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THE NEGOTIATION OF AN SPA UNDER ENGLISH AND US LAW: A CRITICAL COMPARISON

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Introduction

- This presentation compares and contrasts UK and US market practice (and some points of law) as they relate to the negotiation of an SPA
- It's prompted by the experience of a deal where a sell-side client had a choice
- The propositions which the presentation demonstrates:
 - for a UK seller of a UK business, where there is a choice, English market practice is more favourable
 - for a UK seller, an English law SPA can also be advantageous when selling a US business and may be a good option, subject to deal execution reservations
 - on the other hand, for a US buyer of a UK business, where there is a choice, a US law SPA is generally more favourable
 - generally, market practice is a more powerful driver in the arbitrage than differences in substantive law

Pricing mechanisms

- Locked box versus completion accounts:
 - locked box mechanisms are not a common feature of US market practice (but the use of them is growing)
 - in the US the seller is often required to deposit a portion of the purchase price in escrow as security for post-closing true up payments; this isn't common on UK deals
- Market practice rather than the law is the driver
- The advantages of locked box mechanisms are principally on the sell side:
 - control of the preparation of the locked box accounts
 - facilitates bid comparisons
 - avoids the potential for dispute over value, via post-closing true up procedures
 - provides a greater degree of control for the seller over the price (the only adjustments to the agreed equity value are in respect of matters - leakage - which the seller controls)
 - provides certainty of timing on the date of transfer of economic risk (i.e. at the locked box accounts date)
 - the time limit for post-closing buyer claims for leakage is short (typically 3 – 12 months)
- But a locked box is not always the right approach for, or available to, the seller (e.g. where current trading is improving; or inadequate robustness of available financial statements; or a pre-sale restructuring, post locked box accounts date, is needed)

Execution risk: Market practice on conditions precedent and seller warranty bring down (1)

- There are some significant differences in market practice on CPs and warranty bring down to closing
- CPs in a recent Morgan Lewis data room draft SPA (English law, US business): Antitrust and other essential regulatory approvals only
- **12** additional “customary” CPs in one US private equity bidder mark-up:
 - all seller warranties to be true and correct at closing
 - seller compliance with all its covenants
 - no MAC having occurred
 - completion of a “marketing period” to obtain financing
 - no court orders restraining closing
 - delivery of good standing certificates, etc...

(The bidder didn't win the deal)

Execution risk: Market practice on conditions precedent and seller warranty bring down (2)

- On UK deals, the use of locked box mechanisms has contributed to the acceptance of the transfer of risk from the seller to the buyer at signing, so that:
 - CPs are generally limited to those required by law (e.g. antitrust)
 - it's not uncommon on UK deals for "fundamental" warranties to be brought down to closing, but not the full set of seller warranties
 - MAC clauses are much less common in UK SPAs
- But in US law and practice the buyer may not have it all its own way, even with a MAC clause: the leading Delaware case (Hexion v Huntsman) suggests that the Delaware courts may be reluctant to find that a MAC has occurred in the absence of significant and durable damage to the business (although note that US SPAs are governed by state not Federal law and state laws (and their application by state courts) can vary)

Execution risk: SPA buyer financing conditions where buyer is a financial sponsor (1)

- The typical US approach:
 - a so-called “SunGard” financing condition in favour of the buyer:
 - the buyer provides debt financing commitment letters with conditions to draw down close to that of the SPA CPs
 - the buyer represents what the terms of the financing will be and covenants to raise financing on those terms and to enforce its rights against the committed debt provider
 - the buyer is given a minimum “marketing period” during which it (or its lead lender) can seek to place or syndicate its financing before being required to close, or (if it fails to do so) pay a reverse termination fee
 - the lender’s commitment is also often conditional on having the right to syndicate
 - the marketing period doesn’t usually start until the seller has provided a financial information package for use in the marketing to potential lenders
 - the seller often also assumes “reasonably cooperation” obligations, to facilitate the financing, including participating in road shows or other lender and investor meetings

Execution risk: SPA buyer financing conditions where buyer is a financial sponsor (2)

- The typical UK approach provides more certainty to the seller:
 - the buyer typically contracts on a “certain funds” basis, with no financing condition and the risk of a financing failure is allocated to the buyer
 - the parties may agree a reverse termination fee, but often the buyer will simply be in breach of contract for failure to close
 - the seller will often also seek direct contractual commitments from the buyer’s equity providers

Seller warranties (1)

