Global M&A Conference

Monday 27 January

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Destination Brazil

65 ANOS / YEARS
1948 • 2013

Pre Sales Preparation

- Prepare the “bride” to eliminate/mitigate risk factors (contingencies, liabilities, governance, etc).
- Enhance enterprise and equity values.

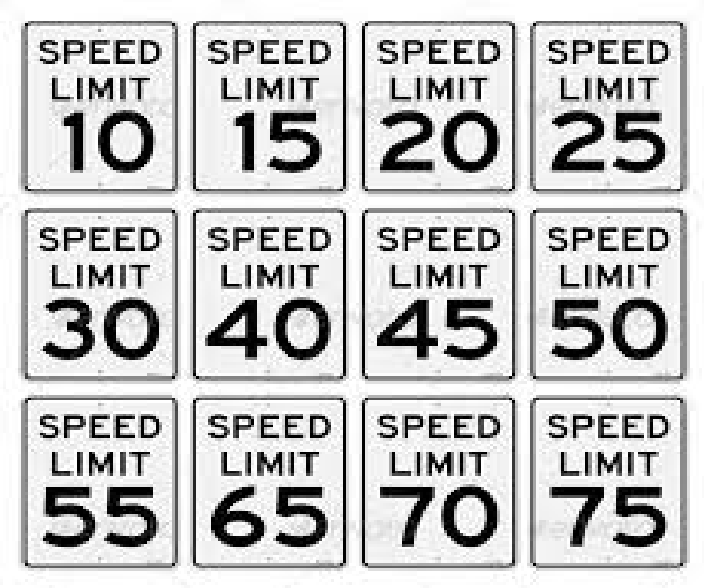
- Buyers/Investors are ready to pay higher price for a well structured business.
- It shorts the selling period and facilitates Due Diligence investigation as well as Reps and Warranties negotiation.

Pre Sales Preparation

- **Strategic and Financial** – Show focus and hardcore business values of the target, ensure transparency of financial and management accountability, develop a business model which anticipate investors' common inquiries. Proper valuation.

- **Legal –** Review target compliance with laws and regulation affecting the business of the target and predict possible legal issues to be faced during the due diligence investigation.

Timing



- Buyer **x** Seller
- Competitive process
- Procedures and Legal Steps (governmental approvals, buyer approvals, due diligence, etc.)

Disclosure - news leaking out. The longer the process goes on, the more likely the news will leak out. Buyers hate it when the news leaks out because it can bring additional buyers into the process and make it more competitive. But most sellers should prefer a quiet process too.

Pre-Contractual Phase

- NDA - Term Sheet
- MoU – LoI (non) binding
- Breakup fee ?! Sellers love while Buyers hate it…

- Set deal´s basics and path
- Milestones – next steps
- No shopping around for Seller…
- GO **x** NO GO – what happens next?

Due Diligence

- Comprehensive
- Look back - statute of limitations
- Focused

Seller cooperation. Seller preparation is key for a "smooth" due diligence.

Buyer proper assessment and understanding of seller's limitations. Public databases and KYP (know your "partner").

Be prepared for the odds….

Surprise...

(1)

DIVIDAS = + ou -

BANCOS = ZERO

TRABALHISTA = 100.000 (-)
1 vara
15 PIÃO – PROPOSITAL

FORNECEDORES + ou -

1.500.000 a 3.000.000

IMPOSTOS R$ 5.000.000

parcelados (em dia)

ICM = CONFIS
IPI =
PIS = INSS ?

(5)

PEPINOS

(1) C/ ECONOMICA

10% – 10 anos
30% – 100 AVAM.

(2) R.F. + ou - 380.000 =
+ ou - 300.000 =
150.000 =

(3) DENUNCIA = ?

ADV = 35.000,00 (6x)

20/6 (1 a 2 anos)

(2)

R

2004 – R INTERN. 1.000.000

2005 – Assalto 12 ARM.

2006 – ANVISA

Janeiro
Fevereiro } FECHAR
Março (6000 a 8000)

DEZEMBRO = 2006 =

(3)

250.000 – JORIVAL
100.000 – DISCO
75.000 – AD. CRIM.
50.000 – ADV
150.000 – EQ
75.000 – FILTRO
120.000 – REF
60.000 – PRESENTE

1.000.000 PARALIZ

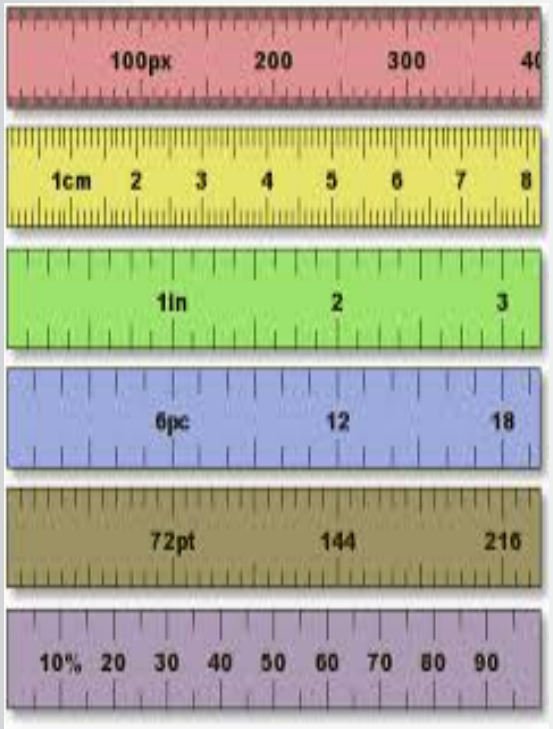
(4)

2004 = FAT.

Janeiro = Ótimo
Fevereiro = Regular
Março = + ou -
ABRIL = + + ou -
MAIO = + + ou -
JUNHO -

ATRASO c/ os fornecedores

Some other stuff...



- **<u>Time Scale:</u>** needs to be realistic and feasible to reach the goal and manage expectations.
- **<u>Transaction costs:</u>** a detailed budget upfront to mitigate unhappy surprises.
- **<u>Technology and communication:</u>** important to keep everybody in the same page.

Antitrust – Pre Merger filing

- **New Brazilian Antitrust Law - Federal Law n. 12.529/11 (in effect as of May 29th 2012)**

- **PRE MERGER FILING -** Under the new Law, companies seeking to engage in specified "concentration acts" such as mergers and acquisitions, must notify CADE of their intent and wait for CADE's approval before closing.
  - Associative contracts – Monsanto's Technology Transfer case law

- **THRESHOLDS FOR PRE MERGER-** There are two tests that determine whether a transaction is reportable under the new Act: (1) the corporate group of one party to the transaction achieved at least **BRL 750 million** in gross revenue in Brazil in the last calendar year, and (2) the corporate group of another party to the transaction achieved at least **BRL 75 million** in gross revenue in Brazil in the last calendar year.

- **ECONOMIC GROUP -** is a group comprising companies under common control and the companies in which the former directly or indirectly, hold no less than 20 percent of the total or voting capital stock

Antitrust - Pre Merger filling

- **GUN JUMPING -** transactions that meet the Brazilian pre merger filing thresholds cannot be closed before CADE's clearance. Penalties for "gun jumping" include fines ranging from BRL 60,000 to BRL 60,000,000 and the transaction may be also declared null and void by the authority. Violations can occur even if the parties to the transaction do not compete in the same markets. In cases involving competitors, coordination of competitive activities or detailed information exchanges can also lead to a cartel violation, subjecting the parties to fines from 0.1% to 20% of a company's (group of companies' or conglomerate's) gross revenues generated in the "sector of activity" affected by the infringement in the year prior to the initiation of the investigation**.**
  - OGX Petróleo e Gás Participações (OGX) case law

- **TERM -** The new law allows CADE up to 240 days to review a proposed transaction. The review period can be extended under certain circumstances, up to 330 days to issue a final administrative decision. In case CADE does nor made a decision, the transaction will be deemed approved.

- **NOTIFICATION FORMS –** (1) a short form for "non-complex" transactions, or (2) a regular form for "complex" transactions, depending on the nature of the proposed deal.

Anti-Corruption Law

- **Brazilian Anti-Corruption Law – Federal Law n. 12.846/2013 (enacted on 08 February 2013), provides for the strict civil and administrative liability of legal entities for acts against the Public Administration, either domestic or abroad.**

- **MITIGATION OF OCCASIONAL SANCTIONS AND RESTRICTIONS IMPOSED TO OFFENDERS:**
  - the leniency agreement (sort of plea bargaining, aiming at stimulating the cooperation between offenders and the Public Administration against corruption). The leniency agreement will be considered if the entity demonstrably cooperates with the investigations and the respective administrative procedure.
  - Compliance measures (way of corporate governance aimed at the creation of ethic codes, internal auditing rules used to assure the accomplishment of anti-corruption rules), stimulating internal mechanisms of control and accomplishment of good practice standards and regulation, preventing the practice of corruption-related conducts.

- **STRICT LIABILITY RULES –** lack of specific and certain criteria, may cause such legal uncertainty and undesirable scenario of mistrust and legal uncertainty, which may also discourage private investments in Brazil.

