Getting the Deal Done!

Anatomy of a Cross-Border Deal

Global Law and Business Seminar

COLUMBIA LAW SCHOOL

July 25, 2022

Course Overview

GETTING THE DEAL DONE!
COURSE OVERVIEW

Course Description:

This course is meant for business executives. If offers a practical introduction to key legal issues that come into play in cross-border deals under NY law, and/or involving U.S. parties

My immediate goal is to make you aware of the main themes that drive or significantly impact deal-making in the U.S. so that you hit the road running when you find yourself working on a cross-border M&A deal with U.S. parties. My overall goal is to have you think about the type of leader you want to be

GETTING THE DEAL DONE!
COURSE OVERVIEW

Course Structure:

- Seminar: Interactive; your goals are mine

- 4 classes: from specific to general:
  - In our first class, we will address regulatory and political risks in cross-border M&A transactions and map out a roadmap to getting a deal closed
  - We will follow with a negotiation workshop
  - And end with two classes on ESG and how it is shaping the business world, in and outside the U.S.

- Guest speakers: senior executives with first-hand experience on the topics we have been discussing in class

GETTING THE DEAL DONE!
COURSE OVERVIEW

- Why me?
- From an M&A perspective, what is the main difference between a U.S. trained executive and a non-U.S. trained executive?

What is M&A?

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

What is M&A?:

- A general term that describes the consolidation of businesses or assets through various types of financial transactions such as mergers, acquisitions or sales
- At its core, M&A consists in advising clients in forming a business, selling a business, or buying a business

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

Why is U.S. M&A important to you?:

- "*The United States led the way for M&A, accounting for nearly half of global volumes – the value of M&A nearly doubled to $2.5 trillion in 2021, despite a tougher environment under the Biden administration.*" (Reuters, Niket Nishant, December 31, 2021)

- U.S.-type documents lead the way in M&A transactions

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

Some of the biggest M&A deals by strategics in 2021:

1. US$43 billion combination between Discovery and AT&T [cash and stock/intern/NY law]
2. US$31 billion acquisition of KCS by Canadian Pacific Railway: The combined firm would bring an integrated logistics firm that spans Canada, the U.S. and Mexico [cash and stock/intern/NY law]
3. US$26 billion acquisition of Shaw Communications by Rogers Communications: The resulting business creates a national mobile communications powerhouse in Canada
4. US$20 billion acquisition of Nuance Corporation by Microsoft: Target's company's products are utilized by more than 55% of physicians and 75% of radiologists in the US, as well as 77% of hospitals in the country [US/NY law]
5. US$ 17.4 billion acquisition of PPD by Thermo Fisher Scientific Inc.: Acquisition brings together a leader in clinical research services with a pioneer in scientific instruments [cash/intern/NY law]

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

Some of the world's biggest PE funds…:

TOP PE GLOBAL FUNDS	
1. *The Blackstone Group*	6. *Advent International*
2. *KKR*	7. *Thoma Bravo*
3. *The Carlyle Group*	8. *TPG Capital*
4. *Apollo Global Management*	9. *Warburg Pincus*
5. CVC Partners [Lux]	10. *Bain Capital*

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

CONCLUSION:

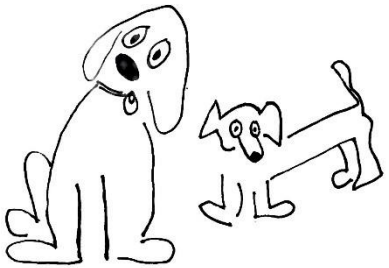
IF YOU ARE GOING TO WORK ON CROSS-BORDER M&A, IT IS VERY LIKELY THAT YOU WILL BE WORKING ON TRANSACTIONS UNDER NY LAW AND WITH U.S. EXECUTIVES

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

In U.S. led cross-border M&A transactions, most transactions will be under NY law:

- U.S. parties are partial to NY law BUT
- NY Law is also the “Gold Standard Choice” for global business contracts

WHY?



GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

Why New York Law?

