreements concerns a non-competition clause, for example a clause in a M&A agreement which prohibits the transferring party from engaging in competitive business activities during a contractually agreed period on forfeit of contractually agreed penalties and compensation for damages suffered. This provision is sometimes infringed by the transferring party. Often not necessarily with the intention of infringing the non-competition clause, but as a mere result of an inappropriate wording of the non-competition clause in the M&A agreement. The parties then argue about the scope of the non-competition clause and what exactly is to be understood by prohibited competitive business activities.

A second example concerns a clause in the final provisions of a contract which stipulates that the parties waive the legal right to annul the contract or to demand its termination. A dispute may then arise as to whether a contracting party can affect the contract by rescinding it only in part. Otherwise, the agreement will remain intact. However, the part of the agreement that is partially dissolved can be a very crucial part of the agreement. For example, the purchase price. Of course, this essential provision may not be allowed to be affected retrospectively.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

As regards the second example outlined above, the clause in the final provisions of a contract which stipulates that the parties waive the right to destroy the contract or to demand its termination/recission, the solution is quite simple. This clause should stipulate that the parties waive their legal right to terminate the contract in whole or in part. This would make the contract inviolable, at least from this legal point of view.

With regard to the first example outlined above – but in fact this applies to all clauses in an M&A agreement – my advice is to allow all disciplines involved within the company to participate in the process of a merger and acquisition. Decisions on provisions in an M&A agreement should be made on the basis of input from various business disciplines. Rarely, if ever, a provision in an M&A agreement has consequences for one business discipline only. What is an understandable and sensible decision from a business economic point of view can be a deadly one from a purely legal point of view. I would also recommend that where partial aspects of the negotiating process have already been agreed in the course of the negotiations, this should always be laid down as such at an interim stage. Finally, my advice in this context is to involve the external lawyer as early as possible in the process of reaching an M&A agreement.

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

It is my experience that there are companies that do an inadequate job of managing their reputations in general and the risks to their reputations in particular. They tend to focus their energies on handling the threats to their reputations that have already surfaced in court. This is not risk management, it is crisis management, a reactive approach whose purpose it is to limit the damage. That is of course a natural reaction. But there are now many alternatives to litigation that can resolve long-standing disputes, and even produce win-win solutions to old and bitter fights in court that would otherwise only leave both sides damaged. To minimise cost and reputational damage I often advise to consider Alternative Dispute Resolution. The most common forms of ADR are arbitration and mediation. At its best, ADR is a 'joint venture' between the company and its attorneys, requiring management participation as early and completely as possible. Handled with sufficient skill, all parties can then join in a non-adversarial search of a mutually beneficial outcome. I often advise mediation when reputational damage is to be expected. Mediation differs greatly from arbitration in that the neutral third party – the mediator – does not impose a solution. The object of mediation is to help the parties resolve their own dispute. The mediator's functions can vary depending on the wishes of the parties and their attorneys as well as the nature and history of the dispute. In general, arbitration and mediation is much less formal than traditional litigation and often requires much less time and money. Reputational damage can be prevented by subjecting arbitration and mediation to secrecy, which mediation by nature already is in the Netherlands.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- Involving a disputes lawyer in an M&A benefits both the deal and process. Due to a lack of experience in court, lawyers tend to forget to define or sum up the reasons that have led to including particular wording. As a result, in a Dutch court a judge has to investigate what the reasons for choosing a wording was and what it includes ... and what not.
- In order to do so, the Dutch judge may want to question parties or receive statements/emails of the deal making process. It is better to elaborate in the agreement itself why certain (choices for) wordings have been chosen. Hurdles a litigation may easily avoid may be overlooked by an M&A lawyer.
- Finally, use the knowledge of a disputes lawyer in relation to choice of law and especially jurisdiction clauses. Some of these clauses tends to be copied without checking in the particular internet context of a possible court decision or an arbitral award is eligible for execution abroad in another country. As a consequence a court decision or an arbitral award may not be enforceable, thereby posing one party in the uncomfortable position to start another court case or arbitration, now abroad, again.

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Robert W. Gifford is a partner with Johnston Clem Gifford PLLC who focuses his practice on complex business litigation and handles some of the most complicated cases for large financial institutions.

Clients hire Johnston Clem Gifford because we live our values: applying a Sense of Urgency in managing crisis or capturing opportunity and an Obsessive Curiosity over the details that affect our clients and give them commanding influences and positions; employing a Collaborative Philosophy that uses the knowledge of our whole firm to improve client outcomes; and utilizing Clear Communication that presents information in a straightforward, relatable way, without legal jargon, and Advanced Technology that prioritizes our client's agenda, uncovers important information, and protects our clients' information. With offices in Texas, JCG represents clients across the United States.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

Post-closing battles often arise from a "purchase price adjustment," a typical provision adjusting the total purchase price based on various post-closing factors. For example, in Nelson Shirley v. FMC Technologies, Inc., A-20-CV-261-RP, 2020 WL 5995695 (W.D. Tex. Oct. 9, 2020), the buyer reduced the purchase price after closing, by nearly $500,000, claiming a working capital adjustment, because it disagreed with the seller's accounting practice. In another example, Rebellion Energy II, LLC v. Liberty Resources Powder River Operating, LLC, 01-19-00413-CV, 2019 WL 5699742, (Tex. App.—Houston [1st Dist.] Nov. 5, 2019, no pet.), the buyer sought a $750,000 purchase price reduction claiming this reflected expenses the seller should have paid prior to closing. Unsurprisingly, both examples resulted in protracted litigation.

Disputes over valuing minority ownership interests may also arise post-closing. Texas does not recognize a common-law minority shareholder oppression claim (Ritchie v. Rupe, 443 S.W.3d 856 (Tex. 2014)), but minority shareholders do have statutory dissenters' rights to demand an appraisal of their interests even after closing (Texas Business Organizations Code §§ 10.351-10.368). In Fenenbock v. W. Silver Recycling, Inc., 601 S.W.3d 32 (Tex. App.—El Paso 2020, no pet.), the minority shareholders would have received $68 per share under the company's merger agreement; after exercising their dissenters' rights, the trial court valued their interests at $90 per share. These rights, however, do not extend to publicly traded companies, companies with 2,000 or more owners, or to partnerships or limited liability companies (unless the partnership or LLC company agreement provides otherwise).

Fraud or failure to disclose constitutes another issue arising post-closing. For example, Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Development, Inc., 972 F.3d 684 (5th Cir. 2020), involved the buyer's claim that the sellers' representing the company was compliant with applicable law was fraudulent based on information discovered after closing.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

Benjamin Franklin admonished that "an ounce of prevention is worth a pound of cure." Subsequent confusion or disagreement over purchase price adjustments can be defused by carefully defining the rules to be applied. Consider how simply referring to GAAP (generally accepted accounting principles) creates confusion – rather than fixed calculations, GAAP are standards with multiple, acceptable alternatives: two companies may determine the value of assets differently but still comply with GAAP. Specifying one party's application of GAAP as controlling (e.g., "GAAP as consistently applied by Seller") avoids subsequent confusion caused by differing accounting practices. As experienced M&A counsel, we also recommend using formulae and examples customized to the transaction, to avoid post-closing disputes.

Ensuring minority ownership receives fair value for their interests (and avoiding a dissenters' rights battle) is, likewise, enhanced by external guidance. As noted in Singleton v. Elephant Insurance Co., 953 F.3d 334 (5th Cir. 2020), Texas law defines "fair market value" as the price property will bring when offered for sale by one who desires, but is not obliged, to sell and bought by one who desires, but is under no necessity, to buy; hence, arm's length negotiation of the sale price between the seller and the buyer generally is the definition of fair market value. Where majority ownership has an interest (or will have an interest) in the buyer or surviving entity, engaging an experienced, reputable business valuation service can be the difference between a smooth closing and a surprise judgment years later.

In business, stuff happens. Generous use of a disclosure schedule benefits both sellers and buyers. Sellers avoid breaching their contractual representations and warranties through ample disclosures, and buyers enter closing with full knowledge of their acquisition. As Dale Carnegie said, "the only way to get the best of an argument is to avoid it."

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

It's lucrative for investors who have had substantial capital gains subject to US capital gains taxes from the sale of assets such as stocks, a business or real estate. Investors can defer tax on any prior gains until the real estate asset is sold or exchanged if the gain is reinvested in an Opportunity Fund.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- Engage M&A counsel early in the process to help identify potential areas of post-closing confusion and dispute; M&A counsel can be most effective when enlisted before the company signs a letter of intent or similar term sheet.
- Actively collaborate with M&A counsel in crafting the disclosure schedule – a thorough disclosure schedule can resolve many burgeoning disputes.
- Engage litigation counsel if a dispute begins to develop, so they can assist with negotiating a resolution and begin preparing for litigation.

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Shilpen has a dual practice focused on dispute resolution and employment law. His expertise as a litigator is in high-value commercial dispute resolution and contentious corporate matters, often involving an international element. He has conducted a number of reported cases and cross-border disputes. Shilpen also advises and represents employers, employees and professional clients in all aspects of employment law.

Shilpen has expertise in acting for senior executives, self-employed professionals and company directors in connection with their entire employment needs, including claims in the Employment Tribunal and the High Court.

gunnercooke is a full service corporate and commercial law firm, that operates in a different way from others. Our firm was created to allow lawyers to play to their strengths and focus their priorities on what they are good at and what they enjoy. As a firm, we are ambitious and strive to create an environment and infrastructure that allows our lawyers the freedom to provide and maintain a first-class service to our clients. We always seek to be innovative so long as it benefits our clients and our lawyers.

What we do not have is the overwhelming baggage of some law firms – we are not weighed down by time sheets or targets of any kind internally, as each lawyer's relationship with gunnercooke is that of an independent partner working within the structure that our firm provides – and consequently our lawyers' first and last priority is serving our clients' best interests.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

In my experience it is the seller's warranties within the purchase agreement that lead to most post-completion problems. These are often agreed by sellers in a rush of optimism to "get the deal done" and then later relied on by the purchaser as the basis of claims for breach of warranty and misrepresentation. If dealt with properly, warranties can be used to support a comprehensive due diligence exercise and provide a balanced allocation of risk between the parties. But they are sometimes used by sellers to conceal a problem that they hope will not be revealed until long after the deal is done. They can also be abused by a purchaser seeking to hold the seller accountable instead of undertaking a comprehensive due diligence exercise itself. This can be devastating for sellers if the warranties are backed by indemnities.

There also tend to be recurring problems with earn-out provisions for key individuals after the transaction, which are often linked with performance over an extended period. It is normal for a purchaser to retain individuals as part of a deal in order to maintain consistency in the medium term, but the strings that are associated with this can become problematic for both sides. This has been very notable in the Covid-19 era, with economic conditions being disrupted beyond anyone's projections.

Key individuals can be especially exposed when the same individuals are also outgoing shareholders and the sale value is linked to their performance after completion. This is not only because of the danger of not being able to meet targets (often due to unforeseen circumstances) but also because these individuals are invariably bound by wide-reaching contractual restrictions, which prevent them from leaving and taking up external opportunities in competition with the company. This can sometimes lead to senior executives and the highest performers of a business finding themselves "locked in" and yet unable to play to their strengths.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

It is important to bear in mind that the negotiation of an M&A agreement is essentially an exercise in bargaining power. There is usually one side that can flex financial muscle and it is this party that will start with an advantage. But that is not to say that the purchaser is always able to call the shots. Sometimes the seller is a company with unique assets that are very valuable – especially when the assets are in the form of intellectual property that has either realised its potential or is expected to do so in the future. If there are other buyers in the market, this can sometimes transfer power to the seller.

It is in both parties' interests to undertake effective due diligence and in-house counsel should resist any temptation to compromise on this. No number of seller's warranties is the same as knowing the best and worst things about a target business and making an early assessment of these things can be a priceless aid to getting the best deal done – with warranties that are likely to stick and be enforceable against sellers if breached.

Counsel acting for sellers should take care to ensure the purchaser has full access to the business, thus making it harder for post-completion claims to be made on the basis of misrepresentations and or breaches of warranty. As the Latin principle of "*caveat emptor*" states, the buyer must beware of what they are buying – and a seller should try to avoid accepting one-sided risk that extends beyond the sale of a business in the form of broad-brush contractual warranties and indemnities.