Foreign Direct Investment (FDI)

- Regulated by Laws 4.131/62 and 4.390/64. Any good, machinery and/or equipment entering into Brazil without exchange and intended for the production of goods and services as well as any inflow of funds to be used in the economic activity provided that they belong to an individual or entity resident abroad. Capital contribution of an used equipment has restrictions.

- FDI is subject to registration at the Central Bank. Registration is declaratory (without being subject to prior review or verification) and made by internet (RDE-IED); 30 days after money inflow or 90 days after customs clearance in case of capital contribution with goods.

- FDI registration allows streamline capital repatriation (capital gain of 15%; 25% in case of tax haven jurisdiction) and dividends outflow (ZERO %). However companies with negative net equity are not allowed to pay dividends.

Foreign Investment Restrictions

Brazil is pretty open to foreign investment. There are very few restrictions in the foreign ownership on the following sectors:

- **Press and Broadcasting** - limited to 30% - Brazilian management mandatory;
- **Aviation** - limited to 20% - Brazilian management mandatory;
- **Highway freight** - limited to 20%;
- **Land property in the border line** (150km=90miles) – not allowed;
- **Rural property** - limited (and very complex rules);
- **Financial services** - requires a Presidential Decree;
- **Coastal shipping** - only Brazilian company; foreign equity allowed; foreign vessels only thru freight under Brazilian company;
- **Mining** - only Brazilian company; foreign equity allowed; and
- **Healthcare** – not allowed to own hospitals; no restrictions for health plans.

Thin Cap Rules

- **THIN CAPITALIZATION RULES** - Brazil has recently introduced thin capitalization rules to limit tax deductibility of loan interest payments made by Brazilian borrowers. Among other requirements, the loan interest expense must be necessary (i.e. usual, customary) for the local generation of income. For instance, payments made to related parties that are not located in tax haven jurisdictions must pass a "debt/equity" test where a 2-to-1 ratio is applicable (in case of a tax haven is limited to 1/3 of net equity). As a general rule, cross-border loan interest payments made by Brazilian borrowers are subject to a 15% income tax withholding – the rate is increased to 25% if the lender is located in a tax haven jurisdiction.

W&I Insurance, R&W

- **W&I INSURANCE**
  - structured to address specific conditions of SPAs, including post-sale contingent liabilities.
  - normally put in place at the time of signing of a transaction
  - Policies are non-cancellable to ensure coverage remains in place for the duration of potential liabilities.
  - Not common in Brazil – Escrow is an alternative…

- **REPRESENTATIONS AND WARRANTIES**
  - Buyer will expect (and push for) the definitive agreement to include detailed representations and warranties by the target with respect to such matters as authority, capitalization, intellectual property, tax, financial statements, compliance with law, employment and material contracts.
  - Disclosure schedules should be considered the target's "insurance policy" and should be as detailed as possible.

Other Issues

- **TARGET INDEMNIFICATION**
  - Breaches of “fundamental reps” (such as intellectual property or tax) may go beyond the escrow as well. In some instances all claims may be capped at the escrow.
  - Exceptions – any claims resulting from fraud and/or intentional misrepresentation usually go beyond the escrow and often instead are capped at the overall purchase price.
  - Brazilian range 5 years limitation for liabilities

- **NON-COMPETE & NON-SOLICITATION**
  - Enforceability of such restrictions requires that the restrictions be (A) reasonable in time and scope, and (B) supported by “fair" compensation

Exit door – push the (button)

TYPICAL ROUTES TO EXIT

- **IPO** – this option has not been attractive in the last few years, partly due to the financial crisis and a slow recovery. However, 2013 has shown increased results as per the last years.
- 2014 – World Cup and Presidential election may affect IPO deals.
- 2013 – 10 IPO Deals in Brazil – US$ 8.5 billion
- Brazilian Stock Exchange (BM&FBovespa) is responsible for 6% of IPO deals in 2013.

Or another M&A DEAL – Passing the ball, let's start over divesting…

Governing Law and Jurisdiction

Preference for the jurisdiction of the target, the jurisdiction where the obligations are to be performed and the jurisdiction where property (in particular immoveable assets) is located.

The reasoning given for considering these factors is the necessity to comply with procedural and legal formalities in connection with such matters and to avoid time consuming ratification of a foreign decision at the Brazilian Superior Court.

Governing Law and Jurisdiction

BRAZILIAN JURISDICTION

- Mixed (both Litigation and Arbitration) Method for M&A dispute resolution. Arbitration is a ONE SHOT.
- Common issues on M&A litigation - Price mechanism/adjustment, lack of performance by one of the parties, skeletons in the closet, earn-out arrangements, etc.

- Lengthy, Costly and Inefficient Procedures – A litigation in Brazil may take 10 years depending on the case – medium range lengthy – 5 years

Arbitration

- Law No. 9307/96 (Brazilian Arbitration Act) regulates arbitration in Brazil. It states that the arbitration award corresponds to a court judgment, and it has force as a judgment debt. The arbitration award rendered in Brazil may be enforced by filing an execution lawsuit before the empowered court, based on the internal rules of the Appellate Court where the suit was filed.
- **Brazil is signatory to New York Convention (reciprocal enforcement of arbitral awards)**
  - Brazilian Arbitration Law defines a foreign arbitration award as any judgment rendered outside the national territory. The Law established that the Brazilian Superior Court of Justice (STJ) must ratify foreign arbitration awards. Law 9.307 also stipulates that the foreign arbitration award is to be recognized or executed in Brazil in conformity with the international agreements ratified by the country and, in their absence, with domestic law.
  - After such ratification, an foreign arbitral award has the similar force of a judgment issued by a Brazilian Court and becomes enforceable in accordance with its terms.
- Brazil has ratified the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention), the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitration Awards (Montevideo Convention) and the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention). Brazil, however, is not a member of the International Center for the Settlement of Investment Disputes (ICSID), also known as the Washington Convention.

Closing – execution and completion formalities

- **COMPLETION FORMALITIES**

  - Corporate documents resulted of the transaction subject to registration with the Registrar of Companies of the State wherein the involved company's or companies' head office is located.
  - S/A - corporate transactions should also be registered in their respective corporate books - Book of Registration of Minutes of the Shareholders' Meeting; the Book of Registration of Shares, the Book of Registration of Transfer of Shares, among others.
  - S/A - publication of corporate documents in the Official Gazette of the State wherein the company's head office is located, as well as in any regional widely-circulated newspaper. In case of listed companies, also filing of relevant documents at CVM.
  - In the event the transaction involves foreign companies investing in a Brazilian company, the registration of the investment transaction with BACEN.

Closing – execution and completion formalities

- Registration with any and all Public Regulation Agencies which the involved companies are also registered (CREA, ANATEL, ANEEL, ANAC, ANP, SUSEP, BACEN, etc).

- Among the public authorities that should necessarily be informed are: the Federal Revenue Office, the Social Security System Institute (INSS) and the Severance Pay Fund (FGTS), in addition to the Local and State governments where the head office is located.

Red tape (Bureaucracy)

- **RED TAPE (EFFICIENCY AND TRANSPARENCY OF BUREAUCRACY)**

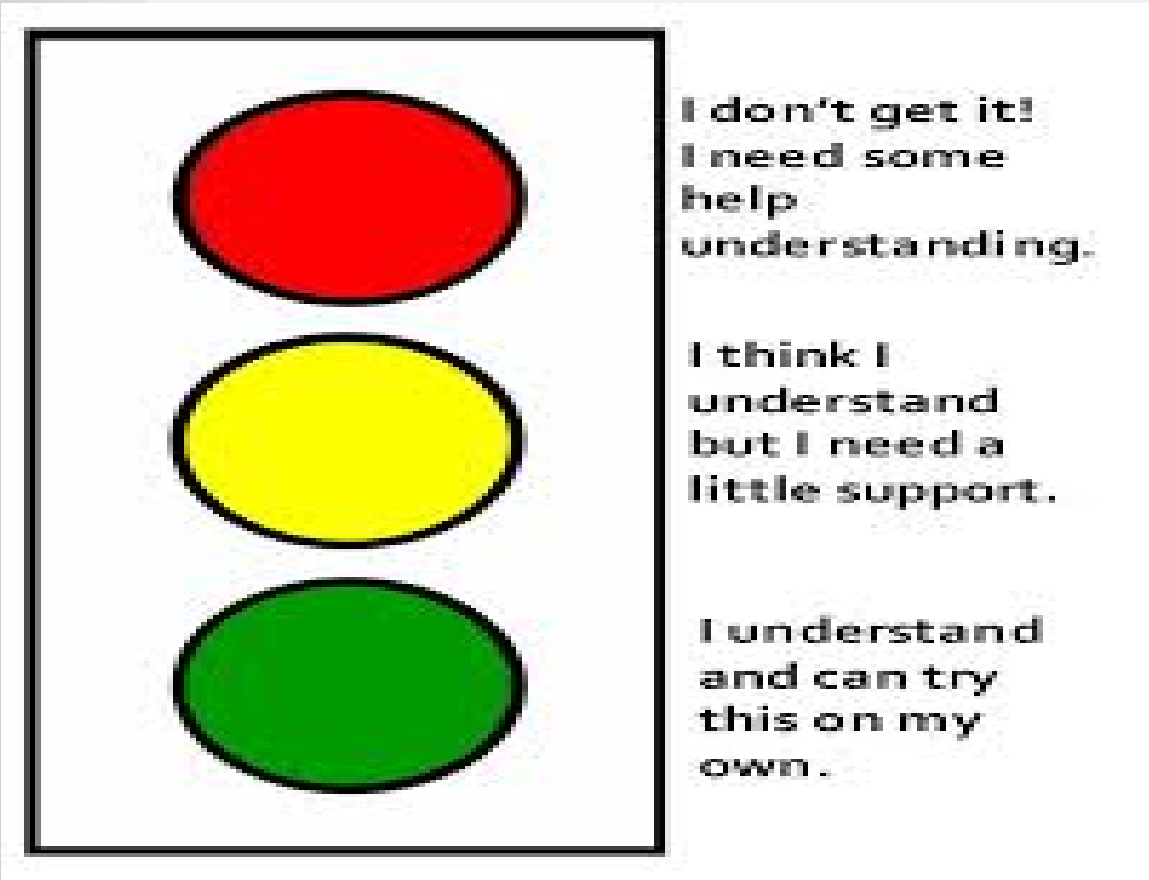
  Brazil still has some sort of RED TAPE *procedure* which may require a length "paperwork trail" to complete a given registration task/step although as systems go online there would be less room to do it;