- One of the most **sophisticated, developed and predictable** bodies of commercial and business law available

- Guided by the **intent of the parties** as expressed in the words they chose in the contract, making the results predictable and certain (*159 MO Corp, v Redbrige Bedford, 33 N.Y.3d 353 (2019*))

- NY imposes a **high standard of conduct** on contracting parties. It incorporates the implied covenant of good faith and fair dealing into all contracts

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

Why New York Law?

- If the agreement involves at least **$250K**, NY law may be chosen, whether or not the agreement has anything to do with NY. A NY state court forum may be chosen for any commercial dispute where the contracts is expressly governed by NY law and involves not less than **$1 million**

- Excellent resources for the resolution of **conflict disputes**: the Commercial Division of the NY State Supreme Court is staffed by judges whose sole responsibility is the resolution of commercial disputes. NY also offers excellent choices for arbitration, with many of the leading arbitral institutions having offices in NY

GETTING THE DEAL DONE!
THE LIFECYCLE OF A DEAL

What about Delaware law?

- Not as popular as NY law for governing commercial transactions. However, Delaware is extremely popular for incorporating businesses, including for the following reasons:
  - Flexible and advanced business formation statutes. Shareholders, officers and directors are not required to live in DE
  - The registration process is straightforward and done online
  - Business owners are not required to list their names when filing business formation papers
  - Does not impose state income tax on businesses that do not operate within the state
  - The Delaware Court of Chancery is a unique 220 year-old business court that has written most of the modern U.S. corporation U.S. case law

Political and Regulatory Considerations

GETTING THE DEAL DONE!
POLITICAL/REGULATORY CONSIDERATIONS

Political and regulatory considerations have two main effects on M&A deals:

1. Need to identify, analyze and mitigate "country risk" (Pre-Execution Phase):
   - Risk of Expropriation, regulatory overreach, increased taxation -- manifests itself in the deal's structure: the use of BITs, political insurance, and/or L/T business strategy
   - Corruption: Need for pre-deal anti-corruption due diligence, and if the deal goes forward, buyer will need to conduct post-closing anti-corruption due diligence and extend buyer's compliance program to target

2. Impact on Deal Documents:
   - Need to Obtain Regulatory Approvals:
     - Requires cooperation among parties and impacts timing – hotly negotiated topic
   - Need to Address Changes in Law / Political Unrest Between Signing & Closing:
     - Material Adverse Effect construct
     - Right to Walk-Away

GETTING THE DEAL DONE!
POLITICAL/REGULATORY CONSIDERATIONS

How do you protect your investment long-term?

GETTING THE DEAL DONE!
POLITICAL/REGULATORY RISK

How do you to protect your investment on a long-term basis? [Discuss: The surge of resource nationalism commentary – Resource Nationalism Index, “creeping expropriation” – Bolsonaro (BR), Lopez-Obrador (Mex), Castillo (Peru), Boric (Chile) and Petro (Colombia)]

1. Treaty planning: Bilateral Investment Treaty (BIT) investing

   - Ensure investment treaty protection. Top 20 FDI recipients are signatories to over 950 BITs [Spain has 99 treaties in force – major player in LatAm + ETVE regime]

   - What is protected?: “Investment” (shares, assets, bonds, enterprise)

   - Who is protected?: the “investor” making the investment – natural persons and corporations

GETTING THE DEAL DONE!
POLITICAL/REGULATORY RISK

- What protections do IBTs offer?
  - Most common:
    - No Expropriation Without Fair Compensation / “Creeping” Expropriation [Mexico]
    - Fair & Equitable Treatment/Denial of Justice
    - Most Favored Nation Treatment/ National Treatment
    - Full Protection and Security
  - Other protections: protection for civil strife or armed conflict, enforcement of agreements with the host state or free transfer of covered investments

- How much and for how long?: Generally unlimited

- Cost: Implementation and maintenance. Forum Shopping. [Resorts/Bottler experience]

- Arbitration: by investor against host country directly. Approximately 40% of the IBT arbitrations are settled or discontinued

GETTING THE DEAL DONE!
POLITICAL/REGULATORY RISK

2. Political insurance: May be the answer against expropriation, political violence, currency inconvertibility (the inability to convert local currency and repatriate it), sovereign debt default, and even acts of terrorism and war