Those advising key individuals who will remain with the business after the sale should be wary of accepting too many strings – both in terms of unrealistic deliverables and post-termination restrictions which could prove very obstructive if things don't work out as planned after the sale.

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

There is always a risk of disputes arising after completion and counsel should provide for this during the contractual negotiations. Agreeing the applicable law and which country's courts will have jurisdiction for any disputes (preferably stated as exclusive jurisdiction to prevent parallel proceedings) is essential. Where possible, I recommend including a multi-tiered dispute resolution clause which provides a runway for dealing with disagreements and avoids disputes being litigated in open court and the reputational damage this can bring. This may begin with a requirement for the parties to engage in discussions in good faith, then escalating to a formal mediation if necessary. If even this fails, then a binding obligation to proceed to arbitration is worth considering because it offers the possibility of a confidential – and much quicker – resolution than going to court.

If these safeguards are put in place long before a problem arises it will make it much easier for counsel on both sides to navigate a path towards a resolution.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- Ensure there is an effective dispute resolution mechanism in place.
- Check that any post-termination restrictions applicable to the outgoing shareholders are reasonable (and enforceable).
- If advising the purchaser, ensure that reasonable (and relevant) warranties are sought and backed up with personal indemnities from the seller in case breaches are later revealed.
- If advising key individuals who are going to remain with the business for an earn-out period, check that their deliverables are realistic and that their obligations on exit will not prevent them from thriving elsewhere if this happens sooner than planned.
- Where there are deliverables placed on the seller on an earn-out basis, these should be balanced against clear "earn out protections" requiring the purchaser to ensure the business is properly resourced and will be managed according to an agreed business plan.

S.U.Khan Associates
Corporate & Legal Consultants

PAKISTAN

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Mr. Saifullah Khan, an international trade lawyer, has 20 years' experience in international trade policy and law advisory, having served a number of foreign and Paksitani clients. He has advised the Government of Pakistan in amending trade defense laws and rules and has an extensive global advisory portfolio in International Trade Management System, International Trade Agreements and para-tariff and non-tariff barriers issues. His other practice areas include data protection, e-commerce and IT laws and competion law. He is Member of the Islamabad Bar Council and is Advocate High Court. He is also Fellow Member of the Institute of Cost & Management Accountants of Pakistan, Fellow Member of the Pakistan Institute of Public Finance Accountants, Member Institute of Certified Public Accountants of Pakistan, Certified Internal Auditor (USA), Member of Chartered Institute of Arbitrators UK, and participant of executive trade policy program at John F. Kennedy School, Harvard University, USA.

S.U.Khan Associates (SUK) provides a distinctive range of services to its local and foreign clients. SUK offers expert services to companies in the public and private sectors. The firm offers innovative solutions to problems relating to international trade, anti-trust law, data protection, e-commerce and IT laws, international trade development, foreign investment, international trade agreements, international trade management, etc. SUK provides services to top Pakistani and foreign companies. The experience and professional qualifications of team members have made SUK one of the most successful professional consultants in Pakistan.

QUESTION ONE

What are the most common post-closing disputes in your jurisdiction? (e.g. breaches of representations and warranties, price adjustment issues, tax covenants or fraud.) Do you have any relevant case law to highlight this?

In the post-closing phase, contractual representations and warranties represent a major cause of dispute. It is our practice to sell on the basis of a long list of representations, warranties and specific indemnities with the purpose of allocating the risks between the transacting parties, taking into account the level of disclosure in the due diligence process. It has also become regular practice to analyse those risks in detail immediately after closing and to evaluate potential claims on that basis. Another important type of dispute that arises after closing concerns the adjustment of the purchase price.

Most common are adjustment mechanisms that seek to account for value changes of the target company between signing and closing. But sometimes adjustments focus on future developments, for example, if the parties are not able to agree on the value of the target, they may provide for some form of earn-out mechanism. This would enable the seller to try to hold the new owner responsible for decisions potentially causing an earn-out shortfall. More frequent are arguments about the calculation of earn-out parameters (for instance, EBITDA or similar indicators of a company's performance). In these cases disputes may revolve around the scope and meaning of the price adjustment provision, the application and interpretation of accounting principles and related considerations. Another example is breaches of post-closing covenants. Sellers will often agree, for some period of time after closing, to refrain from taking certain actions that could harm the business. These may include agreements not to compete with the business, not to solicit or hire employees of the business, not to interfere with customer or supplier relationships, and not to disclose or use any confidential information or trade secrets of the business.

QUESTION TWO

How would you help in-house counsel shape an M&A agreement to minimise any of the potential disputes mentioned above or aid enforcement proceedings?

A well-drafted M&A agreement is key to a successful transaction. The agreement represents the culmination of vital commercial and pricing negotiations. The parties aim to create an agreement that clarifies the responsibilities and duties of each side. However, these agreements are often imperfect and open to interpretation and exploitation. Drafting a balanced and workable M&A agreement can be challenging, but rewarding. Parties must ensure that the language included in the agreement is direct. The easiest way to avoid disputes is to be as clear as possible in the language of the agreement.

An M&A agreement if drafted carefully and with attention to minute details can help minimise the occurrence of disputes. The in-house counsel may consider the following matters while shaping an M&A agreement:

- Language used to identify the time-periods, measurement criteria and exceptions should strive to utilise industry- or company-specific historical reporting periods and terminology
- Define terms when the possibility of ambiguity exists
- Specifically state limitations on the buyer's operation of target exhibits and sample calculations
- Example calculations and worksheet attachments should be utilised, whenever possible
- Use of calculation templates with detailed instructions will help to eliminate creative alternatives
- Consider excluding certain financial statement line items from the estimation and subsequent true-up contractual exhibits
- Incorporate a detailed, descriptive calculation as an example, along with step-by-step instructions
- State accounting policies to be applied
- Quick-Close Rehearsals: Prepare seller for and rehearse a "quick-close," limiting traditional hard close procedures to those accounts posing the greatest risk.

QUESTION THREE

If a post-closing dispute does occur, what best practices should in-house counsel follow to minimise cost/reputational damage?

In the case of a post-closing dispute, foremost importance needs to be given to implied covenant of good faith and fair dealing. Where the agreement does not address any matter expressly and affords parties some discretion in performance of duties, neither party must take actions designed to defeat other party's realisation of fruits of the agreement.

Next, all efforts be made to reconcile the differences whether they relate to price adjustments or otherwise. Negotiation and proper engagement with the other party is key to having a successful dispute resolution. While negotiating, the approach must be to have a level playing field for both parties, negotiations would only be successful when both the parties have achieved their respective goals.

As a matter of best practice, a list of all differences should be prepared before entering into formal negotiations and classify them according to what might be accepted, what might not be or what might be mediated etc.

Preparation of a timeline for negotiation may also be framed, including next steps. The next steps, in the case of unsettled disputes, could be referring the matter for arbitration, appointing/selecting an arbitrator, taking the matter to the court of appropriate jurisdiction and making of public announcement of the dispute.

The in-house counsel needs to apprise the stakeholders (board or shareholders) of all possible options and an estimate of the likelihood of settlement or otherwise of each matter of dispute.

Top Tips – Top Ways To Fully Utilise A Disputes Lawyer During The Deal Process

- **Engagement of commercial, accounting, technical personnel**: When a disputes lawyer is engaged, the company's commercial/accounting/technical team must consult with them, so they are fully conversant with the company's circumstances, which will help them defend the company during the litigation cycle.
- **Due diligence:** The lawyer may also be engaged during due diligence, which will help him understand the company's compliance and risk ecosystem, and to draft appropriate clauses in the agreement.
- **Dispute resolution process details in the agreement:** The lawyer asks that agreement must include sufficient details about the mechanics of the dispute resolution process, which allows the parties to focus on resolving the disputed matters.
- **Drafting arbitration clauses:** Due importance be accorded to plan and draft the arbitration clause(s) in the agreement. Matters that may need consideration are defining a single forum for all disputes, ensuring enforceability of the arbitration agreement/award, timelines, confidentiality and related costs.

M&A Advisory

Our M&A Advisors provide a full global service and include professionals with experience in corporate finance, investment banking, and transactional support. They are fast becoming the 'go to' global alternative for international businesses that value their extensive communication channels within the IR Global network.

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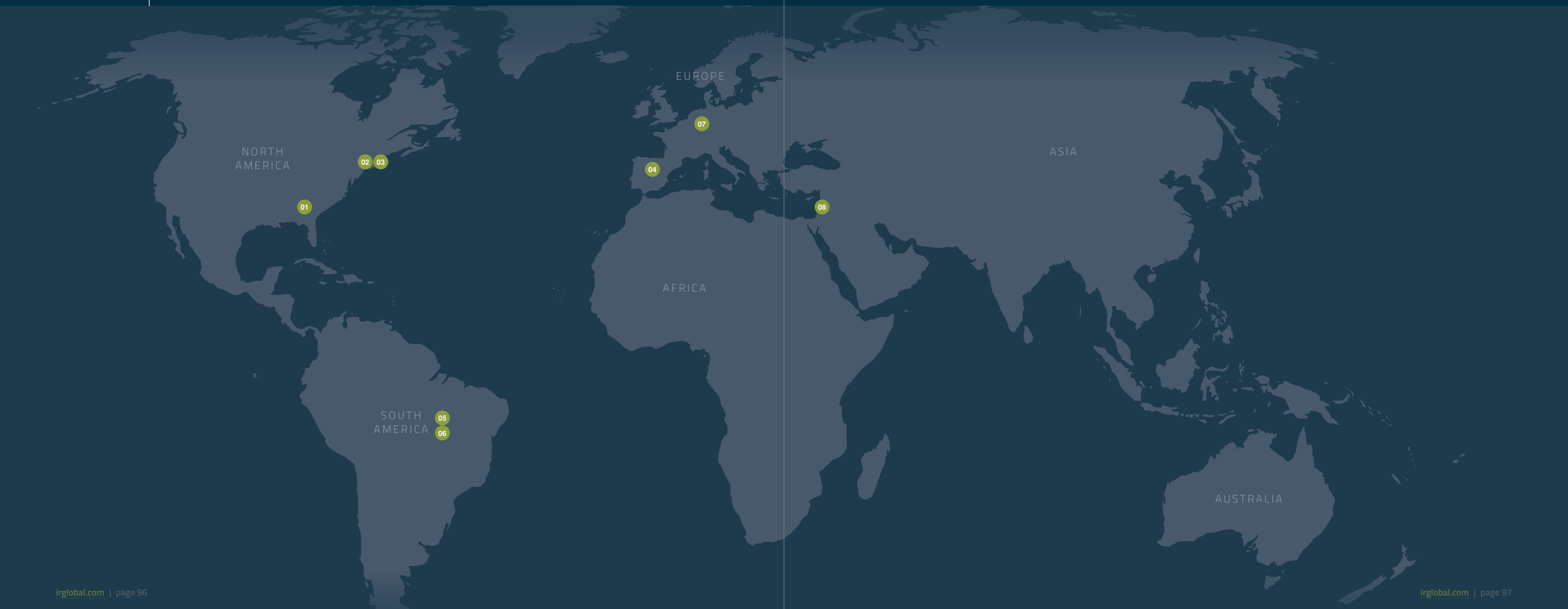

KNAV
PARTNERS BEYOND BOUNDARIES

US - GEORGIA

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Viraj Bhogle is a Transaction Advisory Services (TAS) Senior Manager in KNAV group's Georgia office with a strong finance, auditing and data analytics background.

With a career spanning eight years in a variety of roles with progressively increasing responsibilities, Viraj has advised multiple Indian conglomerates and private equity firms across industries to navigate through the transaction lifecycle, delivering tailored advice attuned to the client's needs. Viraj focuses on validating the key financial, operational and strategic aspects of transactions, so clients can focus on structuring and negotiating a favorable transaction.

Viraj earned his Bachelor's degree in Commerce from the University of Mumbai, India and is an Associate Member of the Institute of Chartered Accountants of India (ICAI). Viraj completed his CPA (Certified Public Accountant) from California Board of Accountancy in 2016 and apart from being a CFA (Chartered Financial Analyst) Level III candidate, he is also pursuing CFE (Certified Fraud Examiner).