  The World Bank's 'Doing Business' index ranks Brazil a lowly 129th out of 183 countries in 2010 for overall ease of doing business, falling as low as 150th for ease of paying taxes. The country does best for protecting investors and getting credit, ranking 73rd and 87th respectively. However, these rather dismal figures don't tell the whole story. 'It often depends on how the question is asked', said John Mein, a former president of the Brazil-US Chamber of Commerce in São Paulo and now a business consultant in the city. There's obviously a lot of room for improvement, but most businessmen coming from the US or Europe will find Brazil culturally pretty similar, with companies facing the same kind of problems and dynamics as where they come from. Sure there are differences everywhere, but people normally find they can learn their way around without too much problem.'*

*(source: IBA report Major Sporting Events in Brasil - Business Opportunity and Legal Framework)

Appendix

- When you think is over…
- Don´t panic – we are here to guide you through the bumps and odds.



Corporate vehicle

Ltda. or S/A:

- Both require at least 2 partners (one of them could be a “nominal partner” holding just 1 share) – and does not matter if foreign or not as well as there is no minimum capital requirement – unless the specific activity of the company so requires;

- Ltda. is cheaper than a S/A and usually does not require its documents to be published but just filed in the companies registrar. Better designed to serve as “wholly owned subsidiary”;

- Ltda. requires just 1 manager (who needs to be an individual and resident in Brazil); Ltda. allows non-proportional distribution of profits, Ltda. used to be the best corporate vehicle until 2003 (very simple and flexible based on a 1919 legislation well tested in the courts);

- In 2003 new Brazilian Civil Code come into effect and brought new rules for the Ltda. and there is very few case law testing the new rules**;**

Corporate vehicle

- S/A is costly (when compared to a Ltda.) usually requires its documents to be published (as well as filed in the companies registrar). Better designed for “joint ventures” when capital is key and partner might end up in conflict. Fairly stable statute and case law;
- S/A requires at least 2 officers (who need to be individuals and residents in Brazil). Board of directors, minimum of 3 member (which is optional except for listed S/A and capital authorized S/A) can be non-residents;
- Officers represent and bind the S/A while board of directors are in charge for the guidelines of the business activities;
- Profits are paid to the share and need to be equal for all shares of a given type/class of shares;
- Shares can be split among voting and non-voting (maximum of 50% non-voting); bearer shares are no longer allowed;

Labor and Employment at a glance

- Very detailed code (CLT), relatively generous to employee, employment cost is high due to the combination of basic benefits and social contributions associated to the payroll.

- In addition to the amounts paid to employees as salary, any other amounts which are paid on a regular basis are, for all legal purposes, considered as part of the employee's salary and are, in general, taken into account in the calculation of vacation, 13th salary (Christmas Bonus) and the amount that must be deposited in FGTS (Severance Indemnity Pay Fund), as well as termination payments.

- A Brazilian worker may not be paid a wage lower than that which is paid to a foreign worker for performing the same work, except in certain special circumstances established by law.

Labor and Employment at a glance

- Companies, in general, must pay to the INSS (National Institute of Social Security), an amount equivalent to 20% of the total payroll (monthly remuneration paid to all employees), to finance the social security costs.

- With respect to succession liability in Brazil, the responsibility to pay contingent tax liabilities, both known and unknown, generally follows the legal entity based on the concept that the owner of the operating assets or the acquirer of the business unit retains the capacity to generate income and hence, pay the tax liability.

- Employees' working conditions are protected and must remain unchanged for succession purposes. Brazilian Labour Legislation expressly provides that any change in a company's name or legal nature does not affect the existing employment relationship.

Labor and Employment at a glance

- The purchaser assumes all seller's obligations, and the company itself is held directly liable for any such obligations. The purchaser's right of appeal against the seller may be set forth in a private instrument entered into between them, but this will not, in any way, affect the purchaser's liability for past or future claims.

- Consequently, whether structuring the transaction as an asset acquisition or a stock acquisition, the buyer may be generally liable with respect to contingent tax liabilities or at least be considered liable at a secondary level.

- Pursuant to Brazilian labour legislation, a company's succession applies in the event of a merger, acquisition, transformation, or upon the sale of one of its establishments. The succession criterion will also apply to a change in a company's name.

- The employees have two years after date of leaving the Company to file labour suits claiming the labour rights related to the past five years.

Tax system overview

- **3 levels of jurisdiction and collection:**
  - Federal – corporate income tax (aka IR)
  - State – "VAT" (aka ICMS)
  - Local – service tax (aka ISS)

- **CALENDAR YEAR** - (JAN-DEC) – corporate year is not taken into consideration.

- **DOUBLE TAXATION TREATIES** - Brazil has signed treaties to avoid double taxation with 29 countries including Argentina, Austria, Belgium, Canada, Chile, the People's Republic of China, the Czech Republic, Denmark, Ecuador, Finland, France, Hungary, India, Italy, Israel, Japan, Luxembourg, Mexico, the Netherlands, Norway, Peru, the Philippines, Portugal, Slovakia, Spain, Sweden, South Africa, South Korea and Ukraine.

- Dividend payments made by Brazilian legal entities are not subject to withholding income tax.

Tax...

- If accumulated earnings are available, Brazilian entities may pay "interest on equity" to their shareholders. IOE is computed by multiplying equity (i.e. capital plus certain reserves) by the government-issued long term interest rate ("TJLP"). IOE is a deductible expense for income tax purposes – deduction is limited by the greater of 50% of current earnings or 50% of accumulated earnings. IOE is subject to Brazilian WHT at the rate of 15% (25% if the payee is located in a tax haven jurisdiction).

- Cross-border transactions between related parties are generally subject to Brazilian transfer pricing rules. Brazil is not a member of the OECD. There are specific/comprehensive methods to calculate parameters to be observed by Brazilian taxpayers engaged in those transactions. For example, costs of goods, services and rights acquired from foreign related parties are deductible items for corporate income tax purposes to the extent that they do not exceed the "prices" determined in light of the available methods for import transactions (e.g., the "cost plus 20% - CPL" method).

Tax...

- Capital gains earned by foreign investors are generally subject to a 15% Brazilian WHT – 25% if the foreign investor is located in a tax haven jurisdiction.
- Brazil expanded the concept of low-taxed jurisdictions in the context of its transfer pricing rules.
- New rules include regions within countries which may include, for example, states, provinces, cities etc.
- Among other cases, the new rules additionally apply to transactions between Brazilian legal entities/individuals and other legal entities/individuals (including non-related parties) which operate under a so-called “privileged tax regime”.

Tax...

- **From a Brazilian perspective, a tax regime is considered to be privileged when:**
  - It does not impose taxation on income, or taxes income at a maximum rate of less than 20%;
  - Grants tax benefits to non-residents (individuals or legal entities) without requiring substantial economic activity in the respective jurisdiction, or grants tax benefits to the extent that the non-resident does not conduct substantial economic activity in the jurisdiction;
  - Does not impose taxation on earnings generated outside of the territory of the respective jurisdiction, or imposes tax on those earnings at a maximum rate of less than 20%;
  - Does not allow access to information relating to the ownership of shares of local entities, the ownership of goods, and/or rights or information regarding economic transactions.

