

**NYSBA/UIA**  
**CROSS-BORDER MERGERS & ACQUISITIONS**  
**JUNE 8-9, 2017**

**OUTLINE**  
**for panel on**  
**SHARE PURCHASE AGREEMENT –**  
**KEY ASPECTS AND CONTRACT STRUCTURE**

**1 SALE OF SHARES AND PURCHASE PRICE**

General transfer provision: This is the key section setting for the substance of any transaction, and the closing logistics for such transaction. It defines the shares to be transferred, i.e. all shares or only certain shares and in which entity. It also in general terms sets out that transfers occurs on closing at a date determined as described in relation to the conditions precedent (see 2 below) to the occurrence of closing.

Calculation and adjustment of purchase price – the form and substance of this provisions vary widely and also depend on the jurisdiction and local traditions.

For example

- (i) Closing accounts (US)
- (ii) Locked box (Europa)

There may also be an element of the purchase price calculated on the basis of future results, i.e. earn-out provisions

**2 CONDITIONS PRECEDENT TO CLOSING**

A balancing act between deal certainty v. buyer protection

Examples

- Consents by third parties/authorities (most jurisdictions)
- Financing (varies)
- MAC, no proceedings, no claims (more in the US)
- Accuracy of representation/warranties (more in the US)

**3 REPRESENTATIONS AND WARRANTIES**

The representations and warranties are primarily intended either (i) to confirm due diligence investigation with respect to certain factual matters, or (ii) to allocate risk among parties of certain other matters.

Warranties may be given on signing and or on closing

Scope and format of warranties will vary, not least depending on the jurisdiction

Exception to warranties varies in form

- General v. specific
- Disclosure of data room

The effect of Buyer's knowledge will need to be considered (sandbagging)

In some jurisdictions the "data room" may be disclosed

De minimis /baskets

Caps

#### **4 INDEMNITIES**

General indemnity for loss under warranties

Specific indemnities, e.g. for known risks

#### **5 COVENANTS PRIOR TO CLOSING**

Control conduct of parties pre-closing:

- Protect value of business to be purchased, e.g., conduct of business, etc
- Facilitate deal logistics, e.g., consents and approvals, etc
- Facilitate operational transfer, e.g., employee matters, etc

#### **6 POST-CLOSING COVENANTS**

Non-compete and non-solicitation

Enforcement

#### **7 TERMINATION**

Cause for termination

Long stop date

Break fee or reverse break fee

#### **8 DISPUTES**

Court

Arbitration

Enforcement issues