KNAV is an Atlanta-based full-service accounting firm offering a complete suite of assurance, taxation, transfer pricing, valuation, risk and business advisory services. KNAV started in 1999 with offices in the US and has since expanded in Canada, India, Netherlands, Singapore and the UK. Being a robust organisation with more than two decades of international experience serving various industries including automotive, BFSI, entertainment & media, manufacturing, pharma & healthcare, retail, technology and telecommunications, KNAV still retains its customized and partner-led solutions. The firm with its qualified team of 200+ pioneers cater to distinct requirements of multinational organizations from its offices across the globe.ity is serving our clients' best interests.

QUESTION ONE

How has the M&A landscape changed in the aftermath of the Covid-19 pandemic? Has it changed the nature of deal making in your jurisdiction and which industries have seen most activity?

We are living in unprecedented times where the Covid-19 pandemic has impacted the due diligence protocols and risk landscape for the majority of M&A transactions, and the ripple effect is likely to last for some time for buyers and sellers, mainly due to the fear of the unknown.

Though it is not the first time the M&A world has experienced such major economic and financial upheaval, this time we believe things are different; going beyond the conventional financial and valuation impact, the pandemic has affected numerous other aspects of the transaction world, including the manner in which due diligence is conducted, how deal terms are developed and negotiated and how technology and other collaborative tools are utilized, while deal participants are practicing social distancing.

While global M&A activity has tumbled to its lowest level in more than a decade in the wake of the Covid-19 outbreak, the US M&A market contraction has been even steeper with a YoY decline of over 50% compared to 2019 . Even though certain transactions proceeded as planned, many deal discussions and sales processes have been placed on indefinite hold or abandoned altogether. Buyers are more focused on evaluating the short and long-term impact of Covid-19 on the target's business and financial condition and reviewing the parties' rights and remedies under the acquisition agreement.

As we approach the end of 2020, we anticipate a turnaround and robust recovery in M&A activity and have strong reasons to believe that when deal negotiations kickstart, it is likely to be a buyer's market where they will get more conditionality and perhaps better terms.

QUESTION TWO

What advice could you give potential clients on effective pre-deal planning? For instance, preparing a business for sale in your jurisdiction or ensuring transparency for a buyer?

Crisis creates opportunities. Cash-rich acquirers and investors, including private equity funds, will seek to take advantage of this adversity to make acquisitions of fundamentally strong businesses at suppressed valuations. Buyers will need to be extra diligent in their approach, while sellers will need to prepare for increased scrutiny. Buyers and sellers may even refrain from entering or even negotiating a traditional letter of intent until the buyer has performed a limited scope customary due diligence on the extent to which Covid-19 has adversely affected the seller's business, financial performance and other areas the buyer deems relevant.

We would advise potential buy-side clients to limit their use of cash and offer deferred consideration to the extent possible until operations return to some level of normalcy. Innovative use of contingent pricing structures involving earnouts and milestone payments would be the flavor of the season. From a US tax perspective, contingent and deferred payments can have their own complexities, especially whether it constitutes capital gain or ordinary income for the sellers, and it is important for the buyer and seller to pre-agree on future tax treatment.

If the seller receives a loan under the Paycheck Protection Program, established by the CARES Act, we would advise buyers to seek additional representations and warranties. The buyer should take into consideration the tax implications of a PPP loan, firstly the interaction with other CARES Act provisions such as employee retention credit and the eligibility for full or partial forgiveness. In case of high possibility of forgiveness, buyers must examine the taxability and timing of PPP forgiveness, especially in the light of tax disallowance of expenses incurred out of the PPP loan. The success of transactions going forward will depend on how effectively buyers and sellers define and allocate risk between them at each transaction stage.

QUESTION THREE

What deal structures prove most effective in your jurisdiction (e.g. asset vs share deals)? Are there any important legislative anomalies that international clients considering a merger or acquisition in your jurisdiction should be aware of?

While contemplating the structure of the transaction, both buyer and seller should consider the tax implications of an asset purchase vis-à-vis a share deal, the legal and accounting complexities involved, and most importantly the quantum of regulatory approvals required. Given the potential delays in obtaining governmental approvals, it is plausible that buyers and sellers might prefer structures that involve the least regulatory interfaces.

The US tax laws provide flexibility to structure a deal as a stock acquisition from a legal perspective but still treat it as an asset acquisition from a tax perspective (often referred to as a deemed asset acquisition) subject to the transaction meeting certain conditions, often leading to a win-win situation for both buyer and seller. Factors such as restriction on utilization of carryover tax attributes especially carry forward of net operating losses, step up tax basis in amortizable intangibles, bonus depreciation on qualified property and equipment and tax equalization need to carefully considered while deciding on a tax optimal structure.

In addition, the CARES Act has made certain changes to the U.S. bankruptcy law which makes distressed sale a better option as compared to bankruptcy, for the seller. On the other hand, buyers may find it opportunistic to acquire distressed targets at values well below pre-covid-19 levels that effectively results in a win-win situation for both parties involved.

Top Tips – Effective Negotiation Strategies In Your Jurisdiction

- US M&A deals have a fair share of contingent consideration included in the consideration. Leveraging future performance of the target allows buyers to finance the transaction through target profitability and gives sellers the opportunity to increase deal value.
- Structuring a transaction as a deemed asset is a key tax negotiation strategy for buyers and sellers.
- Negotiating a transaction as a tax deferred versus a taxable transaction is a plausible alternative where the buyer is a public company and/or the seller wants to maintain a meaningful stake in the business post-sale.
- The most effective negotiation strategy is preparation. Do your homework and know the transaction inside out and identify the main potential deal breakers so you negotiate with solutions in mind.
- Making concessions to find a place of mutual agreement is essential for successful deal making.
- Buyers should defer the purchase consideration to the extent possible based on achievement of earnouts/milestones.

US - MASSACHUSETTS

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Florence Joffroy-Black is a medical device marketing executive, with more than 25 years of expertise in international markets. Her experience includes positions such as global vice president of strategic marketing for corporations such as Draeger Medical and Itamar Medical as well as working as a marketing expert/consultant for HP Medical, Tyco Electronics and TRW, among others. Her core skills include globalisation, strategic roadmaps, innovation and growth.

Dave has been a leader in the medical device industry for more than 30 years. He has taken president, GM and VP roles at companies of various sizes including Covidien and has done much work at start-up organisations, including working pre-IPO on a successful IPO company.

Dave has completed distribution and licensing deals with more than 150 international businesses in 28 countries, comprising major Fortune 500 companies such as GE, Philips and Siemens as well as smaller entities.

MedWorld Advisors is a small, hardworking M&A and business advisory consulting firm that is focused on the medical industry. While we are based in MA, we hit the ground running with our direct approach to finding success for our US and international clients.

With more than 30 years of combined global experience in the medical device, biotech and OEM medtech industries, we understand that if you are under $50 million turnover there are not a lot of dedicated resources to help you succeed. This is where we come in. We have worked for small, medium and large companies in the US and internationally and understand that they need a special focus to gain a competitive advantage in the marketplace. Our passion is to help you WIN! We have a successful track record so talk to us and let's see how we can help make your roadmap to success a great one!

QUESTION ONE

How has the M&A Landscape changed in the aftermath of the Covid-19 pandemic? Has it changed the nature of deal making in your jurisdiction and which industries have seen most activity?

At MedWorld Advisors, we focus exclusively on the medical industry vertical on a global basis. For example, we sold a Canadian company to an Israeli manufacturer and are selling a US company to a larger business in Europe. In our experience this year during the Covid-19 pandemic, the M&A landscape in healthcare markets has seen a variety of impacts.

In the US, hospitals and clinics have had a difficult time. As the country shut down for the pandemic, elective procedures and even simple office visits were postponed for most of the second quarter. For this segment, it has meant that some hospitals and clinics need new investment or some type of M&A consolidation to stay afloat. We expect more M&A in this segment in 2021 as hospitals and clinics work to stabilize their financial footing.

Within medical manufacturing markets, companies with respiratory products in their portfolio have done very well as demand for those has soared. Manufacturers of devices mostly used in elective procedures suffered greatly thru the second quarter and into the summer.

These dynamics have made M&A valuations more challenging on multiple levels. For sellers that are companies with respiratory products, no buyers want to pay a valuation based on a one-time (we hope) pandemic bump in sales. For sellers that manufacture elective procedure devices, they know their value is greater than 2020's performance and seek to hold out for "new normal" valuations vs a valuation based on 2020 performance alone.

The good news for sellers is there remain many PE firms with cash (especially in the US, EU, Japan and China) that are focused on this segment. Additionally, we are observing that the key industry strategic M&A activities are at an all-time high. Therefore, we expect M&A to continue into 2021 with reasonable to high valuations.

QUESTION TWO

What advice could you give potential clients on effective pre-deal planning? For instance, preparing a business for sale in your jurisdiction or ensuring transparency for a buyer?

In the medical industry, it is critical that sellers have "the end in mind" before beginning their M&A process. They should think through the sale process to obtain an offer, the diligence period and the transition activity in advance to plan adequately for a successful outcome for all stakeholders in their business.

Some key areas to focus for selling the business that are important for buyers include (1) growth rates (2) innovation and R&D pipeline (3) IP (4) regulatory clearances globally and (5) reimbursement rates for each country where the seller's products are sold. Of course, financial (EBITDA) and operational (quality/delivery) performance metrics need to be well established. And last, but not least, the employee team that will stay with the business has to be ready to take on the future without the current owners, if the sellers are leaving the company.

The good news for sellers in this industry is that many buyers are attracted to the medical industry for its long-term stability. For this reason, sellers can often obtain better multiples from a strategic or a financial buyer if they take care of the previously mentioned items.

The key to a successful outcome is preparing in the beginning by addressing the key areas mentioned to ensure that (1) the story is interesting to a buyer and (2) the story will hold up in diligence. Thinking about your potential buyer is also helpful as we find that a buyer with a clear strategic fit will offer more especially if the timing is right. At MedWorld Advisors, we often state (and experience) "Value = Strategic Fit + Timing®".

QUESTION THREE

What deal structures prove most effective in your jurisdictions (e.g. asset vs share deals)? Are there any important legislative anomalies that international clients considering a merger or acquisition in your jurisdiction should be aware of?

In the US, often buyers will prefer an asset deal structure as they prefer to not take on any potential liability of the former owners and their business contained in their current entity.

For international buyers coming from outside of the US to invest in a healthcare or medical company, they should do their homework on the US health system. The US healthcare system is constantly evolving due to legislative and court activities as well as current market dynamics.

Interestingly, the key for most segments including hospitals, clinics and manufacturers is reimbursements for products and/or procedures. The reimbursement may come from the government or from private payors. However, it is what drives the type of care as well as the volume of care for patients. And it flows down hill as the suppliers for these procedures either benefit when reimbursements are healthy or they suffer when reimbursements for certain procedures are reduced or withdrawn.

Additionally, in the US, laws can dramatically vary by each State. Therefore, buyers should be careful to understand the laws of the local city and state as well as the federal laws for the type of business they are acquiring.

Top Tips – Effective Negotiation Strategies In Your Jurisdiction

- Keys to successful negotiations in the medical industry include understanding the value of the business is not simply the EBITDA of the past year. It is the growth rate and the confidence in future reimbursements that will drive higher valuations for certain types of companies.
- To be effective an negotiation in the United States, it is important for the buyer to build a relationship with the seller (and vice-versa) to create trust for those inevitable times during the diligence period that sensitive questions arise. This mutual trust (or lack of it) will often make or break a deal between two parties.
- For the best success, we recommend to sellers to be transparent from the beginning to avoid surprises during negotiations. Maximum transparency early and often can lead to maximum value when the negotiations become difficult as the buyer cannot state they were unaware of the issue.

You are Capital.

SPAIN

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As the founder of You are Capital and Eurohold, Jean-François has over 30 years' experience in corporate finance. He has completed hundreds of deals in his career, advised countless corporate transactions, with industrials, private equity firms and entrepreneurs, in various sectors ranging from technology, environment & renewable energies, B2B services and life sciences. Jean-François holds an MBA in Finance (EM Lyon Business School) and a PhD in Financial Technique (ESSEC Business School in Paris) and is fluent in French, Spanish and English.

