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TWENTY-NINTH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
TUESDAY, OCTOBER 30, 2018

Over the Pond and Across the Pacific: Surveying the Wide World of Cross-Border M&A

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Program Materials

1. PowerPoint Presentation
2. Comparative Terms for Cross-Border M&A Deals in U.S., the U.K. and China

Reference Materials

1. Dorsey eUpdate: *CFIUS Announces Pilot Program: Mandatory Declaration Filings in Connection with Certain Transaction*s (October 23, 2018) https://www.dorsey.com/newsresources/publications/client-alerts/2018/10/cfius-announces-pilot-program

2. Dorsey eUpdate: *Greater Scrutiny on Foreign Inbound Investments: Update on the Foreign Investment Risk Review Modernization Act of 2018* (August 15, 2018) https://www.dorsey.com/newsresources/publications/client-alerts/2018/08/foreign-investment-risk-review-modernization-act

3. American Bar Association: *Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties*, Published in The Business Lawyer; Vol. 67, November 2011 https://www.americanbar.org/content/dam/aba/publications/business_lawyer/2011/67_1/report-delivery-doc-review-201111.pdf

Materials are Available on www.dorsey.com at
https://www.dorsey.com/newsresources/events/event/2018/10/corporate-counsel-symposium-2018-materials

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Tuesday, October 30, 2018

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The Cross-Border M&A Climate in the USA, China and Europe

- **Opportunities for Chinese buyers in the US given current climate?**
- **Acquiring in the UK and Europe?**
- **Brexit impact?**

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Transaction Structures, Documentation and Common Practice

- Offer letters/LOIs and signing deposits;
- Exclusivity arrangements;
- Style and substance of sale and purchase agreements;
- Typical conditions to closing;
- The use of break fees and deposits.

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Due Diligence

- What do the clients want from their due diligence reports;
- The use of vendor due diligence (VDD) reports;
- Reliance by third parties/non-clients on due diligence reports.

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Purchase Price Adjustment/Calculation Mechanisms

- The increasing use of the "Locked Box" – What is it?
- Completion Accounts v. Locked Box – and the use of "Hybrid Locked Box" mechanisms.

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Representations and Warranties

- The general approach and scope of reps and warranties;
- Measure of damages – indemnity v. damages;
- The use of escrow arrangements;
- Rep & warranty insurance;
- The disclosure process – disclosure schedules/bundles/disclosure letter.

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Comparative Terms for Cross-Border M&A Deals in U.S., the U.K. and China

Corporate Counsel Symposium
October30, 2018

Key Terms	Deals Governed by U.S. Law	Deals Governed by English Law	Deals Involving Chinese "Elements"[1]
Overall	• General principles: freedom to contract, no affirmative duty to negotiate in good faith • Parties often agree to more detailed terms (in the form of a term sheet/LOI) before the SPA • Use of VDD reports is rare • Distinctive U.S.-style SPA with tax indemnity and disclosure schedules included as part of the agreement	• General principles: similar to U.S. • Parties often agree to a high-level LOI before SPA • VDD reports are commonly used (particularly in auction processes) • Distinctive U.K.-style SPA, sometimes with separate tax covenants and usually with a separate disclosure letter	• Unique risks and challenges: ties of Chinese buyers to SOEs, regulatory unpredictability, closing uncertainty, enforcement risks • Parties sometimes use a separate, short-form agreement for Chinese government filing purposes • Overwhelming use of arbitration for dispute resolution
Payment mechanisms	• Payment is generally made at closing with post-closing adjustments based on closing accounts: may see caps and collars on adjustments • Use of "locked-box" structure is not common as closing accounts	• Similar payment position to U.S. • Increasing use of "locked-box" structure, particularly in auctions and deals with a PE seller: the structure places increased importance on pre-signing diligence and the scope of permitted leakage	• Prevalent use of signing deposit or even LOI deposit • Prevalent use of earn-out payments
Escrow arrangements	• Escrow arrangements used to give buyer comfort on recovery of warranty claims against individuals, or multiple or private equity sellers • Escrow arrangements usually cover closing adjustments, indemnifications, as well as other claims under the SPA • Sometimes used as exclusive recourse against a seller	• Escrow arrangements used to give buyer comfort on recovery of warranty claims against individuals, or multiple or private equity sellers	• More prevalent use of escrow arrangements than U.S. and U.K. • Higher escrow amounts/percentages

[1] Chinese law is not typically chosen as governing law in cross-border M&A deals. This column is designed to capture how M&A agreements handle the unique risks and challenges of deals with Chinese "elements", meaning either a party is Chinese and/or the target assets are located in China.