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DELACOUR

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DELACOUR

ADVOC, Global M&A Conference

London, 27 January 2014

AGENDA

- **Short presentation of DELACOUR**
- **Pre sale preparation**
- **Legal and cultural differences**
- **Choice of law**
- **Liability for terminating pre-contractual negotiations**

PRESENTATION OF DELACOUR

- In Denmark DELACOUR has offices in Copenhagen and Aarhus. Also, which is unique, we have representative offices in in joint premises with local law firms in Moscow and Kyiv, and associated business partners (partly owned by us) in Nuuk, Greenland (Nuna Law), and Tórshavn, the Faroe Island (Faroe Law)

- We are app 200 employees in DELACOUR, 80 of whom are lawyers

- We assist in all legal practice areas within business law with a strong international focus

- We have divided our practice areas into different teams, each team specializing within its own legal field of practice. This ensures that clients are always offered the highest possible level of advisory and consultancy services and case handling

- We have a strong and dedicated transactional team in both Copenhagen and Aarhus – and have made several M&A transactions with our offices and partners in Moscow, Kyiv, Nuuk and Greenland

- We also have UK and German desks, consisting among others of Henrik Kleis (British Consul in Aarhus) and Frans Rossen (who has qualified as Rechtsanwalt in Germany)

PRE SALE PREPARATION

- Draft confidentiality/non-disclosure agreement
- Exclusivity/”break fee”
- Time schedule and agenda for negotiations
- Package of key information
- Draft indicative offer
- Draft letter of intent/Memorandum of Understanding
- Due diligence
- Draft frame work agreement
- Draft asset/share sale and purchase agreement, with exhibits (numerous lists and documents, including for instance an employment contract for a selling shareholder and real estate deeds)

LEGAL AND CULTURAL DIFFERENCES

Understanding and respect for legal and cultural differences, including

- continental law/common law concept of drafting documents,
- the main differences between the legal traditions, expectations and systems of the contracting parties
- major cultural differences
  - in power distance
  - how to address each other and dress
  - expectation in respect of personal contact

LEGAL AND CULTURAL DIFFERENCES

- **Expectations in respect of VIP treatment**

- Danes

  - live by a concept of equality,
  - require modesty of people in power and in particular public office,
  - allow no “short cuts”,
  - exercise delegation and teamwork,
  - are very informal,
  - are fond of humor and sarcasm, but
  - are also very case oriented

  - The importance of understanding these differences is often ignored or under-estimated and should be given much attention and form part of the assistance rendered by lawyers to clients

CHOICE OF LAW

- Always consider whether the preferred choice of law conflicts with mandatory rules of the law of the country of the object of the transaction - and whether the wording of transaction documents reflects and takes into account such mandatory rules

LIABILITY FOR TERMINATING PRE-CONTRACTUAL NEGOTIATIONS

When can a party be liable?

- Parties are under an obligation to negotiate in good faith irrespective of whether they have entered into binding heads
- Potential liability if a party has lost interest and does not inform the other party accordingly
- Parties risk potential liability if parties abort negotiations without reasonable cause once contractual negotiations have commenced
- Reasonable cause does not include changes of the circumstances of the aborting party himself, his evaluation of the project (unless this is caused by negative due diligence findings) or a better offer from a third party.

LIABILITY FOR TERMINATING PRE-CONTRACTUAL NEGOTIATIONS

What damages are likely to be recoverable by the injured party for such termination of negotiations?

- If negotiations are ended in bad faith the ending party will be liable for compensatory damages to put the injured party in a position as if negotiations had not been entered into
- Thus damages for loss of profit will not be covered

How best to avoid the risk of liability for withdrawing from negotiations?

- Act in good faith
- Take care to ensure that no action is taken that could imply a binding agreement has been reached
- If loosing interest inform the other party hereof as soon as possible
- Clearly state in heads of terms which provisions are intended to be binding and which are not

LIABILITY FOR TERMINATING PRE-CONTRACTUAL NEGOTIATIONS

How best avoid to the risk of the seller to waste time and money on a particular buyer in vain?

- If possible agree on a the buyer being obliged to pay a fixed fee to the seller or the legal costs of the seller in case the buyer does not enter into a binding agreement in accordance with the non-binding indicative offer

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CABINET D'AVOCATS

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ASSOCIÉS

Advisors in M&A transactions

Global M&A Conference – London, January 2014

Jean-Baptiste de Cabanes
Adrien Debré
Alexis Marchand

23 January 2014

Advisors in M&A transactions

When it comes to performing M&A transactions, advisors are not « one size fits all ».

Depending on the type of transaction and the industry, a party may need to hire multi specialised advisors:

- Tax and financial accounting firm
- Lawyers
- Actuarial firm (in deals with relevant insurance issues)
- Loan portfolio consultants (in banking deals)
- Employee benefits/ HR consultants
- Environment consultants

Advisors in M&A transactions

- Summary-

A – ENGAGEMENT LETTERS WITH ADVISORS

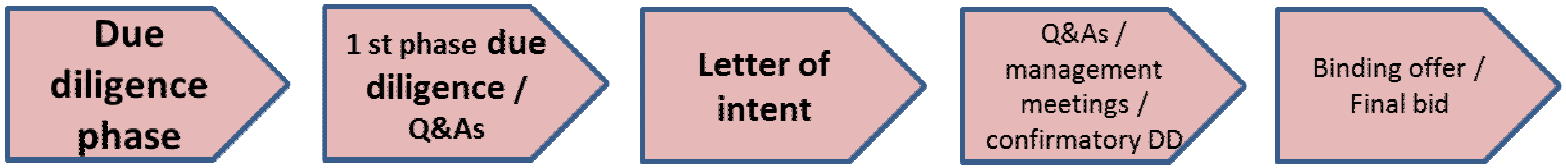
Engagement letters with advisors

When negotiating engagement letters with advisors to perform due diligence, keep the following in mind:

- Make sure the engagement letter accurately describes the scope of the project
- Fees : are usually negotiable within reason
- Consider capping reimbursement for expenses at a reasonable level, above which the advisors will need to revert to the client to obtain its consent
- Consider whether the engagement letter should include a confidentiality provision and/or a restriction on the advisor's ability to accept an assignment that might create a conflict of interest
- If specific individuals' expertise is key, consider specifying that those individuals must comprise part of the advisor's team
- Make sure the restrictions on the use of the advisor's report do not unduly prevent the client from sharing copies of the report with all key members of the diligence team, including outside financial advisors and outside counsel, and making any requisite regulatory filings

B – MANAGING ADVISORS IN DUE DILIGENCE PHASE (OPEN BID)

Managing advisors in due diligence phase (open bid) (Cont'd)



- The due diligence phase generally requires considerable advisory efforts and is highly time-consuming

- Generally, the vendor sends the potential buyer(s) a first draft of an SPA, often shortly before the submission of a final bid by the potential buyer(s) = the request to include a first buyer mark-up in the final bid documentation has become common practice

Managing advisors in due diligence phase (open bid) (Cont'd)

1) Vendor Side

- Open data room for buyer(s) with first set of documents
- Q&A process, generally coordinated by vendor's financial advisor
- Review letters of intent submitted and, as the case may be, short-list bidders
- Release second round of documents
- Organize management meetings
- Circulate draft SPA
- Review final bids and decide which bidder(s) stay in the process
- Consider any employee information issues

Managing advisors in due diligence phase (open bid) (Cont'd)

2) Buyer Side

- Review first set of documents
- Ask questions and request further documents
- Advisors to prepare a preliminary report with findings
- Submission of a letter of intent
- Confirmatory due diligence
- Ask questions and request documents on the basis of previous findings
- Participate in management meetings
- As the case may be, submission of a final bid which may include a first mark-up of the SPA and in certain cases asking for exclusivity
- Consider any employee information issues

C – RELEASE AND RELIANCE LETTERS

Release and reliance letters

- Principle: advisors prepare due diligence reports for the beneficiaries only, which are generally the clients

- Exceptions: due diligence reports may be adressed by the beneficiary to a third party (a financing bank or the client's counterpart) who shall thus be treated as a beneficiary

- In this case, two documents are central in order to avoid or limit liability or conflict of interests: a «Release Letter » and a « Reliance Letter »

Release and reliance letters (Cont'd)

1) Release Letters

- Authorise one party (usually the client of the advisor) to disclose the report to another party, e.g. a vendor to disclose the vendor due diligence (VDD) report to a bidder and at the same time impose confidentiality and non-disclosure obligations to third parties

- Exclude any liability of the advisor to the other party or parties (non-reliance basis)

Release and reliance letters (Cont'd)

2) Reliance Letters

- Create liability of the advisor to the receiving third party for the content of the due diligence report
- Scope of due diligence: remains as agreed between the client and the advisor
- Prohibit the receiving party from further disclosure of the report to third parties
- Usually cap on the advisor's aggregate liability to all beneficiaries
- No obligation of advisor to update the report (may be outdated)
- Need to carefully assess the actual value of relying on a report prepared for a third party

Release and reliance letters (Cont'd)

3) Reliance letters in relation to Vendor Due Diligence (VDD)

- Addressed by the vendor's counsel to the ultimate purchaser, and its financing sources, as the case may be, shortly before signing the acquisition agreement
- Create liability of the vendor's counsel towards the purchaser for the content of the VDD report
- Generally contains statements intended to limit the extent of liability of the vendor's counsel provided by the letter, such as:

- liability cap - only accept liability as a result of their own negligence
- vendor's counsel has acted solely for the benefit of the vendor
- character and scope of the VDD has been limited to certain matters agreed with the vendor
- a number of specified areas or aspects have not been reviewed