You are Capital is a corporate finance advisory firm based in Barcelona with more than 30 partners worldwide, with more than 30 years' experience. We focus on deals that ensure the sustainability and wellbeing of society. Our core is in M&A, private equity advisory, fundraising, debt raising, pre-IPOs and private wealth advisory in the following industries: tech, media, B2B services, consumer brands & retail, life sciences, environment & renewable energy, disruptive industries and leisure & experiences.

Mergers and Acquisitions

Buy-side mandates/sell-side mandates/private placements/valuations/joint ventures/divestments of non-strategic activities and assets /capital restructurings/sell-side of assets/spin-offs.

Private Equity Advisory

MBO/MBI/build-up/LBO/secondary buy-out/public to private/growth capital/venture capital and fundraising.

Financial and Strategic Advisory

Strategic audit and business plan validation/guidance in corporate development/strategic alliances/pre-IPO evaluation/research for build-ups.

Financing

Debt raising/structured debt for leveraged transactions/refinancing of existing debts/pre-transactions debt restructuring/staple finance.

QUESTION ONE

How has the M&A landscape changed in the aftermath of the Covid-19 pandemic? Has it changed the nature of deal making in your jurisdiction and which industries have seen most activity?

During the lockdown period very few deals were closed. PEs and VCs were focused on crisis management of their existing portfolios and multinationals and privately-owned companies were dedicated to managing their ongoing activities under the challenge of Covid-19, so that the external growth was a priority for very few. From mid-June onwards the market started to open up again and look at potential M&A deals. This involved taking the "New Reality" into account with the necessary co-existence of the pandemic, and since the beginning of September there has been frenetic M&A activity, as if the market wants to catch up on all the deals that have not been done to date.

Some sectors are very active in M&A such as technology (cloud computing, managed services, digital transformation consultancy etc.), lifesciences (biotech, pharma, medical devices, clinical analysis etcs), food industry, e-commerce/e-business, logistics and food distribution. Meanwhile, others are still very quiet such as hotels, restaurants, tourism, retail, transport of passengers etc.

QUESTION TWO

What advice could you give potential clients on effective pre-deal planning? For instance, preparing a business for sale in your jurisdiction or ensuring transparency for a buyer?

Many sectors are involved in a necessary concentration process that has been accelerated by the "New Reality". Our advice to clients, depending of course on their size, market share and financial situation, is to participate actively in this concentration process and be one of the first movers, and if possible as a leader. There are mechanisms to compensate the possible dilution generated by lower present valuations. Accepting a reasonable dilution to concentrate on buying smaller actors with a high discount can create substantial value.

When it comes to sales processes it is important to prepare well-documented re-forecasts that take into account the "New Reality", to explore in advance the possibility to accept earn-outs or ratchet formulas and propose short and competitive "commando" beauty-contest processes. This helps to counter the high volatility of the market and therefore the risk of failure due to major, frequent and unpredictable macro-economic or social changes. The VDDs are back and trendy at the moment.

QUESTION THREE

What deal structures prove most effective in your jurisdiction (e.g. asset vs share deals)? Are there any important legislative anomalies that international clients considering a merger or acquisition in your jurisdiction should be aware of?

The deal structure that is common for non Covid-19 affected sectors at the moment is a transaction based on 2019 figures with no discount, but with an adjustment in value if EBITDA in 2021 (or even 2022) does not reach at least 2019 EBITDA.

What also needs to be considered are deals in some strategic sectors that are now subject to European and national restrictions for non-European buyers. As of early April this year, the European Commission published guidelines to EU Member States requesting them to adopt or enforce their foreign investment screening mechanisms to protect sensitive assets from foreign takeover during the crisis. It's important to take this fact into account when it comes to defining target buyers.

Top Tips – Effective Negotiation Strategies In Your Jurisdiction

- The negotiation strategies have to favour short but competitive processes. These are on updated and state-of-the-art documentation, selected and realistic targets and advice from sector specialised advisors to avoid unrealistic valuations/deal structures. Of course, negotiation positions will have to be more or less flexible considering the impact of the "New Reality" on the evolution of affected sectors, the market position of the clients and their financial situation. Flexibility will be required for valuation purposes when it comes to upfront payments and earn-outs or future value correction mechanisms.

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With more than 16 years of combined in-house and law firm team leadership experience, Jonathan is a corporate law generalist with a relevant governance, risk management and compliance background. Jonathan has advised large corporations on securities offerings, domestic and cross-border M&A transactions, supported business teams in key commercial agreement negotiations and defended companies in strategic administrative/judicial litigation and arbitrations.

Jonathan holds a bachelor's degree in Business Administration from Fundacao Getulio Vargas – EAESP-FGV, a bachelor's degree in Tax and Corporate Law (LL.B.) from University of São Paulo – USP, and completed a Risk Management specialization at Harvard Business School.

Diego Enrico Peñas is an associate and the new addition to the Junqueira le Advogados team. He has ample experience in providing regulatory and tax advice for the structuring and implementation of complex financial and corporate transactions, both locally and internationally.

His expertise is focused in assisting clients on navigating the complexity of Brazilian law prior to, during and after major transactions, particularly in what pertains to planning for the incidental corporate taxations – both direct and indirect taxes. He is also experienced in structuring both foreign investment in Brazil and Brazilian investment abroad, often assisting clients with understanding the effects and benefits of applicable double tax treaties as well as the potential limitations of the Brazilian thin capitalization and transfer pricing rules.

The firm is structured to provide specialised legal services for players in the capital markets and wealth management industries, as well as for corporations, building true connections and real relationships with clients by overcoming the challenges presented daily.

It has developed an extensive network including corresponding offices, domestic and global, to provide multidisciplinary work. This is key as most projects involve corporate, contractual, and tax aspects, as well as finance and accounting elements.

The firm's commitment to excellence and transparent communication enables it to simplify complexities and deliver tailor-made solutions, while also enhancing its understanding of the client's businesses and, over time, developing long-lasting relationships as a valuable partner to its clients.

It is also noted for its experience in providing tax, governance, and regulatory advice to local and foreign mutual funds, asset managers, institutional investors, individuals, and corporations on financial markets, private equity, and venture capital transactions.

QUESTION ONE

How has the M&A Landscape changed in the aftermath of the Covid-19 pandemic? Has it changed the nature of deal making in your jurisdiction and which industries have seen most activity?

M&A activity around the world has been historically opportunistic and the deals conducted in the current Covid-19 scenario are no different in that sense. The noticeable difference that we observe comes from the fact that the consequences of the pandemic to businesses are a global phenomenon, which means an increased number of opportunities that is also more widely spread across markets and jurisdictions.

As far as deal making is concerned, the initial Covid-19 scare halted most of the ongoing negotiations in Brazil. Many deals that were in their final stages were paused or abandoned, such as the Boeing-Embraer transaction. This initial stage was succeeded by an introspective moment, during which investors re-evaluated whether the intended acquisitions still made sense to them, and also whether they expected to have the resources to follow through with those transactions. After that stage, the local M&A market slowly reignited, and deals started to flow again.

The current moment may be regarded as a waste-not stage in which companies that managed to stay afloat start looking outward for opportunity-driven deals among businesses hit by the pandemic, in need of additional capital to weather this crisis or with complementary characteristics, such as online capabilities for players not yet fully up to speed in that area. The recent devaluation of the BRL against the US dollar further fuels this perspective and makes Brazilian acquisition prospects more attractive to foreign investors.

Looking forward, we expect the M&A market to gain strength and further develop as divestment in the most affected companies' accelerates and enduring companies secure enough of a foothold to start pursuing expansion opportunities. Moreover, as the situation stabilises, companies that profited most during this period will likely be sought after by well established groups and a second wave of M&A transactions may follow.

QUESTION TWO

What advice could you give potential clients on effective pre-deal planning? For instance, preparing a business for sale in your jurisdiction or ensuring transparency for a buyer?

When planning a deal in any jurisdiction, the primary concern of sellers is usually to obtain a fair price for the business. For the sale of a business in Brazil the effort should be focused on being prepared to explain any industry or Brazilian legislation and regulatory particularities to buyers often lacking in knowledge about doing business in Brazil. To this end, pre-deal planning for the seller often involves some degree of diligence. This introspective analysis also becomes a prime opportunity for the seller to settle outstanding debts and risks, as well as adopt more efficient and streamlined structures that help maximise valuation.

From the buyer's perspective the due diligence is paramount and focuses on the risks, both materialised as judicial or administrative claims and not yet materialised. In Brazil, tax matters are often relevant liabilities for players in all industries as far as amounts involved are concerned. Depending on the industry, labour and consumer liabilities can also be significant in terms of potential number of claims. Finally, for some industries, regulatory issues may also be vital due to the lengthy and often intricate processes involved. Again, being able to count on the expertise of dependable and knowledgeable local advisors that are capable of working and dialoguing with the representatives of all the parties involved is often the dealmaker for cross-border transactions.

Finally, there are the dispute resolution clauses, which affect both buyers and sellers of businesses and cannot be overlooked. The Brazilian judiciary system is notorious for being overloaded and, consequently, for the lengthy life spans of claims from filing until a final decision is reached. A faster, though relatively more expensive alternative than a judicial claim, would be to have any disputes settled by arbitration.

QUESTION THREE

What deal structures prove most effective in your jurisdictions (e.g. asset vs share deals)? Are there any important legislative anomalies that international clients considering a merger or acquisition in your jurisdiction should be aware of?

Differently from other jurisdictions, asset deals are less common in Brazil as they do not provide relevant efficiencies or protection against liabilities when compared to share deals; both structures can likewise result in liabilities for the buyer – all of which highlight the importance of due diligence in M&A transactions. Therefore, the choice between asset or share deals may be based on antitrust or other buyer-related motivations.

Share deals are more common due to the fact that the sale of corporate assets at a largescale may be regarded by Brazilian courts as a de facto succession of the buyer in the liabilities held against the seller prior to the transaction. Moreover, M&A deals in Brazil often have their structures dictated by tax concerns specific to each transaction, aiming to provide the parties involved with the most effective results.

Tax aspects are highly important in any transaction involving a Brazilian party. For instance, the acquisition and corporate restructuring of a company can result in the booking of goodwill on the buyer's entity's balance sheet. Considering that this goodwill may be amortized and deducted for tax purposes and that the possibility of such amortization is a very contentious matter in Brazil, this factor can be by itself a dealmaker or a dealbreaker.

Another local peculiarity is the requirement for the specific registration of all foreign investment in Brazil under Law No. 4,131, be the investments made directly (through share acquisition) or through the indebtedness of the local company against the investor. It should be mentioned that, in regard to investment through indebtedness, Brazil has further tax regulations regarding thin capitalization and transfer pricing which must be analyzed in more detail by local tax advisors with the ability to dialogue and explain such anomalies to all parties involved.

Top Tips – Effective Negotiation Strategies In Your Jurisdiction

- When selling your business in Brazil, do your homework regarding due diligence, solve potential issues that may impact valuation and be prepared to explain any industry or Brazil-specific legal and regulatory particularities to buyers that may be unfamiliar with your business environment.
- When buying a business in Brazil, find reputable and seasoned local advisors to work alongside your acquisition team and your trusted advisors, from the due diligence process, to the negotiation and signing of the transaction documents, all the way to the post-closing dynamics with the sellers.
- Whether buying or selling a business in Brazil, do take the time to consider the most suitable method for dispute resolution for your transaction and the trade-off between the lower cost and lengthier claim decision cycle of the Brazilian judiciary system and the relatively faster and more expensive arbitration process.

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Dr. Matthias Meitner, CFA, is Managing Partner of VALUESQUE. He has more than 20 years of practical experience in all fields of business valuation, investment and M&A, fairness opinions, start-up, intangibles, tax, accounting, distress (insolvency), legal and all sorts of litigation and arbitration appraisals. Matthias worked for more than 10 years at Allianz SE and Allianz Global Investors as an equity investor following a strong fundamental analysis- and valuation-driven approach.

In 2015 he founded VALUESQUE to service the growing need of clients for business valuations that are not only rule-driven but have a high analytical economic content – no matter whether it is about start-ups, SMEs or larger corporations.