- Not always available
- It is expensive (investor pays for insurance with a premium), limited (maximum insurance periods are 15-20 years) and insurance recovery amounts are subject to applicable policy limits
- Insurance protection may also require disclosure, which is not the case if relying on IBT protection.
- Has been in the rise and is arguably speedier and more certain than under treaties

See JD article here

GETTING THE DEAL DONE!
POLITICAL/REGULATORY RISK

3. L/T Business Strategy:

- Develop an international legal/business strategy (e.g., create internal monitoring systems (lobby before *unwanted* changes take place) and build and strengthen relationships with local communities)

- Companies in mining, energy and heavily regulated industries consistently follow this approach

GETTING THE DEAL DONE!
POLITICAL/REGULATORY CONSIDERATIONS

2. Impact on Deal Documents:

- Need to Obtain Regulatory Approvals: [e.g., antitrust/CFIUS-like restrictions]
  - Mutual Closing condition:
    - Allocation of risk among the parties: Buyer's risk ("hell or high-water" approach)
    - Requires cooperation among parties and impacts timing – "Drop-dead Date"
    - Hotly negotiated topic

- Need to Address Changes in Law / Political Unrest Between Signing & Closing:
  - Material Adverse Effect construct: Closing Date Condition ("An MAE has not occurred" – Buyer's right)

  - Right to Walk-Away: Terminate the Purchase Agreement; damages? (*Yatra v. Ebix* (2022)– Careless Termination)

Political and Regulatory Considerations

CORRUPTION

GETTING THE DEAL DONE!
COUNTRY RISK AND CORRUPTION

Corruption:

- Pre-acquisition diligence is focused on understanding the risk profile of the target and how it fits within the acquirer's ESG initiatives

- Once a deal has closed, an acquirer may become liable for the seller's past violations, which can damage reputations and lead to significant financial penalties and loss of value. The FCPA provides for "**successful liability**" if the acquiring company is found liable of "willful blindness" regarding the corrupt practices of target [TIP: Check domestic corruption legislation]

- It is very important to conduct pre-closing corruption DD and, if the transaction closes, to (i) conduct post-closing corruption due diligence and (ii) extend buyer's compliance program to target
    - For example, in 2021, John Wood Group, Plc. ("Wood") paid $177 million in settlements to Brazilian, U.K. and U.S. law enforcement in order to resolve an investigation into historical misconduct at its recently acquired subsidiary. In 2011, the target engaged agents to corruptly obtain internal, confidential information that the target used to win a public tender from Petrobras, a state-owned oil company. Wood knew that the target was under investigation prior to the 2017 acquisition but proceeded with the transaction nevertheless

GETTING THE DEAL DONE!
COUNTRY RISK AND CORRUPTION

- Quick reminder -- FCPA: targets corporate bribery of non-US government officials. Two basic provisions:
  - *Anti-bribery provisions*: prohibit making, promising or offering payments or providing other things of value to foreign government officials for the purpose of obtaining or retaining business
    - This prohibition extends to anyone acting on behalf of the company, under the company's control or at the company's direction, including officers, directors, employees, agents or shareholders
    - "Control": For example, in *Bell South*, the SEC asserted that where the parent company held 49 percent of the equity with the right to acquire an additional 40 percent interest, the parent company had "operational control" and "the ability to cause [the subsidiary's] compliance with the FCPA."
  - *Books and Records provisions*: issuers are required to (i) maintain books, records and accounts that accurately and fairly reflect the issuer's transactions, and (ii) devise a system of internal accounting controls sufficient to confirm (i)