D –BREAK-UP FEES

Break-up Fees

➢**Definition**

Payment from the vendor to the buyer if the pending deal is not completed as a result of certain actions by the vendor, such as breaching a no-shop clause or entering into a transaction with a different buyer

➢**Purpose**

- cover the expenses of the buyer for planning, negotiating and investigating a transaction, notably due diligence fees, if the said transaction is not completed
- protecting the buyer if the vendor receives competitive offers
- used more and more in Europe for restoring lost reputations arising from deals falling through

Break-up Fees (Cont'd)

➢ French legal considerations

- Unlike in the UK, no limit on the level of break-up fees
- Break-up fee arrangements as such are not regulated by French company law. They nevertheless raise a number of legal issues, including:
  - Possibility for a court to reduce the amount of the fee if it is characterised as a *clause pénale*
  - Financial assistance regulations
  - Misuse of the company assets
  - Tax deductibility
- Beside any break-up fees provision, French courts may award a party damages where its counterpart has wrongfully terminated negotiations, on the basis of the general "good faith" principle under French law

Break-up Fees (Cont'd)

- **Clause pénale**

- Courts may moderate or increase the amount payable under "*clause pénale*" provisions, when they deem such amount as excessively high or low (Article 1152 of the Civil Code)
- Courts usually allow break-up fee in a cash amount to be paid by one party to the other in the event the contemplated transaction is prevented to proceed, whether :
  - ✓ as a result of the failure by one party to comply with its obligations (e.g., obtain required corporate approvals, etc.)
  - ✓ ***as a result of the occurrence – or failure to occur – of external events (e.g., anti-trust authorisations, etc.)***

Break-up Fees (Cont'd)

- **Clause pénale**

- Break-up fee must remain proportionate to expenses actually incurred by a party + "reasonable" loss of a chance indemnification ("*lucrum cessans*" theory under French law)

- Particular care must be taken in the drafting of break-up fee provisions in order to limit the risk that the amount of the agreed-upon fee be subject to courts' review

Break-up Fees (Cont'd)

- **Financial Assistance Regulations**

- A company may not advance any funds or guarantee any indebtedness in connection with the purchase (or subscription) of its own shares by a third party

- May apply to any break-up fee arrangement pursuant to which the break-up fees are payable to the bidder by the target company (and not when the fees are payable by the target's shareholders)

Break-up Fees (Cont'd)

- **Misuse of the company's assets**

- Potential liability in the event the break-up fee arrangement is entered into (i) in bad faith, (ii) in a way which is contrary to the interests of the company, (iii) in furtherance of management's personal interests or (iv) to encourage another company or undertaking in which they have a (direct or indirect) interest

- Care to be taken to ensure that any break-up fee arrangement strictly complies with the corporate interest of the company (in particular to the extent such provisions may limit the future latitude of the target company to negotiate in connection with any counter bid)

Break-up Fees (Cont)

➢Specific considerations for public listed companies:

Where an offeror cannot purchase the shares of significant shareholders before filing an offer, the offeror may want significant shareholders to agree to pay a significant break-up fee if those shareholders do not tender their shares to the offer

- Rare examples of such break-up fees in France : Alcan, Pechiney and Alusuisse; SAP's offer for Business Objects in 2007, and Honeywell's offer for Sperian Protection in 2010
- Break-up fees could block a higher bid, and thus constitute a poison pill risk
- Break-up fees may contravene an AMF (French Financial Market Authority) Regulation which states that all parties must maintain a level playing field between alternative bids
- The duties and responsabilities of the board of directors require that the interests of all stakeholders, including most importantly, employees, be taken into account in considering any offer. As a result, most directors refuse substantial restrictions in their freedom to analyze an offer and appropriately defend the target against a change in control

E- FINANCIAL ADVISORS / FINDERS' FEES

Financial Advisors / Finders' Fees

1) Introduction

- A finders' fees is a commission paid to an intermediary or the facilitator of a transaction. The finder's fee is rewarding the intermediary who discovered the deal and brought it forth to interested parties
- The finders' fees can thus reward various fields of activities among which, the solicitation, the placement of securities and the advisory activities
- Although being often complementary, those activities are governed by differents regulations which raises many issues

Financial Advisors / Finders' Fees (Cont'd)

2) Solicitation of French investors

- The French Monetary Code regulates the solicitation in France of investors for the purchase of securities that are not admitted to trade on a French regulated market or a foreign "recognised" market (article L.341-1 *ff*. of the Monetary and Financial Code)

- These regulations do not apply where the investors would satisfy to the definition of « qualified investors », such as venture capital firms

Financial Advisors / Finders' Fees (Cont'd)

3)Placement of securities

➢Definition

Business of seeking subscribers or purchasers, on the behalf of the issuer or vendor of financial instruments.

➢Conditions

- ✓ The intermediary must be an authorized French investment services provider
- ✓ Licensed with the French Banking Authority (ACPR) or with the AMF or by an equivalent entity in an EC member state and benefiting from the single passport regime
- ✓ Transaction-based compensation

Financial Advisors / Finders' Fees (Cont'd)

4) Advisory activities

a)Investment Advice (Conseil en Investissement Financier)

✓Definition

Provision of personal recommandations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments

✓Conditions to be satisfied for providers

- Accreditation with a professional organization or license as an investment service provider with the French Banking Authority (ACPR)
- Activities regulated by the French Monetary and Financial Code, implementing MIFID

Financial Advisors / Finders' Fees (Cont'd)

b)Corporate Finance Advice (Conseil en Fusions-Acquisitions)

✓Definition

Activities consisting in advising undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings. Considered as an ancillary financial service.

✓Conditions

French Monetary and Financial Code does not require any authorisation for providing Corporate Finance Advice

Financial Advisors / Finders' Fees (Cont'd)

5)Issues related to activities rewarded by finders' fees

- **As regards to the securities placement activity**

Non-licensed intermediary are **only authorised to solicit investors** and distribute teaser documents or info memoranda, but **not to place securities on behalf of the investors or hold funds of the investors**

It is therefore preferable, where the intermediary is not duly registered :

-not to base the consultant's fees on the amount of equity raised

-ask such intermediary to make only occasionnally mere introductions of potential investors to issuers, either for free or under a non-contingent arrangement

Financial Advisors / Finders' Fees (Cont'd)

- **As regards to the advisory activity**

Relevant Issue

Determining whether a firm is actually providing advice that requires autorisation or that causes the firm to become regulated (« Investment Advice ») or not (« Corporate Finance Advice »).

Financial Advisors / Finders' Fees (Cont'd)

ESMA has stated that the material criterion for determining whether the advice provided shall be considered as an Investment Advice or a Corporate Finance Advice is the **purpose** of the advice given

Therefore:

- If the primary purpose for seeking advice is in order to generate a financial return on an investment, the client's objective is patrimonial in nature and the advice provided would be Investment Advice

- where the primary purpose for seeking the advice is for an industrial, strategic or entrepreneurial purpose, the advice provided would be a corporate finance advice

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Tea Break & Networking

The next session will promptly begin at 11.30

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MÜNCHEN LEIPZIG

Global M&A Conference London, January 2014

M&A - specifics in Germany

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Pre-contractual phase

Before starting DD:

- Checking potential merger issues by legal pre-research (otherwise, if “clear” that cartel authorities will prohibit transaction, no sense to start cost-intensive DD or even concrete negotiations)

DD process:

- Execution of a DD mandatory in order to exclude liability of purchaser’s management (due to decisions of German Courts)
- Specific problem for listed companies: management board has to determine that DD is in the company’s (and not only in the majority shareholder’s) best interest

Pre-contractual phase (cont.)

- ***Ad hoc* announcements during DD and negotiation phase**
  - German practice following European and German Court decisions

- **Breaking off of negotiations:**
  - no significant risk if the target is a **GmbH**, as notarization is required for any binding Share Purchase Agreement;
  - In all other cases: potential claims possible, but only under special circumstances - in practice only if parties agreed upon break-up fees

„Reps & Warranties“

- **Drafting representations and warranties**
  - The German Civil Code (“BGB”) provides for a complete and comprehensive legal régime regarding defects in title and quality
  - According to German Law, the remedies of the purchaser of a used car and of the purchaser of shares of a company are more or less the same!

  ⇒ It is absolutely mandatory to exclude the application of the legal provisions of the German Civil Code – they are applicable unless expressly excluded!

  ⇒ The exclusion of the provisions of the Code can be tricky – it is highly recommended to seek advice from local counsel

Public Registers

The Commercial Register and the Land Register – making things easy (and giving work to lawyers and notaries public)

- **Commercial register**
  - ✓ reliable information on the corporate structure of a company including the shareholders, giving “public faith”
  - ✓ accessible via internet (but only available in German language)
  - ✓ does not cover every aspect, e. g. encumbrance of shares
  - ✓ Notarized deed required for any entry in commercial register
  - ⇒ Commercial register is an excellent and anonymous, but incomprehensive source of information on a potential target

Public Registers (cont.)