- A common feature of both US and UK SPAs: unless the process is highly competitive, warranty protections and limitations on seller liability for breach are heavily negotiated in practice on both sides of the Atlantic
- The scope of the warranties tends to be substantially the same, the extent of materiality and seller's knowledge qualifiers being generally a function of the parties' relative bargaining power on the particular deal
- Having said that, the risk allocation under the warranties tends to favour the buyer in US SPAs and the seller in UK SPAs. For example:
 - where the seller is a financial sponsor: in the UK, often fundamental warranties only are given; in the US, financial sponsor sellers more commonly provide warranties, with their liability capped at a part of the purchase price placed in escrow or the proceeds of a warranty insurance policy
 - US SPAs also often include a broad and unqualified warranty as to the absence of undisclosed liabilities (or as to the absence of unprovisioned liabilities required to be reflected on a GAAP balance sheet); this is much less common in UK SPAs

Seller warranties (2)

- Before leaving the subject of warranties, some commonly encountered legalese: the difference between “warranties” and “representations”:
 - in the US these terms are typically combined (e.g. “Sellers hereby represent and warrant that” etc.) and the use of one word or the other doesn’t affect the remedies available to the buyer for breach
 - under English law, the choice of word matters: Sellers seek to avoid the use of the word “representation” (and generally in practice succeed). This is to prevent the buyer being able to make a tortious (i.e. non contractual) claim under the Misrepresentation Act 1967 (the remedies under the 1967 Act include rescission)

Seller warranties: Seller disclosure and buyer knowledge (1)

- In both the US and the UK, seller warranties are usually qualified by disclosures made in a disclosure letter (in the UK) or disclosure schedules (in the US)
- In a US SPA the parties will often agree that the disclosure qualifies the warranties if its relevance is “readily” or “reasonably” apparent
- On a UK deal a comparable standard is customarily agreed upon – the disclosure has to be “fair” to have exoneratory effect
- On a US deal, the disclosure typically doesn’t qualify all the warranties, unless there is clear relevance to another warranty. It’s more common on a UK deal for a disclosure to be agreed to qualify all the warranties, not just a specific warranty against which it is made
- Also on a UK deal (particularly one resulting from an auction process) it is common for the contents of the data room to be deemed disclosed. This is a lot less common in the US

Seller warranties: Seller disclosure and buyer knowledge (2)

- Buyer knowledge:
 - in the US:
 - there is often a negotiation around “pro-sandbagging” and “anti-sandbagging” clauses
 - these clauses result from the US courts typically requiring that the buyer satisfies a “reasonable reliance” (on the warranty) test, as a condition of its right to recover
 - pro-sandbagging: The buyer can bring a claim even if it knew about the matter before signing or closing
 - anti-sandbagging: The buyer is barred from bringing a claim if it knew about the matter before signing or closing
 - often US SPAs are silent on the point, and the issue is then governed by state law regarding breach of contract claims; in the absence of a pro-sandbagging clause, in many states in the US the buyer would be challenged to bring a successful claim for a breach of warranty of which it was aware before signing or closing

Seller warranties: Seller disclosure and buyer knowledge (3)

- Buyer knowledge:
 - in the UK
 - anti-sandbagging clauses are often negotiated and are effective (they are often negotiated together with the issue of data room disclosure)
 - pro-sandbagging clauses: These clauses are a lot less common, but on this point English law is probably not more favourable to the buyer than the equivalent law on pro-sandbagging clauses in the US: Infinetland & Anor v Artisan Contracting (Court of Appeal, 2005): if a buyer has knowledge of a fact which would constitute a breach of warranty, it may make a claim, but the court may award only nominal damages
 - Known, material liabilities identified in due diligence are often the subject of specific indemnities

Remedies for breach of seller warranties: Limits on seller liability (1)

- Remedies for breach:
 - in the US:
 - generally the buyer is entitled to indemnification for breach of warranties;
 - the buyer may negotiate “materiality scrapes” (all materiality and MAC qualifications applying to the warranty are to be disregarded for purposes of determining breach or recoverable loss, or both)
 - in the UK:
 - express contractual indemnification for breach of seller warranties is less common (except for specific identified liabilities (e.g. environmental remediation) or tax);
 - The buyer’s remedy is usually limited to a contractual claim for damages, based on the reduction in value of target company’s shares resulting from the breach;
 - losses are generally recoverable to the extent they were “reasonably foreseeable” when the SPA was entered into
- Recoverable losses: in both the US and the UK, exclusions for special, indirect, consequential losses or claims based on value multiples are commonly negotiated

Remedies for breach of seller warranties: Limits on seller liability (2)