GETTING THE DEAL DONE!
COUNTRY RISK AND CORRUPTION

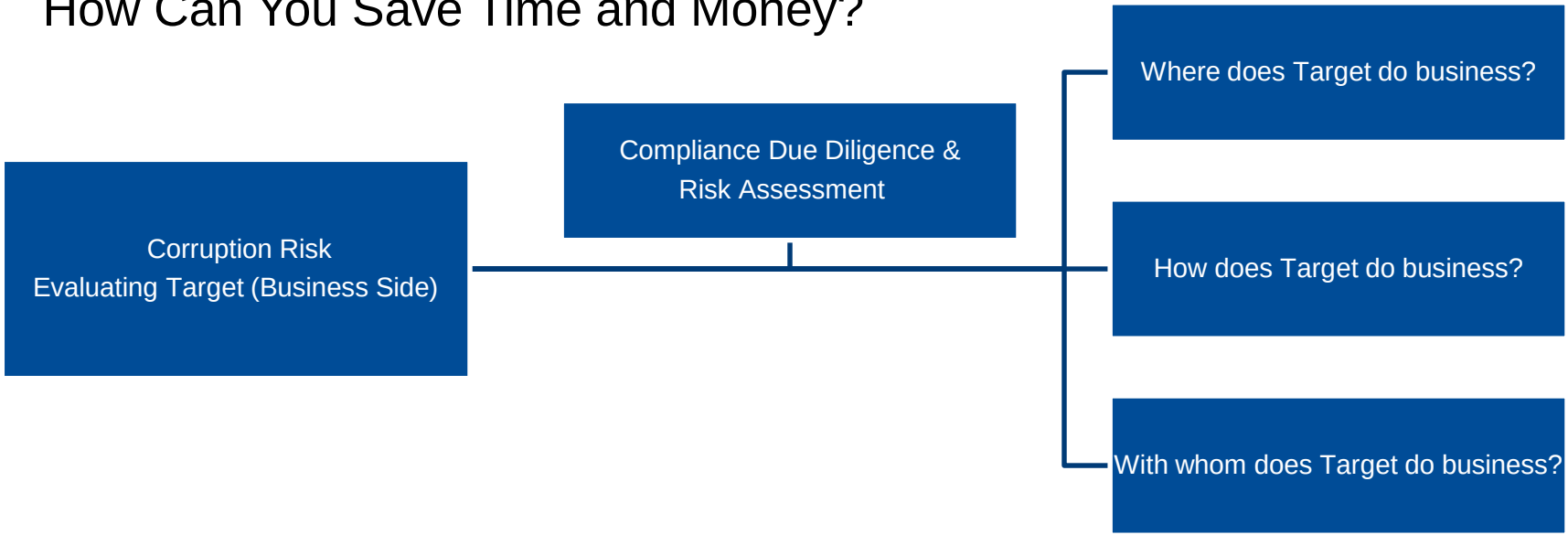
Ten Biggest FCPA Cases (2008 - 2021):

1. Goldman Sachs Group (US): 3.3 billion in 2020
2. Airbus SE (Netherlands/France): $2.09 billion in 2020
3. Petroleo Brasileiro S.A. (Petrobras, Brazil): $1.78 billion in 2018
4. Telefonaktiebolaget LM Ericsson (Sweden): $1.06 billion in 2019
5. Telia Company (Sweden): $1.01 billion in 2017
6. MTS (Russia): $850 million in 2019
7. Siemens (Germany): $800 million in 2008
8. VimpelCom (Netherlands): $795 million in 2016
9. Almston (France): $772 million in 2014
10. Societe Generale S.A. (France): $585 million in 2018

*** FCPA Blog (May 26, 2021)**

GETTING THE DEAL DONE!
COUNTRY RISK AND COMPLIANCE

How Can You Save Time and Money?



COMPLIANCE DD AND RISK ASSESSMENT – INITIAL QUESTIONNAIRE

•**High-Risk Jurisdictions:** Does the target have sales or operations in any high-risk jurisdictions? Who oversees sales and operations in high-risk jurisdictions? What (if any) gifts, hospitality, entertainment, travel, corporate sponsorships or charitable donations occur in high-risk jurisdictions? [Where does target do business?]

•**Government and Regulatory Touchpoints:** What licenses, permits or regulatory approvals does the target need to conduct its business? Who obtained these approvals? Who is responsible for government relations? Are there any lobbying efforts, political contributions, or political engagement — either directly or through a trade association? [How does target do business?]

•**High-Risk Third Parties:** Do the target's third parties engage them to interact with governmental entities, state-owned enterprises or government officials? Does the target rely on sales channel partners, such as wholesalers, distributors, resellers, joint venture partners, locally sourced content providers, customs clearing agents or freight forwarders? Who are the target's key suppliers, and where are they located? What are the targets processes for diligencing and contracting with high-risk third parties? [With whom does target do business?]