Key Terms	Deals Governed by U.S. Law	Deals Governed by English Law	Deals Involving Chinese "Elements"[1]
Conditionality and termination rights	• Financing conditions are more common and low HSR thresholds mean that U.S. deals are often subject to regulatory clearances • If gap between signing and closing, a no material adverse change condition is common and would give rise to a termination right	• Closing may be subject to regulatory or shareholder or third-party consents, but rarely subject to a financing condition • If gap between signing and closing, conditions to closing will be limited and a seller is unlikely to agree to a no material adverse change condition (with termination right)	• Higher percentage of reverse break-up fee if buyer is Chinese • Quantify and tie up reverse break-up fee with specific conditionality (anti-trust, CFIUS, Chinese regulatory approvals, etc.) • Significant use of "hell or high water" clause
Representations and Warranties	• No legal distinction between representations and warranties: no rescission rights for a breach of representation • Repetition is common practice: accuracy of R&W is often a condition to closing • R&W package is extensive, but warranties are often given subject to a level of materiality • General disclosures against R&W are not common • Increasing use of R&W insurance, especially by PE buyers and PE sellers	• Legal distinction between warranties and representations: rescission is available for a breach of representation • A seller will seek to resist the repetition or limit the repetition to those warranties over which it has direct control: accuracy of warranties is rarely a condition to closing • Warranty package can be extensive (more limited in auction processes or where private equity seller) and a buyer is unlikely to accept materiality qualifiers • Increasing use of R&W insurance • A seller will seek to restrict a buyer's ability to claim for a breach of warranty where it was aware of the matter resulting in the breach	• Lack of R&W insurance products • Rarely use R&W insurance • Additional R&W re: compliance (export control, sanction/OFAC, anti-bribery/FCPA, ATM, etc.)

Key Terms	Deals Governed by U.S. Law	Deals Governed by English Law	Deals Involving Chinese "Elements"[1]
	• A seller's disclosure against warranties is limited to particular matters set out in a disclosure schedule to the SPA • A buyer is often not restricted in the SPA from claiming for a breach of warranty where it was aware of the matter resulting in the breach: where the buyer is restricted, the provision is referred to as an 'anti-sandbagging' clause • R&W are generally given on an indemnity basis, facilitating dollar-for-dollar recovery for any loss suffered by the buyer • Quantum of recovery is often calculated by discounting any reference to materiality in the body of the warranties (referred to as a 'materiality scrape') • Obligation on a buyer to mitigate its losses is common	• Parties generally agree that to be effective disclosure must be 'fair' (matters must be fairly disclosed with sufficient detail to enable a buyer to identify the nature and scope of the matter disclosed), reflecting the position established by the English courts • Damage for a breach of warranty is generally assessed by the English courts by looking at any reduction in the value of shares acquired as a result of the breach • Warranties are generally not given on an indemnity bases, but it is common for a buyer to ask for specific indemnities to cover specific liabilities that have been identified: these indemnities may be capped in amount or subject to a time limit for claims • Unless an indemnity provides for it, there is no common law duty to mitigate losses under an indemnity	
Enforceability Risks	• Low	• Low	• Medium or High • Choice of non-Chinese governing law sometimes unenforceable • Choice of non-Chinese arbitration tribunal sometimes unenforceable • Use of bifurcated approach (arbitration + court) for different claims (damages + specific enforcement/injunction)

Key Terms	Deals Governed by U.S. Law	Deals Governed by English Law	Deals Involving Chinese "Elements"[1]
Delivery of Diligence Reports to Third Parties	• In the U.S., U.S. law firms typically seek to limit distribution of their diligence reports to third parties • Even when they consent to delivery of copies of their diligence reports to third parties, U.S. law firms will refuse to permit third-party recipients to rely on the reports • U.S. law firms will typically state expressly in their reports that reliance by non-clients is prohibited • U.S. law firms will also require third-party recipients to sign non-reliance letters as a condition to receiving the reports	• In England and other jurisdictions in Europe, it is not uncommon for the buyer's counsel (including European offices of U.S. law firms) to provide copies of its diligence report to third parties (financing sources and co-bidders) and to permit such third parties to rely on it pursuant to a "reliance letter" signed by the recipients • In an auction sale, the seller's counsel often prepares a vendor legal diligence report and permits the winning bidder to rely on it pursuant to a "reliance letter" • The permission to rely is typically subject to numerous qualifications and conditioned on the recipient's agreement to limit the counsel's liability to the amount of the legal fee for the transaction or a multiple of the fee, and in no event an amount that exceeds the law firm's malpractice coverage	• Financing sources of Chinese buyers often request copies of the diligence report prepared by the buyer's counsel, typically on a non-reliance basis