- Financial limits:
 - liability caps, deductibles or tipping baskets (i.e. thresholds) and de minimis amounts are standard in both the US and the UK;
 - historically seller liability caps were buyer friendly in the US but there seems to be convergence in recent years, under the influence of PE involvement in the M&A market and the competition for good companies, which is driving down caps to distinguish bids;
 - market practice on de minimis and deductible or tipping basket thresholds seems to be broadly comparable (in the US de minimis levels not closely correlated to transaction value)
- Warranty survival periods:
 - not generally an area for arbitrage between the US and the UK; in the UK, tax and fundamental warranties are typically up to six years, plus the current year (coterminous with the UK tax prescription period) and other warranties one to two years; practice in the US is broadly comparable

Seller warranties – the impact of warranty insurance

- Warranty insurance (representation and warranty insurance in the US) has become increasingly popular in the UK in recent years, driven by financial sponsors looking for a “clean break” on exits; it is less common in the US but rapidly gaining acceptance
- In both the US and the UK, the dominant trend is for recourse to buy side policies
- Typical policy exclusions in both markets include unfunded pension liabilities, forward looking statements and claims for non-financial relief. UK policies also typically exclude known tax liabilities and transfer pricing risk
- Survival periods in both markets can be longer than the negotiated SPA survival periods
- Premiums and deductibles are reported to be generally higher in the US

Miscellaneous points (1)

- Scope of interim covenants: because of (1) the greater degree of closing conditionality and (2) the transfer of risk on signing in a locked box type transaction, seller interim operating covenants can be less extensive in the US than in a deal negotiated under English law (but particularly on a deal between strategics, “gun jumping” always needs to be borne in mind, whether English or US law governs)
- The disclosure to the purchaser of legally privileged target company correspondence and documents: a hot topic in the US, not so in the UK
- No shop, go shop (if no pre-signing market check), no talk and exclusivity provisions: These are common in US SPAs, but not in UK SPAs

Miscellaneous points (2)

- Exclusions for fraud:
 - Rule 10b-5 under the US Securities Exchange Act of 1934, as amended (a Federal anti-fraud provision) applies to sales of shares in private companies (unless waived and there is debate about whether it can be) – note that its application doesn't depend on the choice of governing law
 - under English law SPAs, there is invariably an entire agreement clause and non-reliance statement, but waivers of liability for fraud are understood to be unenforceable (HIH Casualty & General Insurance v Chase Manhattan Bank)

Tax provisions - the commonalities

- In broad terms and under comparable deal conditions, the protections generally secured by a buyer under a US SPA are not materially different from those secured by a buyer under a UK SPA
- In both cases:
 - the buyer would expect to receive a set of seller tax warranties designed to elicit disclosure and provide a basis of recovery for pre-closing tax liabilities
 - the buyer would also expect to receive a pound for pound/dollar for dollar tax indemnity (in the US) or (in the UK) “tax covenant”
 - seller liability under the tax indemnity or tax covenant is generally not subject to a de minimis or deductible/tipping basket, but it is capped (although sometimes in US deals it will be uncapped)
 - liability under the tax warranties is qualified by disclosures, whilst liability under the tax covenant or tax indemnity typically is not

Tax provisions – the differences

- It is more common for a US SPA to provide for a breach of the tax warranties between signing and closing to be a basis for a buyer to decline to close a transaction (but the typically negotiated materiality requirements of the seller warranty-related CPs make such an outcome unlikely)
- In a US tax indemnity, the indemnities are generally given in favour of both the buyer and the target and its affiliates
- In a UK tax covenant, the beneficiary of the payment obligation is the buyer, not the target company and payments are deemed to be adjustments to the purchase price for the purchased shares (this follows HMRC guidance on a 1985 tax case called Zim Properties v Proctor, which established that a “chase in action” is a chargeable asset for capital gains tax purposes; HMRC has stated that this rule doesn’t apply to seller payments under a warranty or indemnity in an SPA which are treated as an adjustment to the purchase price)
- US SPAs also typically contain a “Tax matters” section (including post-closing covenants regarding the filing of tax returns, agreement on the conduct of tax disputes, etc.)
- Transfer taxes and stamp duty: in US non-real estate related deals they are often nominal and split by the parties. In UK deals, the buyer generally agrees to pay the stamp duty

Conclusion: There might be a choice, so what's the right answer for the client?