•**High-Risk Customers:** To whom is the target selling its products or services? Are there any governmental or state-owned enterprise customers? If so, how is that business typically awarded? Who is responsible for maintaining relationships with customers? What (if any) gifts, hospitality, entertainment, travel, corporate sponsorships or charitable donations are connected to sales efforts? [With whom does target do business?]

•**Compliance and Control Infrastructure:** Are the target's policies and procedures adequately designed? Are employees and high-risk third parties appropriately trained? How are the control functions (legal, compliance and audit) resourced? Has the company conducted a risk assessment? Has an external or internal audit recently tested any of the key compliance controls?

•**Corporate Governance and ESG:** Who is on the board? What issues are escalated to the board? Have there been any allegations of wrongdoing or breaches of the target's internal policies? Does the target have any material outstanding litigation or investigations? Is the target's supply chain free from child and slave labor? How does the target's operations impact the environment? Is there any adverse media coverage related to the target?

* Effective and Efficient Pre-transaction DD

GETTING THE DEAL DONE!
POLITICAL/REGULATORY RISK

Country Risk and Corruption: Impact on Deal Documents

- *Purchase Agreement:*
  - *Reps:* No violation of corruption related laws, no false entries in books and records, no convictions of employees/directors on corruption related charges, and financial statements compliance rep
  - Interim covenants: Audit rights
  - Condition to Closing: Bring-down of compliance reps without materiality qualifications
  - Carve-out of “tainted” business/asset [Case study: Mexico hotel]
  - In joint ventures: compliance put and call options allowing acquirer to exit or force its partner out of the JV if a material compliance breach occurs

- Remediation may be available but takes time, it’s costly and may carry reputational risk

GETTING THE DEAL DONE!
DUE DILIGENCE AND RISK ASSESSMENT

TIPS ON DUE DILIGENCE AND OUTSIDE COUNSEL:

1. Lawyer intensive process:

    1. Limit time and cost

    2. Work Product: executive summary and risk table; require standardized contract review
        - *Forensic due diligence:* Interviews with top management, background checks, transaction testing around high-risk transactions, reviewing correspondence with regulators, litigation history and whistleblower complaints

    3. The use of specialists (investigative firms - transparency)/ Tax due diligence

    4. Have weekly one-hour calls with the other side to review DD progress

A Roadmap to Closing an M&A Private Deal!

TRANSACTION AGREEMENT WALK-THROUGH

Table of Contents

1. Definitions and terms / Recitals
2. Purchase and Sale
3. Consideration
4. Closing
5. Representations and warranties of the Seller
6. Representations and warranties of the Buyer
7. Covenants
8. Conditions to Closing
9. Termination
10. Survival: Indemnification
11. Miscellaneous

THE LIFECYCLE OF A DEAL

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOCUMENT	KEY WORDS	COMMENTS
PLANNING	Confidential Information Memorandum (CIM) Term Sheet Confidentiality Agreement	Forward-looking statements; market share related statements Exclusivity Binding/Non-binding	Tailoring: scope, term, covenants
DUE DILIGENCE	Due Diligence Report: 1. Executive Summary 2. Risk Table	Material Mitigation Valuation	Balance Cost/Expectations Coordination: key team members Opportunity to develop a relationship (juniors)

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOCUMENT	KEY WORDS	COMMENTS
NEGOTIATION	PURCHASE AGREEMENT	Purchase Price: 1. Purchase Price Adjustments (WC) 2. Earnouts 3. Holdbacks (buyer)/Escrows [Market Studies: ABA Deal Points Study, PP Allocation Study]	PP Adj.: run them by accountant Earnouts: valuation gap; fair Escrows: unilateral release; no tailoring; time
		R&W: statements of fact; true, complete and correct *Disclosure Schedules*: carve-outs to indemnity obligations "Bring-down" (exceptions) Qualifiers: Materiality, Efforts, Knowledge	Party giving rep must indemnify the other party if "breached" Update Disclosure Schedules: impact on indemnity (TIP: Seller: right & no indemnity unless *MAE*/ Buyer: obligation & indemnity in all cases) Knowledge of the Seller: whose knowledge?; constructive vs. actual

APA WORKSHOP
REPRESENTATIONS AND WARRANTIES (PRO SELLER)

Section 5.8(b). Product Registrations.