VALUESQUE provides all sorts of business valuation services. From typical investment support (M&A, fairness opinions, decision-oriented modelling, due diligence, etc.) to appraisals for tax, accounting, distress-related, cartel-related and other legal reasons (e.g. squeeze-out, shareholder expulsion, etc.) and all sorts of litigation services (tax, matrimonial, etc.). Due to the unique combination of strong conceptual know-how and deep practical experience, VALUESQUE has a leading market position in complex valuation cases, valuations with significant technical challenges and valuations that require a deep analytical understanding, in terms of business models, valuation techniques and accounting. Valuing your business is VALUESQUE's business! goal-oriented – quality-addicted – economic-content-focussed!

QUESTION ONE

How has the M&A landscape changed in the aftermath of the Covid-19 pandemic? Has it changed the nature of deal making in your jurisdiction and which industries have seen most activity?

While availability of capital due to low interest rates and lack of alternatives and the ongoing need for succession solutions, in particular in the German 'Mittelstand' (i.e. SMEs), keep M&A activities on track in general, we also see a couple of new trends in Germany.

First, due to lower visibility during Covid-19 due diligence and decision-making processes are taking longer – for the buyer and the seller side. This is an important point to take into account, particularly if deadlines apply. Second, the relevance of contingent acquisition price clauses (e.g. earn outs) has strongly increased. Also due to the lower visibility and the accompanying inability to make sound forecasts, buyers are less willing to agree to a fixed price at time of acquisition. They rather want to pay for the target contingent on this target's actual future operating performance. In such cases, if both parties agree, a base price is paid and milestones or hurdle rates for the target's future performance are set at the time of acquisition. Over time, further payments are made by the buyer dependent on the performance of the target as compared to the milestones – the better the performance, the higher the payment duties for the buyer. Third, the use of technology during the due diligence process has strongly gained ground. Not only do many negotiations sometimes now take place via video conferencing tools, we also see a strong step-up in the use of drones for virtual factory tours and initial physical asset scrutiny.

In terms of M&A industry focus we mainly observe trends that mirror the Covid-19 impact on business models. This means med-tech, pharma, software and construction see ongoing strong activities. Capital goods activity restarted after the lock-down was lifted. Tourism and similar industries are – not a big surprise – very weak currently.

QUESTION TWO

What advice could you give potential clients on effective pre-deal planning? For instance, preparing a business for sale in your jurisdiction or ensuring transparency for a buyer?

I think the basic rules of professional deal preparation are international. So, I would rather focus on the Covid-19 particularities. For sellers and buyers some important things have changed in recent months. First, professional valuation and analysis advice has become ultra-important. The times are gone where investors focused on a more or less comparable set of peer group companies and simply applied an average multiple of this group to the target (admittedly, this never was a very smart way of valuation but now it is even less so). Most target companies are currently not in a ready state, their fundamentals are at an imbalance, and many risk parameters are out of the normal range. So investors currently have to think far beyond simple multiples-arithmetic. They have to turn to more complex though still practically applicable valuation approaches.

Second, valuation expertise is also needed for the increasing number of contingent consideration clauses. These clauses are structured financial instruments which could not always be understood intuitively. Independent of Covid-19, I have seen several transactions where one side did not fully comprehend the clause details and consequently ran into a very bad deal. The same is true in cases where complicated vendor financing instruments are applied.

Third, and this is a trend independent of Covid-19, potential buyers should properly prepare the due diligence process. Sellers today more and more restrict the access time and number of people with access to the digital data rooms. In many cases even the number of questions allowed is restricted. So a good preparation is mandatory to take the most out of the data rooms.

QUESTION THREE

What deal structures prove most effective in your jurisdiction (e.g. asset vs share deals)? Are there any important legislative anomalies that international clients considering a merger or acquisition in your jurisdiction should be aware of?

In normal times, share deals are the dominant deal variant in Germany as they are less complex to structure. However, in times of crisis asset deals gain in attractiveness for buyers. The reason for this is that share deals usually require the buyer to stand in for the liabilities of the acquired company and hence to face the whole insolvency risk. In asset deals, however, the buyer can pick the preferred assets and liabilities and consequently can limit the downside risk. For sellers, the opposite is true: asset deals are less attractive in times of crisis. However, as sellers of crisis-companies are often in a weaker position than buyers, we see a general increase in asset deals when the economy suffers.

In terms of legislative anomalies, from my experience, what surprises most international investors is the German corporate governance system. In Germany, the board follows a two-tier structure with a clear separation of supervisory and management board. Additionally, Germany puts a lot of weight on co-determination. E.g., in stock corporations up to 50% of the supervisory board seats have to be held by employee representatives. This aspect is particularly relevant for investors that plan to acquire restructuring candidates.

With specific regard to Covid-19 international clients should be aware that in Germany the duty to file for insolvency remains suspended until the end of 2020, but only for over-indebted businesses that are still solvent. Hence, investors should take extra care when going for target companies that are in crisis.

Top Tips – Effective Negotiation Strategies In Your Jurisdiction

- **Have a clear agenda!**

  Define your goals! Define the range of acceptable outcomes. Stick to this framework!

- **Be prepared!**

  Even if you stay within your framework, negotiations do not follow predetermined paths. Only if you know the economics and details of the underlying case very well, and if you also understand your counterparty's position, you can properly move within your framework.

- **Stay honest!**

  Mutual trust is the key to successful negotiations. Your chances of a great outcome increase with your level of integrity and honesty.

- **Use team power!**

  If possible, always have a colleague/partner that joins the negotiation and is in listen-and-watch-only mode. This allows you to better understand moods, tensions and motivations of your counterpart.

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Over the course of his 20-year career, Wissam has gained experience in assurance, financial management and reporting, tax, risk management and good governance practices.

He has lectured at university level and has been invited to speak at several international forums. His recent focus is on expanding the family firm beyond Lebanon and in parallel developing advanced programmes on good governance and responsible citizenry.

He is a Lebanese certified public accountant and member of the Institute of Internal Auditors with an MBA from the Lebanese American University and a 3rd degree black belt in Shotokan Karate-Do.

For more than 50 years, our guiding principles at Abousleiman & Co. have been about conducting ourselves with professional integrity and creating added value for our clients. As a trusted professional services firm, we have conducted valuations of assets worth more than $1.5 billion, standard audits (turnover $500 million), tax claims ($10 million), risk assessments and medical audits (savings $5 million), due diligences for M&As (43 billion).

These days our focus is to expand our presence further as we actively engage in M&A due diligences, deals and new projects within the MENA region and beyond.

QUESTION ONE

How has the M&A landscape changed in the aftermath of the Covid-19 pandemic? Has it changed the nature of deal making in your jurisdiction and which industries have seen most activity?

M&A activity has always been slow in Lebanon and when it has happened in most cases has failed due to either poor financial planning or the inability to align either strategies or internal cultures. Now with the Covid crisis, this is just another nail in the coffin for the country economically. The sole and heavy reliance on the banking industry for more than 30 years finally unfolded creating economic disparity with unemployment soaring, banking capital controls, severe devaluation of the lira and escalating inflation.

But with this misfortune comes room for opportunity. It is obvious that the old economic and business models are outdated and ineffective, which gives room for restructuring and readiness to engage with investors on practical yet innovative solutions. In this respect we are expecting that the entire banking industry, which has some 60 banks for a population of 6 million plus, will undergo large scale M&As to reduce the number of financial institutions, including insurance companies. This will cut down the huge structural costs by using more technological solutions to shut many oversized branch operations.

As for other industries, we are also expecting increased synergies, as well as M&As within the agribusiness as the country steadily reinvests into its vast agricultural landscape to become more self-reliant. We also see these synergies on a smaller scale occurring between retail businesses, non-profits and crafts people as they look to boost their outputs and collectively improve their economic situation.

Of course, energy projects remain a necessity especially as countries look to reduce dependance on importing and/or consuming fossil fuels and demand more renewable solutions. So, beyond Lebanon and in other parts of the MENA, we have actively engaged in several renewable energy projects whose appetite we do not see receding for the coming decade, if not longer, as our energy needs continue to increase.

QUESTION TWO

What advice could you give potential clients on effective pre-deal planning? For instance, preparing a business for sale in your jurisdiction or ensuring transparency for a buyer?

From the seller's side, the biggest challenge they have is in their exposure in one or more of the following: weak compliance; poor financial planning; unproductive asset management, oversized structures, limited use of innovative technologies, and/or lack of corporate development of teams as a pathway to realize growth. All this puts strain on the seller's balance sheet and increases exposure liability, making it an unattractive venture early on, or, at the least, puts buyers or investors in a stronger bargaining position than the seller would appreciate.

In short, a more corporate and business-minded approach is needed to elevate the burden and risk implications of these factors. Sellers need to consider performing regular due diligence or risk assessments to identify and effectively address, contain and/or mitigate these risk factors. This should be complemented with a set of other healthy decisions, such as making use of qualified tax advisors and auditors as well as legal counsel, who not only have local but also international capacities to advise on growth strategies and business development plans. Luck aside, success after all lies in the ability to plan ahead. Only then can the seller be ahead of the curve and take stronger bargaining positions.

From the buyer or investor side, it comes down in many instances to the culture factor. For the Middle East, saving face and avoiding shame is very important. Selling a business is usually considered a sign of weakness or loss of wealth and stature. This is an archaic trait that impacts employees and business culture as well. So, buyers need to considerably weigh the impact of this factor to ensure healthy transitions in case of a buy-in. Otherwise, if possible, the safest option would be an asset purchase, hence avoiding other possible areas of exposure.

QUESTION THREE

What deal structures prove most effective in your jurisdiction (e.g. asset vs share deals)? Are there any important legislative anomalies that international clients considering a merger or acquisition in your jurisdiction should be aware of?

With increasing compliance requirements on the one side and lack of adherence on the other, coupled with a culture of everyone is a leader, M&As are rarely successful. For these reasons, apart from the few cases where an international company takes over local operations, it is more common to see asset acquisitions rather than full mergers. Still, in both instances, another matter of noteworthiness remains in assessing any underlying impairment in the business or its asset valuation as a result of the difference between seemingly strong past economic performance and current economic deterioration.

On a more macro level, new international market entrants need to be aware of banking capital restrictions as a result of the economic crisis and both government inadequacy and ineptness, especially in protecting struggling businesses. Still, this is circumvented when exporting to foreign markets and indeed there are many significant opportunities in the country, especially in the services, agribusiness and industry that if funded properly, with 1) falling operational costs due in part to the currency devaluation, 2) lesser constrictive regulations and compliance requirements 3) with lower operational costs, can yield higher returns in international markets.

Top Tips – Effective Negotiation Strategies In Your Jurisdiction

- Look for business synergies within familiar industries where there is abundance in technical skills and know-how as well as underutilized resources: 1) outsourced back office and technical services (engineering and architectural, medical research, IT, etc), 2) agribusiness and 3) industry.
- Hire reliable employees and advisors that are capable to communicate, financially plan and align business cultures to realize strategic goals.
- Look at the underlying asset value of the business and determine its fair value to establish sound expectations and plan for reasonable financial returns.

Tax

IR Global's Tax members offer worldwide expertise through the sharing of knowledge between different jurisdictions for corporates and high net-worth individuals. We are able to ensure clients understand the fundamentals of taxation legislation in different jurisdictions. Our members are proud to hold the highest ethical standards and be at the forefront of the global tax community.

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Alfred Strolla is the founder and CEO of STROLLA Limited and STROLLA LLP.

Alfred was previously a General Senior Partner in the Deloitte & Touche Middle East Practice. He has over 40 years of successful professional experience providing audit & assurance, tax consultancy and financial advisory services to a range of clients in the Middle East and Europe and brings with him a wealth of experience in the GCC region in assurance and advisory engagements. He was also the regional leader of Deloitte's Energy and Resources Practice at Deloitte Middle East.

Alfred has unparalleled experience in the United Arab Emirates, and the wider Middle East region and Europe in the provision of audit, tax and financial advisory services to a number of regional and international Oil and Gas (Energy) industry, companies covering exploration and production, refining and gas processing, marine transportation, oilfield services and petroleum engineering, maintenance and construction companies.

The strength of the STROLLA brand is a critical enabler of our ambitious strategy. The combination of quality leadership, technical expertise, and inclusive culture built on consensus, not directives, has brought STROLLA'S services to a position of being a credible challenger to the consulting world.