➢ Land register

- ✓ Public faith of all entries in the land register
- ✓ Entry in the land register is mandatory for all transactions involving real estate and a prerequisite for the execution of any such transaction
- ✓ Land register is not accessible to the general public
- ✓ Land register is part of the local court system
- ✓ Notarized deed required for any entry in the land register

German Labour Law…

German Labour Law – making things difficult (and giving work to lawyers as well)

German labour law is an area of law inhabited by unique and unheard-of species that can make a post-merger integration or restructuring a lengthy, costly and cumbersome experience, such as:

- Collective bargaining agreements and company agreements that cannot be changed unilaterelly or at short notice
- Employees who are non-redeemable or have long cancellation periods
- the Employment Protection Act, which is basically applicable to all companies with > 10 employees
- The existence of unwritten “company usages” (betriebliche Übung)
- Complex and costly pensions schemes that you cannot reduce or alter etc.

⇒ All of the above is particularly troublesome in cases of privatization of publicly owned companies!

„German bureaucracy“

- **Notarization required**
  - German notaries public – a class of their own
  - Mandatory in cases of
    - any transfer of shares in GmbHs
    - any real estate transaction
  - For post-closing measures:
    - Required for change of articles of association or nomination/dismissal of directors
    - For any transfer of shares in GmbH between group companies in cases of internal restructuring

„German bureaucracy“

- **Notarization triggers legal fees (not negotiable) depending on the purchase price**
  - e.g. purchase price EUR 5 m => fee of about EUR 17,000 + VAT
  - Fees can reach considerable heights for complex transactions involving higher purchase prices
  - Notarization in foreign languages triggers a surcharge!
  - Avoiding notary fees by engaging foreign notaries (e.g. notary in Switzerland) is possible in certain cases

„German bureaucracy“ (cont.)

- **Time-consuming requirements for foreign companies required by notaries public and public registers**
  - Formal proof of foundation of the investing company and that it still exists (= certificate of good standing)
  - Formal proof that person that acts for company is duly authorized
  - Any document to be submitted to a public register has to be
    - **apostilled or even legalized** (for countries that are not member of the Hague Convention regarding apostilles), and
    - **translated** into German by a certified translator

How to deal with the former management?

- **Recall of the previous management board and establishment of a new management board**
  - GmbH: recall of the previous managers possible, no reason for recall required;
  - AG: recall only possible if there is a good cause
  - Competence for revocation and nomination is usually assigned to the Supervisory Board

How to deal with the former management? (cont.)

- **Dismissal of former management may be cumbersome!**
  - Revocation of a director does not automatically terminate the director's employment contract; separate notice required (!);
  - If no "real" good cause for notice exists, the salary has to be paid until regular termination of the service agreement (usually up to five years);
  - Employment contract often contains change of control provisions which enable the director to terminate his contract and entitle him to a significant "severance package"

Thank you for your kind attention!

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Global M&A Conference

The challenges and triumphs of doing M&A deals in other jurisdictions

London

27 January, 2014

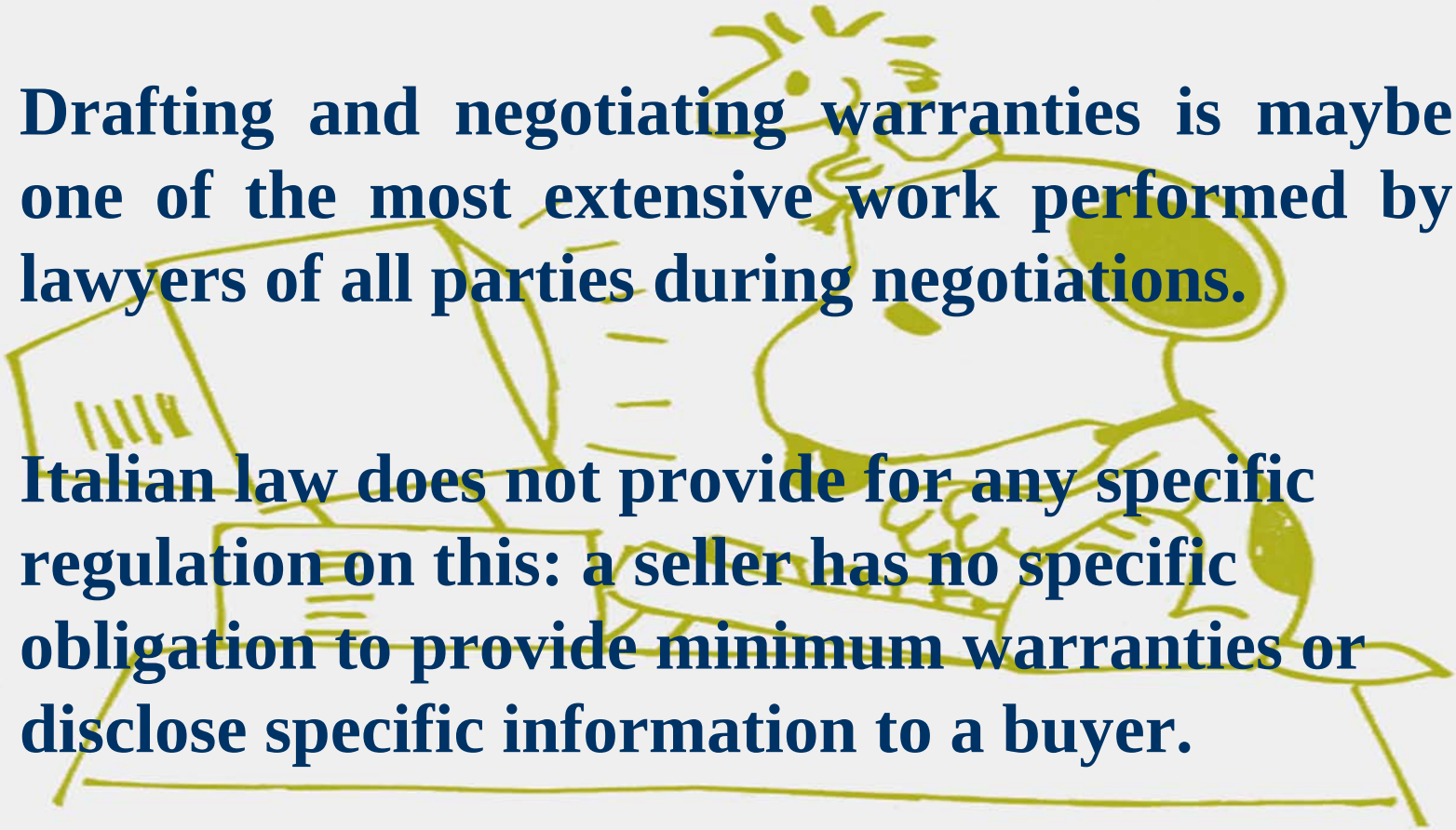
Avv. Alessandra Tarissi De Jacobis
Cocuzza & Associati

Warranties and Indemnities

The different approaches

Cocuzza & Associati

Warranties



- **Drafting and negotiating warranties is maybe one of the most extensive work performed by lawyers of all parties during negotiations.**

- **Italian law does not provide for any specific regulation on this: a seller has no specific obligation to provide minimum warranties or disclose specific information to a buyer.**

Warranties

- **Representations and Warranties have been imported into Italian M&A law from US practice and are now one of the main aspects of almost any deal.**

- **No specific Regulation under Italian law.**
- **The status of warranties ad the legal remedies available in the event of a breach have long been debated by academics and the Supreme Court.**

Warranties

- **In Share Deals, warranties can be divided into two main categories:**
  - **LEGAL WARRANTIES, when they refer to the main and DIRECT object of the transaction i.e. the shares**
  - **BUSINESS WARRANTIES, those referring to the business and the patrimonial situation of the Company.**
- **In terms of the legal remedies to a buyer in the event of infringement, the two different Warranties are treated differently by our Case Law.**

Legal Warranties

The main Legal Warranties are those referring to:

- **TITLE;**
- **CORPORATE DOCUMENTS;**
- **GOOD STANDING OF THE COMPANY;**

In case of breach of legal warranties the rules on the sale of goods in the Italian Civil Code (ICC) apply.

Business Warranties

- According to Italian Case Law, the acquisition of interests in corporate capital of a target constitutes an indirect purchase of the target’s business and assets.
- **Business Warranties are those referring to** the qualities and characteristics of the target's assets.
- A warranty is a contractual assurance from a seller to a buyer. It is a subsidiary or collateral provision to the main purpose of the agreement: the sale itself.
- The number of warranties and matters to be covered by warranties will vary considerably depending on the nature of the business and the negotiating strength of the parties

Purposes Of Business Warranties

- One of the main purposes and effects of warranties is to apportion risk and liability between a buyer and a seller.
- Warranties protect a buyer by providing a possible price adjustment mechanism if a warranty proves to be false and, in the context of a sale of the business, by enabling a buyer to gather information on the business through a disclosure process.
- However, warranties should not be used as a substitute for due diligence as it is better and usually cheaper for a buyer to know of a problem in advance so that it has the chance to walk away, negotiate a price reduction or seek specific contractual protection (possibly in the form of an indemnity), rather than having to sue for breach of warranty at a later stage.