(b) Except as set forth in Schedule 5.8(b), to the Knowledge of Seller, all Products sold under the Product Registrations are manufactured and marketed in accordance with the specifications and standards contained in such Product Registrations, except where the failure to comply therewith would not have a Material Adverse Effect.

"Material Adverse Effect" means a material adverse effect on the Purchased Assets, taken as a whole, or on the ability of Seller or its Affiliates, as the case may be, to perform their respective obligations under, or consummate, the transactions contemplated by this Agreement; [provided, however, that none of the following events….]

"Knowledge of Seller" means the current actual (but not constructive or imputed) knowledge, without inquiry or investigation, of any of the individuals listed on Schedule 1.1(a) hereto.

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
NEGOT	PSA	Covenants: agreements to take action in the future: 1. Pre-closing covenants [third party consents; regulatory approvals]: outline degree of efforts necessary to close – *Interim covenants* 2. Post-closing: non-compete, indemnification, tax Buyer wants to limit exposure (more covenants)/Seller wants certainty of Closing and independence	Interim pre-closing covenants: govern the operation of the business between signing and closing. Issues: what is "ordinary course of business" [TIP: Covid – if S, include ability to act in a pandemic or other health crisis (AB Stable Decision 2020], and you also want to carve-out pandemics and other health crisis from the MAE definition Gun-jumping
		Closing Conditions: 1. Mutual (No Proceeding, No Law or Order, Waiting Period/Regulatory Approvals Obtained) 2. Bring-down of R&W 3. Closing deliveries 4. No *MAE* (benefit of Buyer)	Reduce deal certainty Seller: limited bring-down (not all and R&W qualified by updates to Disclosure Schedules, VDR, and/or MAE)

APA WORKSHOP
INTERIM COVENANT AND CLOSING CONDITION

Section 7.2. Conduct. From and after the date hereof until the Closing Date, except (a) as required by applicable Law, (b) as contemplated by Section 7.17 with respect to the Remaining Assets or (c) as Purchaser shall otherwise consent in writing, which consent shall not be unreasonably withheld, conditioned, or delayed, Seller agrees that it will maintain the Purchased Assets, and will cause the Purchased Assets to be maintained, in the ordinary course of business consistent with past practice.

Section 8.2(a) Conditions to the obligations of Purchaser(a) Seller shall have performed in all material respects its agreements and obligations contained in this Agreement required to be performed by it at or before the Closing, and the representations and warranties of Seller contained herein shall have been true and correct when made and shall be true and correct as of the Closing, as if made as of the Closing, except for (i) failures to perform covenants or breaches of representations and warranties that would not, individually or in the aggregate, have a Material Adverse Effect; and (ii) those representations and warranties that address matters as of a particular date, which need be true only as of such date); and

APA WORKSHOP
PURCHASER CLOSING CONDITION EXAMPLE

Section 8.2(a) Conditions to the obligations of Purchaser(a) Seller shall have performed in all material respects its agreements and obligations contained in this Agreement required to be performed by it at or before the Closing, and the representations and warranties of Seller contained herein shall have been true and correct when made and shall be true and correct as of the Closing, as if made as of the Closing; (ii) failures to perform covenants or breaches of representations and warranties that would not, individually or in the aggregate, have a Material Adverse Effect; and (iii) those representations and warranties that address matters as of a particular date, which, subject to clause (ii) above, need be true only as of such date); and

Section 8.2(a) Conditions to the obligations of Purchaser(a) Seller shall have performed in all material respects its agreements and obligations contained in this Agreement required to be performed by it at or before the Closing, and the representations and warranties of Seller contained herein shall have been true and correct when made and shall be true and correct as of the Closing, as if made as of the Closing, except for (i) changes contemplated or permitted by this Agreement or attributable to matters disclosed by Seller in the Disclosure Schedules hereto or disclosed in Seller's electronic online data room on the date hereof; (ii) failures to perform covenants or breaches of representations and warranties that would not, individually or in the aggregate, have a Material Adverse Effect; and (iii) those representations and warranties that address matters as of a particular date, which, subject to clause (ii) above, need be true only as of such date); and