Connecting industry and specialised knowledge with innovative technology and ideas, our qualified professionals create true business value for existing and potential business partners. Our brand promise is communicated externally through our tagline 'Strive for Business Partners & Talent'.

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QUESTION ONE

Describe a typically tax-efficient deal structure in your jurisdiction? Any examples.

Considering that the income tax law in the UAE has yet to be enforced, the typical tax-efficient deal is the deal that meets the following conditions:

1. Does not bear foreign tax liabilities;
2. Cannot be challenged as an artificial set up to avoid the tax in another taxable jurisdictions across the globe;
3. Minimise the indirect tax obligations, specifically the Value Added Tax (VAT).

The UAE is considered as a "low or no tax jurisdiction" except for branches for foreign banks and international oil companies. Therefore, a deal that may result in consolidation, elimination, or addition of non-UAE or non-GCC ownership may attract the attention of the tax authority of the country from which the owner comes. Additionally, where the new business structure (post-deal structure) results in a tax residency in the UAE without "or even with a limited" business operations, such a structure can be challenged by the foreign tax authorities as BEPS practice, i.e. deliberately established to avoid tax by tax planning.

From an indirect tax perspective, a merger or an acquisition deal that results merely in assets acquisition without a transfer of liability may prove to be an inefficient deal. Transfer of ownership of a business as a going concern, i.e. without immediate change or alteration to the business assets, operations, or liabilities, is considered as outside of the scope of VAT in the UAE and as a result such a deal will not result in VAT impact. However, other types of deals can constitute supplies subject to VAT at standard rate of 5%, and although this is relatively a low tax rate, given that the amount at stake in business deals is significant, the VAT implications cannot be neglected in such circumstances.

QUESTION TWO

What elements of a structure or deal could prevent a client from implementing your recommendations? For example, holding companies, trusts, exemptions, withholding tax.

As a tax haven jurisdiction, there are a number of large organisations that are studying the market to set up their holding companies or trust companies in the UAE to avoid excessive tax payments. Benefits include the location of the UAE, ease of doing business and attracting cost effective talent from the subcontinent (e.g. India, Pakistan, and Philippines) and efficient infrastructure, accommodation and communications. Most of the companies that come and register for doing business in the UAE present a transfer pricing study based on which they can re-allocate certain types of costs including ERPS systems, highly technically skilled engineers and field experts, management and reporting systems to their operations in the UAE.

QUESTION THREE

How would you minimise the VAT risks on a deal of acquisition of real estate property?

Here's a scenario: a client investing in properties in the UAE had a complex VAT issue where he wanted to minimise his VAT exposure on a certain transaction. The third party was willing to buy two floors of a property owned by our client in one of his large buildings; not directly from our client as an individual but through special purpose vehicle to be sold by a Sale and Purchase Agreement (SPA).

The first step taken for our client was to sell the floors to one of his investment companies together with its current tenant agreements for the investment company to be entitled for the rental income. As a result, the transaction was classified as outside the scope of VAT.

Conditions for the transfer of business as going concern:

1. The UAE VAT public clarification on the transfer of business as a going concern states that for the sale of a business to qualify as a transfer of a business as a going concern, it should meet all the following conditions:

- The supply should consist of a business or an independent part of a business;
- The recipient of the supply should be a taxable person;
- The acquired business should continue operating after its transfer.

As an answer to the question whether the real estate property of the investment company may qualify as a transfer of a business or an independent part of a business, we examined whether it met the below definition of the business as stipulated by the VAT Law:

"Any activity conducted regularly, on an ongoing basis and independently by any person, in any location, such as industrial, commercial, agricultural, professional, service or excavation activities or anything related to the use of tangible or intangible properties."

The property under consideration consisted of 2 floors that were regularly rented out for commercial purposes. Renting out of floor spaces for commercial tenants is an activity related to real estate property that does not require integration with the other business activities.

On that basis, although the rental of commercial floors certainly does not constitute the entire business of the investment company, it can be considered as an independent part of the business since it can be conducted regularly and independently.

However, the tax authority also requires that for the transferred business to qualify as a transfer of going concern, it shall be operating prior to its sale, i.e. it shall not be newly founded or developed. Furthermore, the transfer shall also include the underlying assets of the business as well as its related liabilities based on which the continuity of the business after its sale is granted.

Pursuant to the SPA the floors are occupied by commercial tenants when it is sold to the third party. The expiry dates of tenancy contracts of the concerned floors vary between March 2020 and February 2029. Consequently, the floors of the Investment company shall be considered as operating at the time of its supply.

Based on the above, although the commercial real estate property under consideration can be considered as an independent part of the business of the Investment company since it can be operated independently to earn rental income; nonetheless, the SPA agreement explicitly specifies whether the continuing lease agreements with current tenants, other assets or liabilities that attached to the floors under consideration will also be transferred to the third party as part of the sale. Accordingly, the subsequent sale to the third party may also meet the first condition of the transfer of business as a going concern.

As a second condition, although it is not necessary for the supplier to be registered or obligated to register for UAE VAT; yet the tax authority requires that in order for a sale of a business to qualify as a transfer of going concern business, the buyer or the recipient of supply shall either be registered or obligated to get registered for VAT purposes in the UAE VAT. The third party is registered for VAT, irrespective of the fact that investment is currently not registered for VAT, the second condition is deemed to be met.

The last condition is related to the intention of the recipient of the supply with respect to the future of the business which it acquires. For a sale of a business to qualify as a transfer of going concern, the customer shall intend to continue operating the business which it acquires to conduct the same economic activity and generate income.

From the information which we have obtained, we concluded that the intention of the third party with respect to the future of the concerned property is to continue rent out the floors. Therefore, the third condition of the going concern criteria is also met.

As a conclusion, the sale of the real estate property of the investment company may qualify as a transfer of business as a going concern and there is no VAT to be charged.

For an overview of the taxation system in the United Arab Emirates please visit the following webpage - **https://www.irglobal.com/article/overview-of-the-taxation-system-in-the-united-arab-emirates/**

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After obtaining his Law Degree in 2000 (University of Antwerp and Lausanne), Stefan specialised in tax law in 2001 (University of Antwerp) before joining a big four environment as a tax advisor. After a few years, Stefan joined the Antwerp bar and built his experience in all facets of tax law and M&As.

Stefan is a native Dutch speaker but is also fluent in English and French.

Areas of Expertise:

- Tax (private client)
- Corporate tax
- Inheritance tax
- VAT
- M&A.

Antaxius Advocaten is a boutique tax law firm that provides specialised legal services to individuals and local and international companies in the areas of tax law, customs & excise, M&A and corporate law.

Clients appreciate the no nonsense, hands-on and dedicated approach of the Antaxius' lawyers.

QUESTION ONE

Describe a typically tax-efficient deal structure in your jurisdiction? Any examples.

Restructurings

Belgium implemented several European directives that foresee tax neutrality if certain conditions are met. In such a qualifying reorganisation (merger, (partial) demerger and contribution of a universality of goods or a line of business), assets, liabilities and all related rights and obligations are in principle transferred from the transferring company to the receiver. If the transaction qualifies for the tax-neutral regime, the transferor doesn't suffer any capital gains tax, while the receiving company gets no step-up in tax basis.

No tax-neutral treatment is available where a main objective of the transaction is tax evasion or avoidance. If there's any doubt, a preliminary ruling can be requested. If such a restructuring is successfully challenged by the tax administration, the restructuring that was deemed tax free becomes taxable, with capital gains tax for the transferor and a step-up tax basis for the receiver.

Share deal or asset deal?

For a purchaser, an asset deal may be interesting, because they can recover a significant part of the acquisition cost through depreciation of certain assets acquired at a relatively high corporate tax rate.

In an asset deal, the seller should request a certificate stating that the selling entity has no outstanding tax liabilities vis-à-vis the Belgian corporate income tax, VAT and social security tax authorities. The purchaser must notify the authorities of the asset transfer agreement. These are necessary for the asset deal to be recognised by the Belgian tax authorities and to avoid the joint liability of the purchaser for unpaid taxes/social security of the seller.

From a Belgian seller's perspective, a shares sale is usually preferred because capital gains realised on shares are generally tax-free or low-taxed for Belgian individuals and companies. However, neither the purchase price nor any goodwill included in the purchase price can be depreciated for tax purposes.

QUESTION TWO

What elements of a structure or deal could prevent a client from implementing your recommendations? For example, holding companies, trusts, exemptions, withholding tax.

1. Interest deduction limitations regarding a Belgium-based acquisition vehicle.

   In several cases we would recommend a Belgian holding company as an acquisition vehicle. When using a Belgian company as an acquisition vehicle, one must consider the thin capitalisation rules. With the introduction of a 5:1 debt-to-equity ratio for intragroup financing, the deductibility of interest expenses is restricted although it still leaves a broad margin for debt financing. As of this year, the earnings-stripping rule imposed by the European ATA Directive will enter into force, limiting the deductibility of interest expenses to the higher of EUR3 million or 30% of EBITDA.

2. Using a branch instead of setting up an acquisition vehicle.

   As an alternative to the direct acquisition of the target's shares through a Belgian holding company, a foreign purchaser may structure the acquisition through a Belgian branch. A branch is not subject to additional tax duties and is taxed at the standard corporate tax rate of 25%. No withholding tax applies on profit repatriations from the branch to the foreign head office. If the client believes the Belgian operation is expected to make losses initially, a branch may be advantageous since, subject to the tax treatment applicable in the head office's country, a timing benefit could arise from the ability to consolidate losses with the profits of the head office.

QUESTION THREE

How would you minimise the tax risks on a deal, including historic tax liabilities and ongoing tax optimisation?

The tax risks on the deal itself and ongoing tax optimisation can be excluded on beforehand by obtaining a ruling. The Office for Advance Tax Rulings gives to every person liable to tax the possibility to obtain an preliminary ruling from the FPS Finance as regards the tax consequences of a transaction or a situation, which has not yet had consequences for tax purposes.

A request for a preliminary ruling must be made under conditions specified by law – in writing, with a full description of the situation or transaction and the legal and regulatory provisions concerned. Tax rulings are a very powerful risk management instrument, and, from our experience, the Belgian rulings system can proactively support businesses. Tax advisers worldwide can benefit from the transparency of the Belgian rulings practice as a source of inspiration.

With historic tax liabilities, this will only be an issue in case of a share deal and not of an asset deal. We recommend undertaking a thorough due diligence investigation before the share deal is concluded. To the extent possible, the outcome of the due diligence investigation should be reflected in the SPA-contract under the tax representations, warranties and indemnities. In a Belgian context, indemnifications are structured as a reduction of the share-purchase price so that they are not taxable to the recipient.

Top Tips – Tax Traps To Be Avoided In Your Jurisdiction

- A special assessment of 100% is applicable to so-called 'secret commissions', which are any expense of which the beneficiary is not identified properly by means of proper forms timely filed with the Belgian tax authorities. Filing of the required documents is a must!
- Except when Belgium signed an addendum to the DTA (Luxemburg, the Netherlands, Germany) with the country concerned, there could be a tax trap looming for cross-border commuters and the companies that depend on them, if working from home becomes permanent following the pandemic. People who live in one country and work in another, and their employers, could face difficulties regarding the "right to tax".
- Belgian resident taxpayers have an obligation to report their foreign bank account in their annual Belgian income tax return. A taxpayer that does not know this will be considered as acting in a fraudulent way.

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Lavinia has more than 20 years of experience as a lawyer, advising financial institutions and companies, while structuring and implementing financial transactions in Brazil and abroad, including regulatory and tax issues.

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Cauê has worked in renowned law firms in São Paulo, international banks and multinational companies as a tax consultant, advising financial institutions and companies, while structuring and implementing financial transactions in Brazil and abroad, including regulatory, accounting and tax issues.

The firm is structured to provide specialised legal services for players in the capital markets as well as wealth management industries, building true connections and real relationships with clients by overcoming the challenges presented on a daily basis.

The firm constantly works in partnership with corresponding offices throughout the national territory and internationally, foreign banks and professionals from other areas of expertise delivering multidisciplinary work, especially in the corporate, finance and accounting areas.

This dynamic work allows the firm to deliver tailor-made solutions to their clients, thereby enhancing the understanding of their business and making them valuable partners.

