



M&A Workshop

Key features of the sale and purchase agreement

Introduction

- This session will:
 - focus on private M&A;
 - analyse the key terms of the share purchase agreement;
 - summarise the key differences in UK and US approach to transaction terms; and
 - assess current trends in M&A terms.

Key objectives of buyer and seller

The purpose of the share purchase agreement (the **SPA**) is to record the detailed terms on which the shares in a company are sold and purchased.

Key buyer objectives

- Good title to shares
- Provision of information
- Limit risks/obtain protection
- Obtain protective covenants

Key seller objectives

- Receive consideration
- Limit/remove exposure for ongoing liabilities
- No liability outside the SPA

Key terms of the SPA

- Sale and purchase of shares
- Conditions precedent
- Consideration
- Warranties and indemnities
- Business terms
- Pre-completion covenants
- Completion
- Protective/restrictive covenants
- Tax and environmental indemnities?
- Boilerplate?

Consideration

Types of consideration

- Cash – in the current market, cash is king
- Shares
- Assumption or repayment of debt

Consideration structures

- Debt free/cash free deals
- Completion accounts
- Deferred consideration
- Earn-outs
- Locked box structures

Conditions precedent

- Shareholder approvals (seller and purchaser)
- Antitrust/regulatory clearance
- Financing?
- Purchaser conducting satisfactory due diligence?
- Material adverse change (MAC)?
- Condition to be satisfied at discretion of either party?
- Consequences of failure to satisfy conditions: break fee or payment of costs?
- Long stop date / waiver of conditions

Warranties

- Warranties: key protection for buyers
- What are warranties?
- Twin purpose of warranties
 - a form of retrospective price adjustment
 - to encourage the seller to disclose known problems to the buyer
- Warranties true except as disclosed
- Protects purchaser against risk of unknown liabilities
- Who gives warranties?
- Division of liability between warrantors
- Sweeper warranties
- Repetition of warranties at completion?

Scope of the warranties

- General
- Accounts and financial
- Commercial
- Taxation
- Properties
- Employees, pensions and incentives

- Critical to link to the disclosure exercise; the warranties and disclosure should be negotiated together
- Appropriate to have materiality?

Disclosure: scope for negotiation

Interaction between due diligence, disclosure and scope of the warranties in the SPA

Purchaser's position

- Full and fair disclosure
- Specific disclosures against specific warranties
- Resist limitations on ability to claim by reference to “knowledge”

Seller's position

- Resist full and/or fair disclosure
- Preference for documentary rather than specific disclosure
- Exclude liability for matters within the “knowledge” of the purchaser and its advisers

Damages for breach of warranty

- Remedies in contract:
 - English common law position – “diminution in value” (difference between actual and market value)
 - “pound for pound” or “indemnity basis” - actual loss to underlying asset base (requires specific provision in SPA if governed by English law).
- Remedies in tort/statute:
 - misrepresentation: put purchaser in position he would have been in “but for” misrepresentation
- Security for breach of warranties: parent company guarantee, escrow/retention account or set-off against deferred consideration

Limitations on liability

- Financial limits
 - thresholds (*de minimis*, hurdle, excess)
 - overall cap on liability
- Time limits
 - generally one or two years
 - longer periods for tax and environment
- Buyer to only bring claims under the warranties
- Seller awareness
- Buyer knowledge
- No claims against continuing management
- Notification of claims
- Conduct of third party claims

Indemnities

- Why and when required?
- Difference between warranties and indemnities
- Time limit for claims
- Limit on claims when aggregated with warranties cap?
De minimis? Threshold?
- Application of warranty limitations generally
- Conduct of third party claims

Pre-completion covenants

- Access to management and information
- Conduct of business in ordinary course
- Capital expenditure
- Disposal of assets
- Non-routine borrowings/payments
- Giving of guarantees/indemnities
- Payment of dividends

Completion

Delivery of:

- stock transfer forms
- share certificates
- corporate books
- directors/auditors' resignations
- completion board minutes
- consideration

Typical complications

- Multiple jurisdictions
- Multiple sellers
- Shared assets
- Interests in joint ventures
- Continuation of key contracts
- Intra-group commercial relationships
- Separation and integration

Current trends in SPA terms

- Locked box → completion accounts
- No staple
- Deferred consideration/earn out
- Increases in warranty caps
- Increased conditionality, especially MACs
- More DD but more focused
- Increases in escrow/set off/guarantees of warranties
- BUT auctions and VDD not dead

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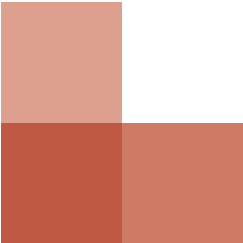
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