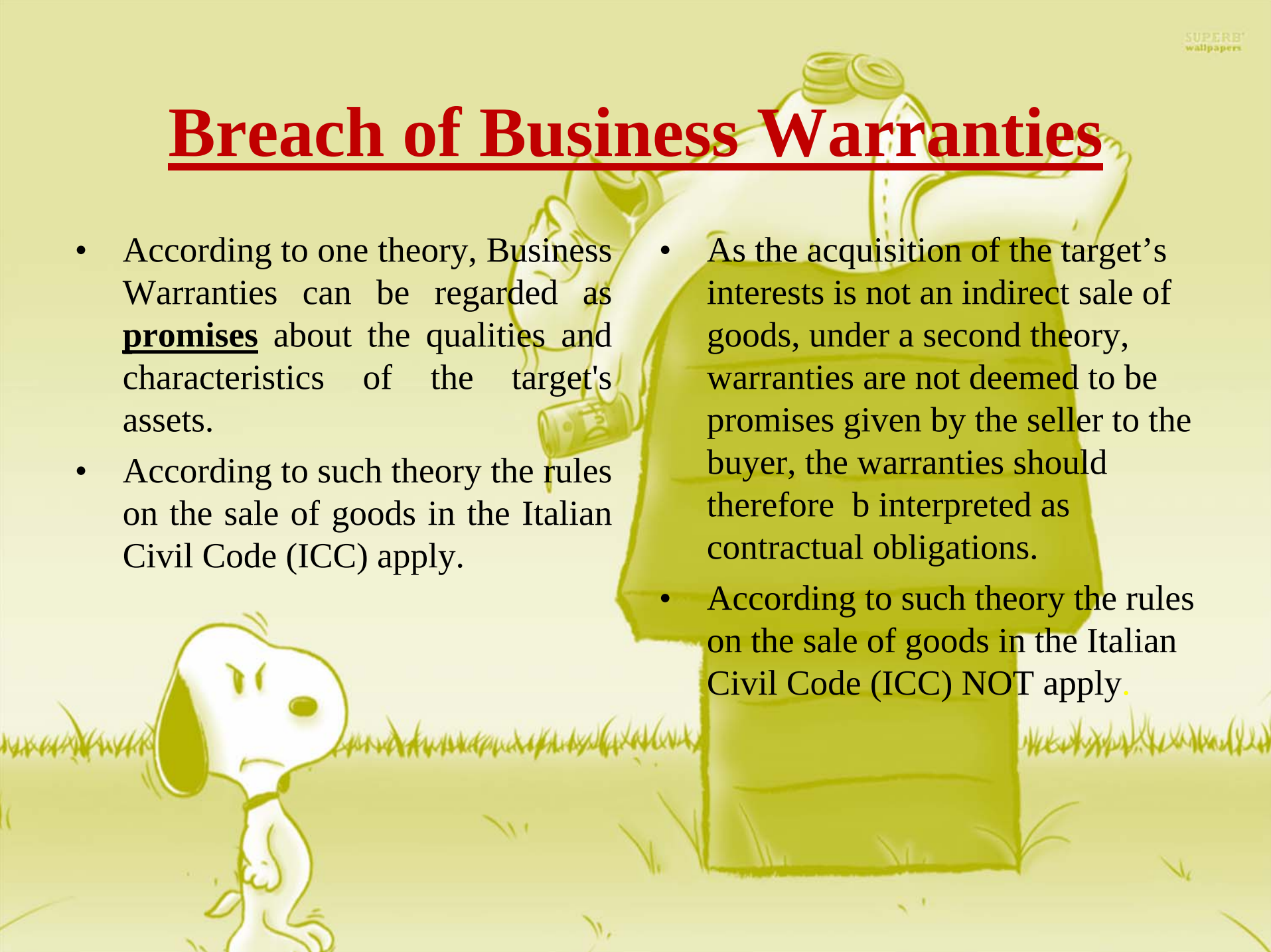
Breach Of Business Warranties

- In case of a breach of business warranties, under Italian law, the regime is controversial, especially when dealing with share deals.
- The majority of the authors and case law sustain the theory according to which **the subject matter of the share deal is not the assets of the target whose shares are purchased, but the shares themselves.**
- In light of this theory it is of **paramount importance to include in the agreement representations and warranties much detailed as possible, regarding the assets and the consequences arising thereof.**

Breach of Business Warranties

- According to one theory, Business Warranties can be regarded as **promises** about the qualities and characteristics of the target's assets.
- According to such theory the rules on the sale of goods in the Italian Civil Code (ICC) apply.

- As the acquisition of the target's interests is not an indirect sale of goods, under a second theory, warranties are not deemed to be promises given by the seller to the buyer, the warranties should therefore b interpreted as contractual obligations.
- According to such theory the rules on the sale of goods in the Italian Civil Code (ICC) NOT apply.



Breach Of Business Warranties

- If the sale of goods ICC rules (article 1490 and following) are deemed to apply, they entitle the buyer to sue the seller pursuant to ICC in the event of misrepresentation of the seller. ICC allows a purchaser to claim compensation, in the form of either a reduction in the purchase price or damages, or to terminate the agreement.
- In this case the buyer shall first inform the seller of the claim within eight days and than the action is subject to a statutory limitation period of one year from closing. Although the parties may extend the eight-day term, the one-year statutory limitation cannot be modified by agreement.

Breach Of Business Warranties

A buyer may try to identify the warranties as contractual obligations (rather than promises about the qualities of the target's assets) and to make any subsequent legal action subjects to the ordinary 10-year statutory limitation period (rather than the shorter one-year period) or in the different shorter term that might be negotiated.

Breach Of Business Warranties

- It may be useful for the buyer to adopt certain precautions when drafting an acquisition agreement, taking into consideration the possibility of future litigation in the event that the warranties are infringed.
- It is highly recommended that, in order to prevent the warranties from being characterized as qualities of the target's goods, among other things the buyer (*i.e.* his legal counsel) may

❑ qualify the business warranties as contractual obligations;

❑ expressly exclude the application of article 1495 of the code. So as to clarify the intention to identify the warranties as contractual obligations;

❑ For the purpose of the application of the ordinary 10-year statutory limitation period, provide a contractual indemnity procedure; and

❑ provide for a different term in order to exclude the eight-day term for informing.

Contractual Remedies For Breach Of Warranties

Other measures may be included in the acquisition agreement, depending of the buyer's specific needs, in order to give a buyer adequate legal protection, in view of its real indemnifications needs in a M&A transaction. For this reason the clear and unquestionable contractual autonomy of the parties in such matters is recognized.

Guarantees

- **Guarantees released by the Seller or by companies controlling the Seller**
  - Letter of Patronage
  - Pledge

- **Guarantees released by third parties**
  - Bank Guarantee
  - Escrow

Indemnities

An indemnity is a promise to reimburse the buyer in respect of a particular type of liability, should it arise. The purpose of an indemnity is to provide guaranteed compensation to a buyer in circumstances in which a breach of warranty would not necessarily give rise to a claim for damages or to provide a specific remedy that might not otherwise be legally available.

Indemnities

- Indemnities are clauses usually included in a contract according to which the party providing the indemnity undertakes an original and independent obligation to indemnify (make good) a loss.

- Indemnity clauses are different from the clauses aimed to a price adjustement.

- It may be more appropriate to use Indemnities clause in combination with other remedies under Italian law, to ensure that the buyer position is better protected.