QUESTION ONE

Describe a typically tax-efficient deal structure in your jurisdiction? Any examples.

The Brazilian tax system has several types of taxes that affect different business models. A key point to invest in Brazil is to choose the right business model, through Brazilian investment funds or Brazilian companies, which may be financial or non-financial and may act as a support or ancillary business to the non-resident company. Choosing the right way to structure your business and the right region to act from may allow you to benefit from privileged tax regimes, tax benefits or simply change the way taxes levy and save you money in direct taxes such as corporate income taxes, turnover taxes, property taxes and transaction taxes, as well as indirect sale taxes on services or products, and taxes on imports of goods and services. It is important to plan ahead to offset tax credits. If you are buying a business in Brazil, structure carefully to benefit from goodwill deductions and prevent succession of tax, labour and civil law debts to the extent possible.

A typical deal structure in Brazil is to buy a Brazilian business through a Brazilian holding company to merge and deduct the goodwill and structure the business as a non-resident investing in Brazil. Utilise the Brazilian company whenever a local presence is needed using to the maximum extent possible the thin capitalisation and transfer pricing rules to minimise the Brazilian taxable profits. Try to apply for regional and federal tax benefits and maximise the use of service companies and intellectual or copyright property companies rather than commercial and industrial businesses, which are heavily taxed. With industrial and commercial businesses, work on the sales and logistics chain to optimise profit margins, tax benefits and levies while maximising the offset of accumulated tax credits.

QUESTION TWO

What elements of a structure or deal could prevent a client from implementing your recommendations? For example, holding companies, trusts, exemptions, withholding tax.

Limitations imposed because of counterparty needs may prevent the investor from choosing a certain business model. The need for prior approval to operate in specific sectors may create a timing constraint for the business. Some companies are unable to change a global business model to a Brazilian practice or may try to do so but lack the necessary substance for the new business model to prevail and be sustained. The company has to prepare and keep documentary evidence to support the tax positions and request special tax treatments and lack of compliance to such obligation may jeopardise the benefit. Certain special tax treatments or benefits are not extended to companies owned by non-residents. Some regional tax benefits impose a sort of cash trap for reinvestment and do not allow distributions of the amount obtained because of the tax discount.

Another major factor that ends up invalidating some tax planning, especially those that involve companies of the same economic group, located in different jurisdictions, is the withholding income tax levied on the intercompany rendering of services or royalty payments intercompany, that are often essential for the business development. Usually, corporations only analyse the corporate effective tax rates of each jurisdiction where they intend to operate and do not analyse the withholding income tax, other taxes levied on these intercompany relations and any cash trap imposed by the country; factors that could end up encumbering the structure as a whole.

QUESTION THREE

How would you minimise the tax risks on a deal, including historic tax liabilities and ongoing tax optimisation?

It is important to have extra tax substance implemented in all business models and to the goodwill payment and structure for its realisation and deduction. Transactions with related parties need to be carefully implemented to allow deduction of expenses and costs. The materialisation of tax risks into tax liabilities can contribute to the devaluation of the company. Implementing a good tax compliance program in Brazil that allows a foreign investor and Brazilian company to acknowledge and keep track of key drivers in the tax liabilities, tax positions, tax reporting and filing obligations and documentary evidence of tax options, expenses and transactions is important to avoid tax liabilities of non-compliance, avoid accumulation of tax credits and optimise liabilities.

Brazil presents a large bureaucracy for the filing of tax returns and ancillary documentation, often imposing on taxpayers' sizable fines for noncompliance or insufficient proof of their dutiful practices. The sheer volume of information that must be provided to Brazilian Tax Authorities is overwhelming to most, which often exposes newcomers to failure. Situations in which the taxpayer levies taxes correctly but provides inadequate tax returns are commonplace, especially for poorly advised newcomers.

Preemptive analysis of potential tax liabilities is a large part of our services since even legal structures are susceptible to tax assessment, as Brazilian tax authorities adopt a "substance over form" criteria. Thus, given this scenario, we find it important for all entrepreneurs operating or looking to operate in Brazil to seek the advice of tax specialists to maximise the tax efficiency of local transactions and minimise the ensuing tax risks. The trained eye of professionals knowledgeable in tax law, and with a comprehensive business vision, is the key for successful development of corporations in Brazil.

Top Tips – Tax Traps To Be Avoided In Your Jurisdiction

- Brazilian corporate income tax can be levied under different regimes – "Actual Profit", "Presumed Profit" and "Simples Nacional". Each regime implies different rules for defining taxable income and expense deduction. The efficiency of each regime varies in accordance with the company's activities and income/expense ratio. Companies often incur unnecessary tax expenses when choosing the regime without understanding how each suit them differently.
- Often the most efficient corporate income tax regime is the Simples Nacional, but this is also the most restricted. Not understanding the requirements for making this choice commonly results in assessments.
- A single real estate transaction can be executed to different degrees of tax efficiency in accordance with the seller. The ensuing income tax has different treatment for companies and individuals.
- Transactions with companies resident in tax havens and privileged tax regimes often incur in raised tax rates, the most efficient structures often move away from such jurisdictions.

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Jude is a Partner and Head of Tax, Transfer Pricing & Intellectual Property practices of the firm, and a key member of the Commercial Advisory and Dispute Resolution groups.

He represents both domestic and international businesses and high-net-worth individuals on transactional, regulatory and tax-related issues in the following areas: corporate structuring and reorganizations, such as domestic and cross-border mergers and acquisitions, tax consolidation and financing. Jude assists our clients to resolve tax disputes, tax debt issues, taxpayer reliefs from interest and penalties.

In particular, he represents clients before Nigeria's Federal and State tax authorities, the Tax Appeal Tribunals and other appellate bodies up to the Supreme Court of Nigeria. He also routinely advises the firm's multinational clients and others operating a group structure on transfer pricing policies relating to intercompany revenue and expense allocations. This prevents costly investigations and penalties by ensuring proper documentation and negotiation of advance pricing agreements with the Federal Inland Revenue Service (FIRS).

Uche a Senior Advocate of Nigeria (the equivalent of British Queen's Counsel) is one of the Founding Partners of Alliance Law Firm and is the Managing Partner of the firm. His multidisciplinary skills set, wide-ranging experience and insight are constantly brought to bear in the resolution of clients' issues. Uche is a highly ranked transaction solicitor and litigator. Clients of the firm and peers alike hold him in high esteem. He is a notable contributor to the IMF/World Bank Doing Business Guide publications, and the author of "Class Actions in Nigeria" – a pioneer book on the subject in Nigeria.

He has advised on a wide range of matters in Energy, Power, Capital Markets, Banking and Finance.

Uche has been listed amongst the top most integrity-driven professionals in Nigeria by major newspapers including The Guardian and Thisday; and has contributed over 40 published articles in the areas of capital market, business and investment laws in the Business Day Law Specialist Section. He has received several local and international awards.

ALLIANCE LAW FIRM is a dynamic partnership registered under the laws of the Federal Republic of Nigeria.

Our mission is to establish a world class, full-service Nigerian law firm distinguished by its premium service.

We incorporate a rich blend of traditional legal practice with the dynamism required to satisfy the constantly evolving nature of business in our result-driven professional services.

QUESTION ONE

Describe a typically tax-efficient deal structure in your jurisdiction? Any examples.

A typical tax-efficient deal structure in Nigeria could be described as an investment plan or scheme that least exposes an investment to different aspects of the country's tax regime. In summary, such a deal structure or scheme should drastically minimize the business' tax exposures more than other available investment options. One example of the available tax-efficient deal structures in Nigeria – especially after the incentives introduced by the Finance Act, 2019 – is "Real Estate Investment Company" ("REIC"). A REIC is a company duly licensed by the Securities and Exchange Commission ("SEC") for the sole purpose of acquiring intermediate or long-term interests in real estate and/or property development.

Some of the tax incentives enjoyed by a REIC are:

1. Exemption from Income Tax: Rental or dividend income earned by a REIC is exempted from the company income tax ("CIT") provided that a minimum of 75% of the income is distributed within 12 months of the end of the financial year in which the income was earned.
2. Exemption from Excess Dividend Tax ("EDT"): Ordinarily, EDT applies to dividend paid in excess of profits declared by a company in an accounting year. However, a REIC is exempted from EDT: provided that the REIC distributes a minimum of 75% of its rental and dividend incomes within 12 months of the end of the financial year in which the income was earned.
3. Exemption from Withholding Tax ("WHT"): WHT does not apply to dividends and distributions payable to a REIC. However, dividends and distributions payable by REIC to its shareholders attract WHT.

The purpose of the tax incentive is to attract investment in the real estate sector of the Nigerian economy. However, the most used forms of deal (re)structuring in Nigeria are mergers and acquisitions. Indeed, how a business enterprise is structured may be the most important factor that determines how tax-efficient such a business may be. A tax-efficient structure saves taxes and improves output. To realise a tax-efficient structure, Passive Investment Holding Companies are often used. In this case, a holding company accumulates dividend and interest incomes, which it may lend back or reinvest in the originating company. Income taxes payable by an originating company are reduced because dividends are not taxable, since they are considered franked investment income; and interests paid are deductible.

QUESTION TWO

What elements of a structure or deal could prevent a client from implementing your recommendations? For example, holding companies, trusts, exemptions, withholding tax.

Traditionally, a deal structure in an M&A may be realised through asset purchase, stock purchase or merger. The major processes of deal structuring in Nigeria include: the acquisition vehicle; post-closing organisation; form of payment; form of acquisition; legal form of selling entity; accounting; and tax considerations. Generally, clients contest the location of holding companies and the characterisation of entities. Thus, deal structuring can be a contentious issue arising from the failure to agree on allocation of debts and tax liabilities. Clients who buy often generally prefer assets while those who sell often prefer stock. Usually, clients want an informed understanding or appreciation of the implications of a preferred structure – especially for the mitigation of tax exposures and other commercial purposes.

QUESTION THREE

How would you minimise the tax risks on a deal, including historic tax liabilities and ongoing tax optimisation?

Typically, tax risks in a deal are reduced by planning. In an ideal situation, it is expected that to minimise compliance risks, the context of such deals should be established. This will involve setting boundaries within which mitigation or monitoring strategies can occur. Thereafter, the possible risks should be identified. This may be achieved through client segmentation, which is fundamentally essential for thorough identification of risks. The next stage is to ideally assess and prioritize the risks by establishing a sound framework for assessment and data analysis. This is important because not all risks will necessarily be addressed. What is needed is a balanced approach to the treatment of a wide range of risks.

The next step will be to determine the appropriate treatment strategies. Ideally, avoiding taxes and saving revenue are usually the utmost goals of most companies. Indeed, tax optimization usually leads to additional cash for companies. With the amendments made by the Finance Act, 2019, there is tax rate reduction opportunities for companies based on income aggregation.

Though these strategies may be complex, they often help to save money, which can be reinvested.

Some of the strategies are:

1. Taking advantage of tax credits and incentives: for example, structuring a business to take advantage of "Pioneer Status" under the Industrial Development (Income Tax Relief) Act. This confers massive tax Incentive (tax holiday) for a maximum of five years.
2. The implementation of effective compensation strategies, most of which are deductible expenses.
3. Consider a global tax planning: Entities can adopt this strategy by restructuring the way capital is financed through an intermediary company that may hold its assets.

However, it must be noted that an effective tax optimization plan may be complex, time consuming, time bound due to changes in tax laws in jurisdictions that a prospective business intends to operate.

Top Tips – Tax Traps To Be Avoided In Your Jurisdiction

- Buy-Sell Arrangements ("BSA"): If BSA is not properly arranged, it may trigger capital gains tax. In particular, this occurs when the owners unwind the buy-sell transfer policies back to the insureds. It is advised that a trusted cross-purchase is done using partnerships.
- Exposing Life Insurance Proceeds to Potential Income Taxation: Life insurance proceeds may be subject to income taxation by virtue of section 33(4)(d) of the Personal Income Tax Act 2011 as amended (PITA). To avoid this trap, it is better to comply with section 33(4) before the policy is issued.
- Triggering Transfer-for-Value Rule: Death benefits may be subject to income taxation due to the transfer-for-value-rule. It is advised that it qualifies for transfer to a partner exception; stock redemption arrangement; and purchase of new insurance.
- Tax Traps in the commercialization of Intellectual Property ("IP"): Many complex and costly tax problems may arise following the development and commercialization of a Nigerian company's IP.
- Loss Carry-forward in an M&A: Losses may only be carried forward by the new entity if it continues with the same line of business the old or extinct company was involved in.