THE LIFECYCLE OF A DEAL

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
NEGOT	PSA	Termination: 1. Mutual termination 2. By either party if: 1. Closing has not occurred by Drop-dead Date 2. Non-appealable Order 3. Breach and failure to cure and/or condition impossible to fulfill 3. By Buyer if MAE has occurred or reasonably expected to occur	MAE is a very high standard. Until 2018, no Delaware court had ever found an MAE to exist such that buyer could walk out of the deal Requires that a sustained and severe business decline, not attributable to general economic or industry factors, has occurred (1) of a temporary long duration (not a blip); (2) highly significant (approximately 20% of a company's total equity value in terms of remediation and other costs could be a relevant threshold – *Akorn* case), and unexpected (perhaps) If you are a Buyer you may want to tighten-up the ordinary course of business covenant – in the *AB Stable* (2020) case, COVID-19 was carved-out from the MAE definition, but Buyer had the right to terminate the PSA for breach of the ordinary course of business covenant that required S to operate "only in the ordinary course of business consistent with past practice"

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
NEGOT	PSA	Indemnification: remedy for losses incurred under the PSA Loss (scope) Indemnifying Party Indemnified Party (affiliates, directors, officers and agents) What is indemnified? Breaches of R&W, Covenants (Excluded Liabilities: pre-Closing Liabilities, Pre-Closing Taxes) Survival; Limitations on Indemnification Indemnification Procedures	Indemnification Limitations: typically apply only to breaches of reps (other than fundamental reps) ► De Minimis amount (threshold) ►Deductible Basket: Indemnifying Party is only liable in excess of [Deductible Amount] ►Tipping Basket: Once the Deductible Amount is reached, Indemnifying Party is liable from Dollar one ►Cap You may want to check what's market in the U.S. as a reference (click for example here) Simplify Indemnification Procedures: post-closing claims are dealt with generally by parties

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOC	KEY WORDS	COMMENTS
SIGNING	PSA	Signatories – POAs	Coordinate POAs and signing resolutions internally but only after review by the other side Attach close to final drafts of Exhibits (including Ancillary Agreements): increases certainty of Closing Often by email
INTERIM PERIOD	PSA	Interim Covenants Update Disclosure Schedules (it depends)	Parties are working towards the Closing: Buyer has more leverage Think of internal and external communications as discoverable If there is a breach, still comply with your covenants to close: operate on a “need-to-know basis” and bring-in litigators if needed (not the time to save)

GETTING THE DEAL DONE!
A ROADMAP TO CLOSING – A CHEAT SHEET

PHASE	DOCUMENT	KEY WORDS	COMMENTS
CLOSING	PSA	Signatories – POAs	Coordinate POAs and signing resolutions internally but only after review by the other side Often by email
POST-CLOSING	PSA ANC. AGRTS	Indemnification	Handle internally unless there is a problem Think of internal and external communications as discoverable

ROADMAP DETOUR
R&W INSURANCE

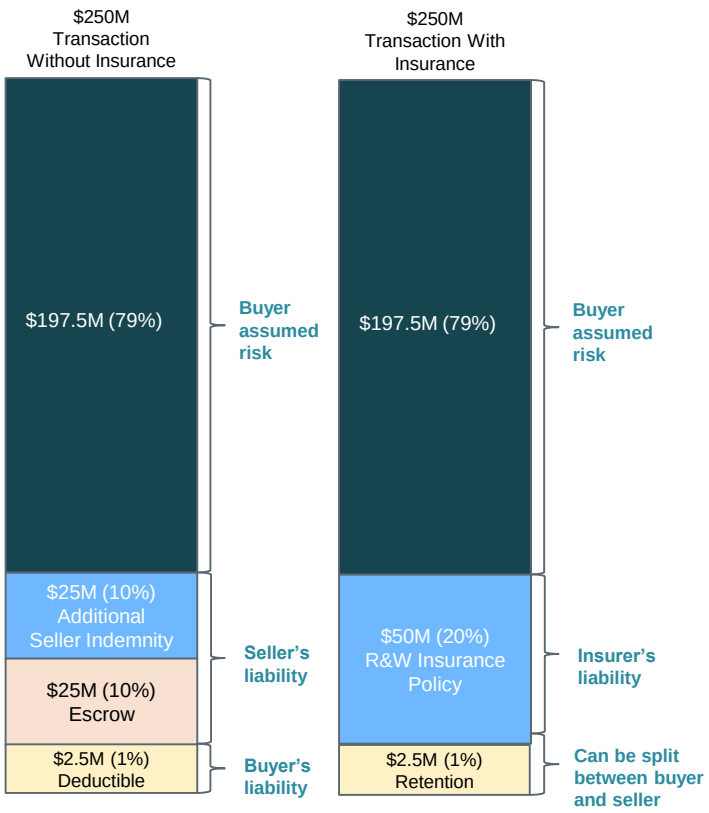
The Basics:

- Traditional indemnification structure: Seller deposits a portion of the Consideration (typically 10-15%) in an escrow account for one or two years to cover breaches of R&W
- RWI:
  - covers financial losses resulting from unknown breaches of R&W <u>made by the Seller and Target</u>, <u>including</u> as a result of fraud
  - covers pre-Closing tax indemnity, third party claims, defense/prosecution costs
  - Types:
    - *Sell-Side RWI*: Covers Seller for losses resulting from claims by Buyer alleging Seller has breached R&W
    - *Buy-Side RWI*: Covers Buyer for losses resulting from Seller's breaches of R&W
      - Note: Most RWI policies issued in the U.S. are Buy-Side

ROADMAP DETOUR
R&W INSURANCE

Advantages – Sellers	Advantages - Buyers
• Expedite sale process	Purchase agreements is easier to negotiate with Seller
• Reduce contingent liabilities	Broader reps, longer survival periods, expansive definition of losses
• Protect passive Seller	Reduces the need to deal with the Seller (only with respect to exclusions – interim breaches, WC Adjustments
• Reduce or eliminate post-Closing indemnity obligations	Insurance companies have a duty of good faith and fair dealing, in contrast, such obligations my not be as well defined in the typical business contract
• Exit deal with increased funds	Ease collection concerns associated with Seller's credit worthiness or other issues (e.g., cross-border deals)
• Attract better offers	Generally well-received by Seller

M&A PRACTICE
R&W INSURANCE



Background

- Transaction value: $250 million
- 20% indemnity cap on R&W and 1% deductible
- Buyer wants to differentiate its bid in a highly contested auction
- Seller wants to maximize closing date proceeds

M&A PRACTICE
R&W INSURANCE

R&W Insurance Structure:

Retention (aka Deductible) in the aggregate:

- 0.75% to 1.0% transaction value, with 0.5% possible for largest deals
- Initial retention is decreased at 12 or 18 months after closing; this “drop down” is timed to coincide with the release of the seller escrow (if any)

Total Costs = Premium, Underwriting Fee, Broker Commission, Taxes/Fees

- 3% to 4% of policy limits, generally
- 2% to 3% of policy limits, if total policy limits are $50M+
- 4% to 5% (or more) of policy limits, if total policy limits are $5M or less

✓**Parties may agree to split Retention and Total Costs**

GETTING THE DEAL DONE!
READING MATERIALS FOR JULY 26

Reading:

- Bio of Suzana Nutu (Sanofi, M&A Director)
- Turkey's Erdogan Capitalizes on Ukraine Crisis as Grip at Home Wavers - WSJ (2022)
- Negotiation Skills and Strategies: Winning Over Reluctant Counterparts - Harvard Law School (Program on Negotiation) (2022)
- Three Negotiation Mistakes That Are Hurting Your Deals - Chris Voss podcast (2021)
- Your Behavior is the Key to Winning the Deal According to Joe Valley Negotiations Ninja Podcast (2022)

This presentation should not be considered or construed as legal advice on any individual matter or circumstance. The contents of this document are intended for general information purposes only and may not be quoted or referred to in any other presentation, publication or proceeding without the prior written approval of Maria Luisa Canovas, which may be given or withheld and Maria Luisa Canovas´ discretion. The distribution of this presentation or its content is not intended to create, and receipt of it does not constitute, an attorney-client relationship.