- The client needs advice which is:
 - objective and disinterested; and
 - takes account of deal execution risk and the realities of the process (the identity of the bidders and their advisors; the execution costs of “double heading” UK and US advisors; and issues arising/time lost because of “losses in translation”...)
- The bottom line for a UK sell-side client:
 - if selling a UK business, push back hard if your US bidders push for US law/market practice;
 - if selling a US business: an English law governed and UK style SPA might work and could be to the client's advantage
- The bottom line for a US buy-side client:
 - be prepared to take some deep breaths and abandon some of the deal protections you are accustomed to, if the seller insists on English law and UK market practice. Your common assumptions on deal points and risk allocation aren't shared

Biography



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Stephen Walters counsels clients on public and private mergers and acquisitions, joint ventures, private equity and other equity financing transactions, corporate governance, and general corporate advisory matters. Stephen also handles financial services matters for a number of financial institution clients. He has experience of advising clients in a range of sectors including energy, technology, life sciences and financial services. Dual qualified in England and France, he advises clients on transactions in the UK and France and has also advised on transactions in the United States and a number of emerging markets

Corporate clients he has advised on M&A transactions include: BlackBerry; CRH plc; Chevron Corporation; Lazard; LyondellBasell Industries; OM Asset Management plc; Royal DSM NV; Smiths Group plc; SoLocal SA and Telefónica SA

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Biography



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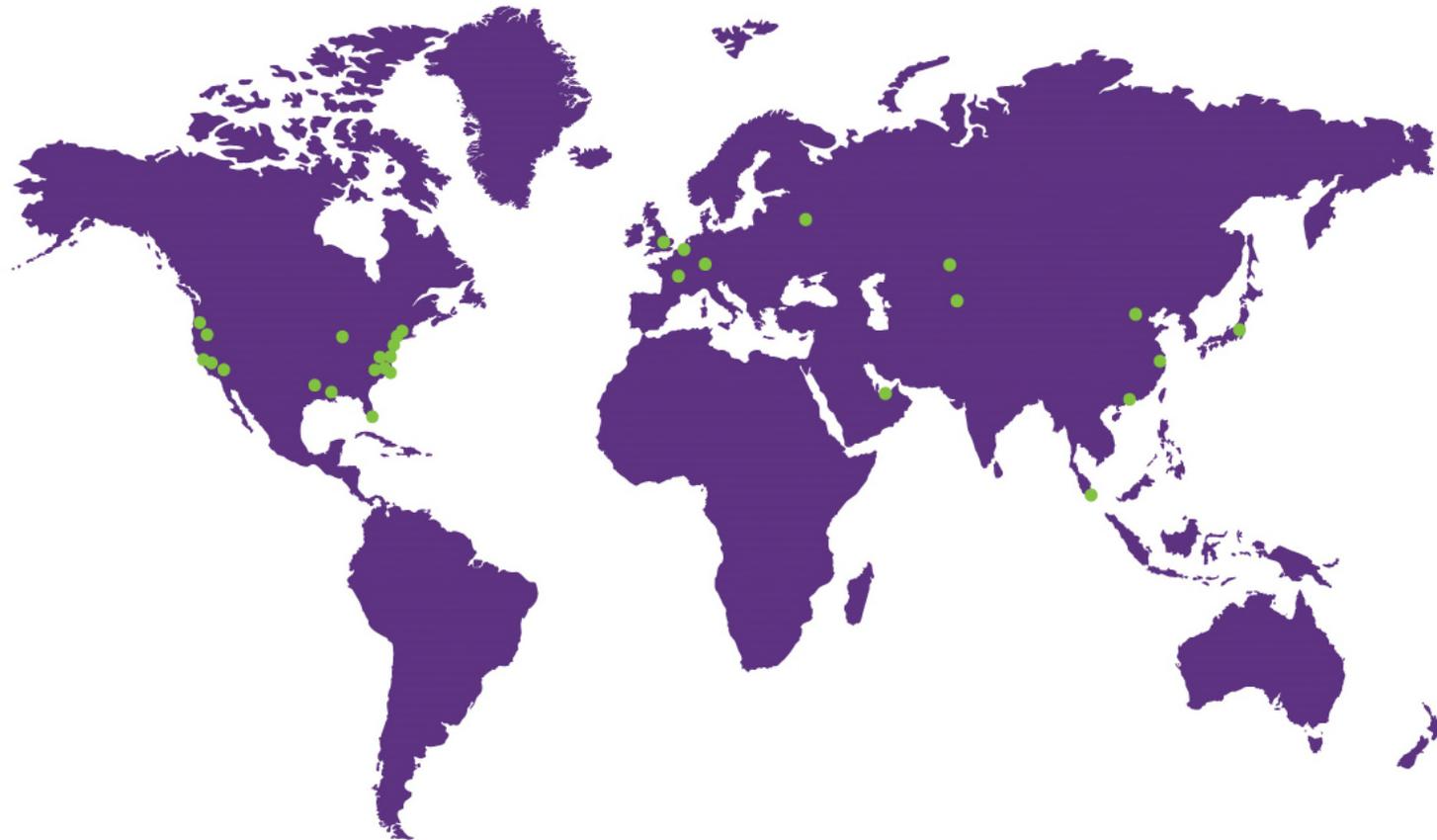
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