ITALY

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Alessandro provides tax planning and assistance both domestically and internationally. In business operations, he has developed significant experience assisting clients in corporate matters and extraordinary transactions. He is an expert practitioner in issues related to trusts and in the establishment of supranational bodies and institutions. As a receiver at the Tribunal of Milan, he is a member of the supervisory bodies and audit committees of leading industrial, commercial and financial companies. He is also active in assisting non-profit organizations and associations, serving as statutory auditor and board member for numerous institutions. He founded MM&Associati FinaRota in 2009.

MM&Associati FinaRota provides tax and legal advisory services to domestic and international companies to help them in every aspect of their business.

Established in 2018, the firm assists companies in relation to Tax Law, Business Consulting, Commercial and Corporate Law, Corporate Liability, Employment Law, Corporate Restructuring and Bankruptcy, combining legal and tax expertise to create a unique service rooted in experience, trust and dedication.

Aware that current market conditions require businesses to transcend national boundaries, the four founding partners have therefore built a team of professionals able to provide to clients all the necessary support for their international project.

QUESTION ONE

Describe a typically tax-efficient deal structure in your jurisdiction? Any examples.

One of the typical tax efficient deal/structures in our jurisdiction is the LBO. The term Leveraged Buyout indicates that an operation of corporate acquisition is made using a large capital injection of debt with respect to risk capital, leveraging on debt capacity of the "target" company (ie the "target" company to be acquired), in particular using the assets and the income capacity of the same as a guarantee for the debt repayment. Specifically, the word "leveraged" refers to the effect and the centrality that the contribution of the debt has on the structure of the operation.

The main phases of a typical LBO operation:

1. a group of investors, or an institutional investor depending on cases (such as a Private Equity fund), constitutes a new one "vehicle" company, also known as SPV ("Special Purpose Vehicle") or "NewCo";
2. the same investors, shareholders of the NewCo, negotiate and finance the latter with a large amount of debt, sufficient to proceed to the acquisition of the shareholding (wholly or controlling) of the company "Target" (i.e. the target company of the acquisition)
3. the NewCo proceeds with the acquisition of the target company by exploiting the minimum contribution of shareholders' equity and third-party financing. To the latter guarantees the shares of the target company or its own asset;
4. after the acquisition in most cases the two companies merge. The merger is not a must, but it is the "natural" epilogue of the operation.

Further alternative structures to the typical LBO operation can be:

- LBO carried out with a non-proportional spin-off operation, internally of which the target splits a particular branch (performs a so-called "Carve out"), which is then incorporated by the NewCo.
- LBO carried out through the sale of a company (the so-called "Asset goes up" or "Oppenheimer" technique): the difference in this case is that the acquisition of the shares in the Target Company does not take place.

QUESTION TWO

What elements of a structure or deal could prevent a client from implementing your recommendations? For example, holding companies, trusts, exemptions, withholding tax.

The LBO operation is presented as a high-risk operation, so much so that it is framed as a structured finance event for which high and specific skills are required.

This degree of risk is not given by the modest size of the Newco, relegated to the role of vehicle company, but by the size and duration of the financial intervention and the future outcome of the industrial project, on which the expectations of those who hold the role of entrepreneur and who holds that of lender. Furthermore, the most delicate aspect of these operations, which also represents their peculiar trait, is the translation of the purchase cost on the assets of the acquired company. The acquisition, therefore, is possible through resources and potential, including borrowing capacity, of the target.

While being aware that the transaction in question represents a high level of risk, it must be said that it also has significant advantages.

Much has been discussed on the purposes and, above all, on the opportunities offered by the implementation of an LBO operation. First, it was pointed out that they put back into circulation available funds intended to finance obviously more attractive investments from the point of view of the shareholders who are preparing to sell (second factor ... are the shareholders ready to sell?). On the other hand, the company remains with those who believe they can make the most of it. This means that these operations make it possible to reallocate resources according to an efficiency criterion, i.e. in favour of those subjects who value them.

Another possible advantage consists in the fact that these operations contribute to fluidize the corporate control market, as they facilitate the organizational renewal and the turnover of the managerial team when this is found to be inadequate for their duties.

QUESTION THREE

How would you minimise the tax risks on a deal, including historic tax liabilities and ongoing tax optimisation?

The task of any tax/lawyer consultant who supports the potential buyer as part of the negotiation process is first of all to verify the existing tax risks, or, potentially deriving from the transaction, but also to insert those institutions that allow the client to reduce or cancel any type of tax risk, which it could respond to in the post-acquisition period.

The working practice has allowed the advisors to develop many tax guarantee instruments. The main minimal institutes that can be used, are the following:

1. insertion of an arbitration clause;
2. execution of the tax due diligence;
3. modification of the negotiating scheme;
4. request for the certificate of pending tax charges;
5. institution of tax amnesty;
6. alternative institutions to the direct or indirect acquisition of the business

On a residual basis and for the sole purpose of verifying the existence of any tax credits expressed in the financial statements of the target company, the institution of the new "tax credit certificate" – introduced by art. 10, of the legislative decree n. 269/2003 – which allows you to verify the certainty of the amount of any credits claimed by the company from the tax authorities

The list of the aforementioned cases does not pretend to be exhaustive but allows to avoid certain tax risks related to the acquisition process.

Besides the instruments limiting the tax liability of the purchaser, there is, in the course of the acquisition process, including a business or legal function, which provides for the inclusion in the contract to acquire specific warranty clauses.

Finally, the importance of the inclusion of arbitration clauses that can protect both the interests of the buyer and those of the sellers during the acquisition process should not be underestimated.

Top Tips – Tax Traps To Be Avoided In Your Jurisdiction

Here are examples that could induce the buyer to abandon the negotiation:

- failure to keep stock accounts with the correlated risk of inductive assessment by the Tax Administration on all tax periods still open for review;
- a purchase contractual scheme based on a purchase of shareholdings, with full tax risk of the potential buyer;
- the existence of potential tax liabilities to limit the intervention to the tax years/periods still subject to potential assessment by the Italian tax authorities;

The verification of the tax periods subject to potential assessment takes into account these variables: a) limitation periods established by current tax legislation; b) acts put in place by the tax authorities that may have interrupted the limitation period; c) access of the company to entities that have allowed the partial or total definition of the single tax period; d) the company's access to operations of an extraordinary nature which led to the latter's joint tax obligation for other tax periods.

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Robin is a tax advisor at Zirkzee Group accountants and tax lawyers, and focuses on direct taxation on cross-border SMEs. Also, as an ambassador at Zirkzee Group, Robin is continuously looking for new opportunities to help Zirkzee customers bring great success to their business.

After obtaining his Bachelor in Fiscal Economics in Groningen, Robin completed the Tax Advisor programme at the Dutch Register of Tax advisors (RB). Robin has 13 years of working experience within small- and medium-sized accountancy firms.

Every company and entrepreneur is different. For that reason, the services we offer are customised to their wishes. Zirkzee Group's clients consist mainly of international companies, start-ups and entrepreneurs. We offer services including accounting, payroll services, tax and expat services.

Located in the SBIC-building in Noordwijk, the Netherlands, Zirkzee Group is part of a community involving lots of techno start-ups from the ESA-BIC incubation programme. In this community companies experience how assistance and learning from each other can be an inspiration and lead to better results. For this reason, Zirkzee Group does not consider you or your company as customers, but as business partners. Our approach is focused on getting the best out of your company.

QUESTION ONE

Describe a typically tax-efficient deal structure in your jurisdiction? Any examples.

The Netherlands is often seen as the preferred location for central sales and distribution activities in EMEA and beyond due to its central location in Europe, excellent airport facilities, a sophisticated banking system, highly trained and multilingual employees and sufficient office space. Moreover, The Netherlands is known for its many tax treaties (more than 90!) with countries across the world. At Zirkzee Group, we apply these treaties to your advantage. Lastly, the Dutch Corporate Income Tax Act has a so-called participation exemption, which avoids double taxation on dividends or capital gains when distributing from the subsidiary to the parent company.

Bilateral tax treaties

When you locate your head office in The Netherlands, you can avoid double taxation when collecting dividends, interest and royalties from subsidiaries and other group companies.

Dutch Participation Exemption

Dutch Corporate Income Tax law provides for an exemption of dividends and capital gains on shares in subsidiaries if they meet the following conditions:

- Ownership of at least 5% of the issued share capital of the subsidiary
- The subsidiary has equity divided into share capital
- The shares in the subsidiary are not held as a portfolio investment.

The participation exemption can also be applied in foreign situations. In that case, the foreign subsidiary should be taxed at a realistic corporate income tax rate. A realistic corporate income tax rate is defined as a tax rate of at least 10%. In addition to this, the tax base in the country where the participation is located should not deviate significantly from the tax base according to Dutch standards.

Essentially, the participation exemption applies to dividends and capital gains. But it is also applicable to currency exchange results, hedging results and interest income on certain categories of profit-participating loans.

If the participation exemption applies, losses from the participation cannot be deducted (participation losses are also covered by the participation exemption). However, if there is a loss due to the liquidation of the participation, this liquidation loss can be – under certain conditions – tax-deductible. Of course, Zirkzee Group can help you make optimal use of the participation exemption.

QUESTION TWO

What elements of a structure or deal could prevent a client from implementing your recommendations? For example, holding companies, trusts, exemptions, withholding tax.

As a result of the extensive database of tax treaties and the participation exemption, The Netherlands is sometimes referred to as a tax haven. This negative image is not ideal for trade with our country, which is why the Dutch government is keen to get rid of this image. To do so, The Netherlands is working on anti-abuse measures in respect of the participation exemption: in order to prevent abuse of the participation exemption, it was decided to expand the existing information exchange for conduit companies. A further study will follow to come up with regulations by 2022 that provide for the possibility of exchanging information with other countries about dividend flow companies with insufficient substance in the Netherlands.

Additional to these measures, external factors also contribute to a more positive image for the Netherlands. As a result of the USA's tax reform, it seems that American companies are less eager to use the Netherlands as a transit port for their foreign investments.

Given the expected developments regarding the participation exemption, it is necessary to use the expertise of a local advisor. Zirkzee Group has a great deal of experience with companies from the USA and other parts of the world and is therefore your ideal business partner.

QUESTION THREE

How would you minimise the tax risks on a deal, including historic tax liabilities and ongoing tax optimisation?

In the Netherlands, tax advisers and large companies can conclude a covenant with the Dutch Tax Authorities, called "Horizontaal Toezicht" (Horizontal Monitoring). This agreement offers taxpayers, their tax advisers and the Dutch Tax Authorities the opportunity to make agreements in advance about tax issues and the submission of returns. This results in more certainty for companies about their tax position, improves the quality of tax returns and avoids double work.

The core value of horizontal monitoring is that the Dutch Tax Authorities rely on the work that the affiliated advisor does for the taxpayer. There are agreements in the covenant about the working method and quality requirements that the consultant observes.

The premise for horizontal monitoring is that the advisor wants to submit an acceptable tax return on behalf of the client. For this reason, relevant tax standpoints, which may lead to a difference of opinion, are coordinated by the adviser and the tax authorities before the tax return is submitted (preliminary consultation).

By concluding a Horizontal Monitoring covenant, the Dutch Tax Authorities can quickly provide certainty about the taxation. Also, there is less supervision afterwards and because relevant topics are discussed in advance, tax risks are avoided.

Top Tips – Tax Traps To Be Avoided In Your Jurisdiction

- Contact Zirkzee Group and become part of our community.
- Don't forget to take advantage of some tax or subsidy benefits in a timely manner. Some benefit plans are available on the basis of a released budget. When the budget is used up, the scheme can no longer be used.
- Tax legislation in the Netherlands is relatively stable. Nevertheless, things change every year so use the up-to-date knowledge of Zirkzee Group to avoid any surprises.
- Apply the tax treaties to avoid double taxation by consulting one of our experts.
- To avoid discussion with the Dutch Tax Authorities afterwards, you can discuss tax positions by preliminary consulting.

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