- An Indemnification procedure, should be properly detailed

Buyer's Knowledge Of A Breach

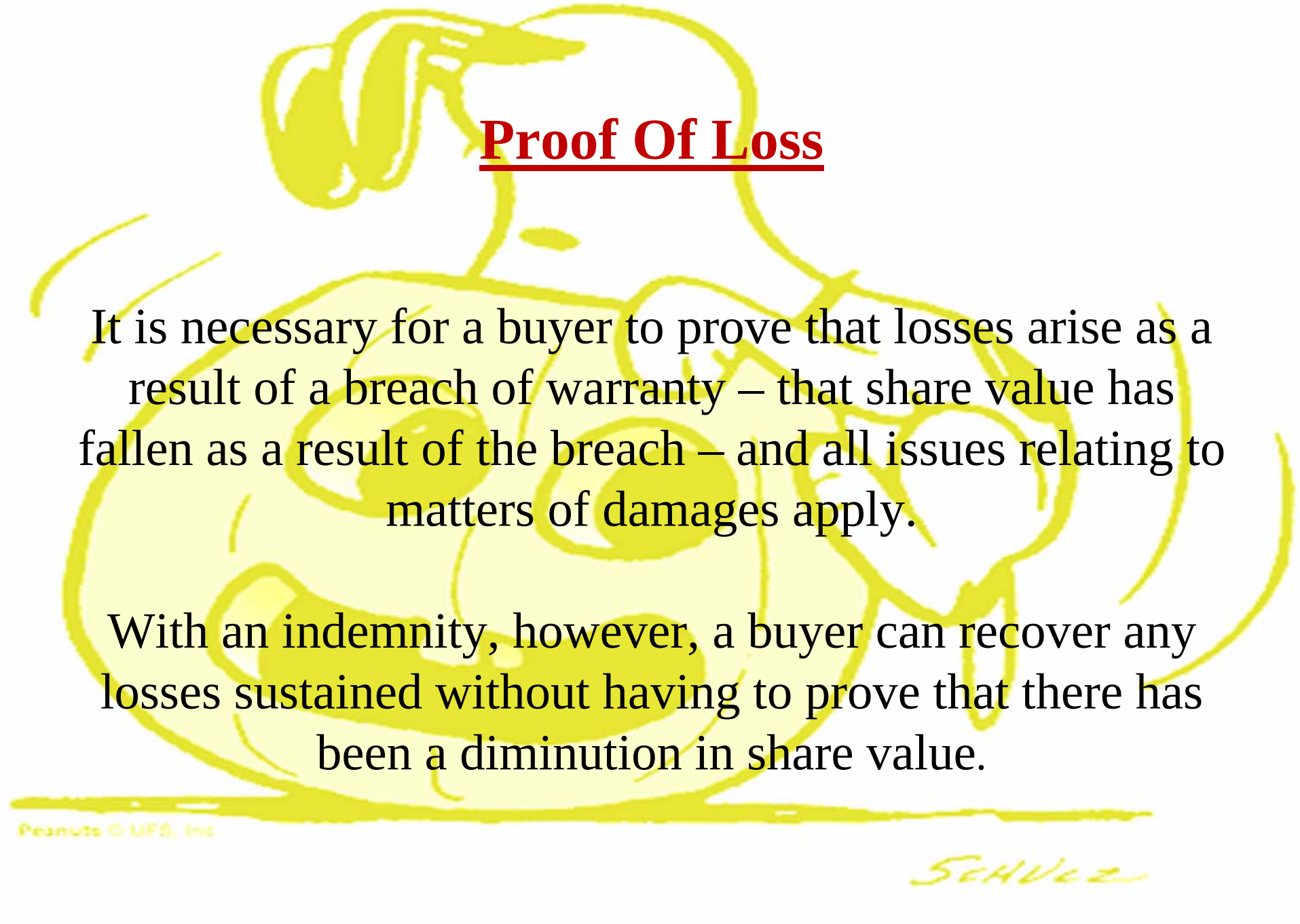
Depending on the terms of a contract, a buyer that is aware of a breach of warranty might be precluded from bringing a claim on the basis that they were aware of a breach and decided to enter into a contract regardless.

However, knowledge of a breach of contract will not prevent a buyer from making a claim under an indemnity. Indeed, buyers often negotiate an indemnity as contractual protection from a specific problem that they have discovered.

Proof Of Loss

It is necessary for a buyer to prove that losses arise as a result of a breach of warranty – that share value has fallen as a result of the breach – and all issues relating to matters of damages apply.

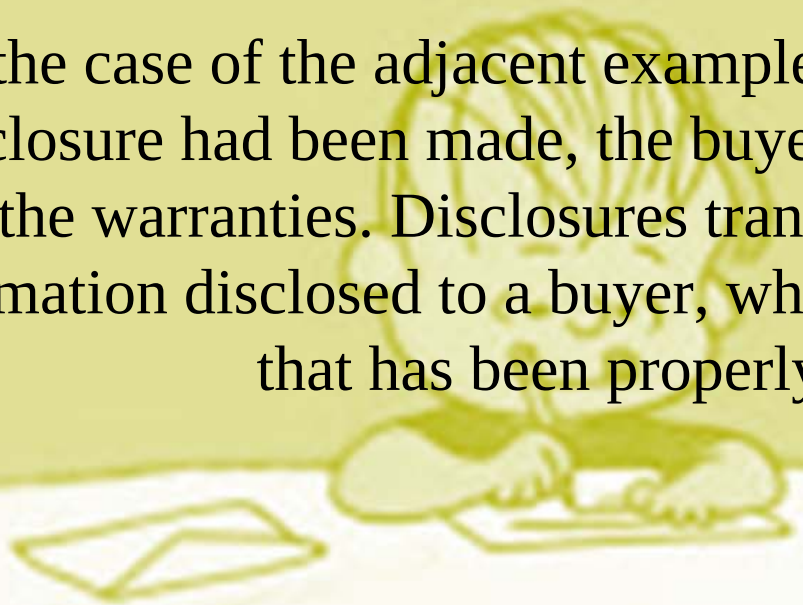
With an indemnity, however, a buyer can recover any losses sustained without having to prove that there has been a diminution in share value.



Disclosure

Disclosures might be made against warranties in certain transactions, such as share or asset sales, thereby limiting liability, but should not be made against indemnities. A buyer might initially seek an indemnity because of information disclosed either during due diligence or in a disclosure letter.

In the case of the adjacent example warranty, assuming the disclosure had been made, the buyer could not bring a claim under the warranties. Disclosures transfer the commercial risk for information disclosed to a buyer, which cannot sue for a matter that has been properly disclosed.



Indemnification “Caps” And “Baskets”

Typically, the indemnification arrangement will include minimum indemnification thresholds and limitations.

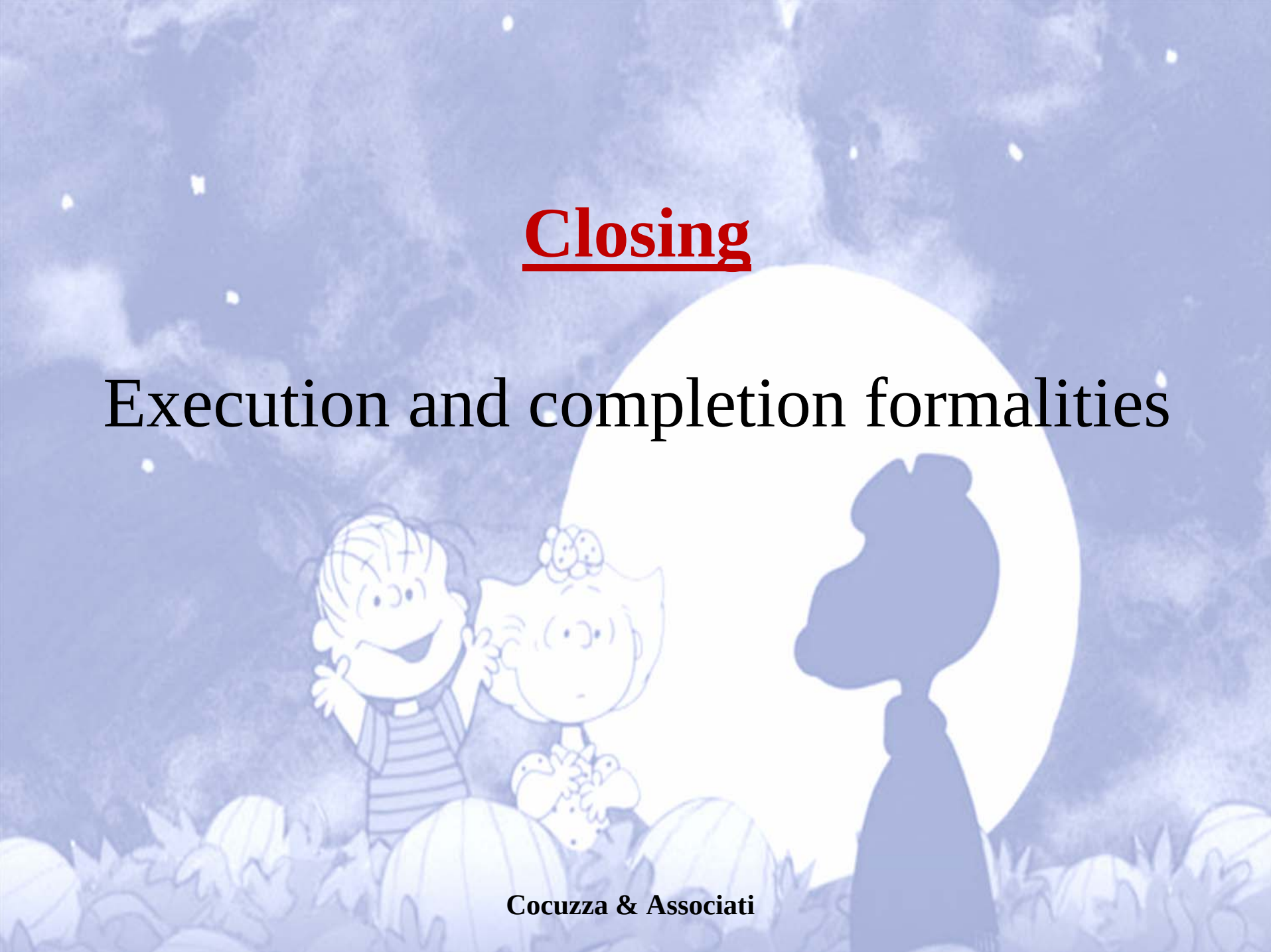
The cap refers to the maximum amount of remuneration a buyer can receive for losses caused by a seller breach.

The basket refers to the minimum threshold which must be exceeded before a buyer is entitled to receive remuneration for losses caused by a seller representation breach.

A basket can be structured to either mimic an insurance deductible or as a tipping basket.

Closing

Execution and completion formalities



Closing

Closing transactions are the final transactions that complete the terms of a contract.

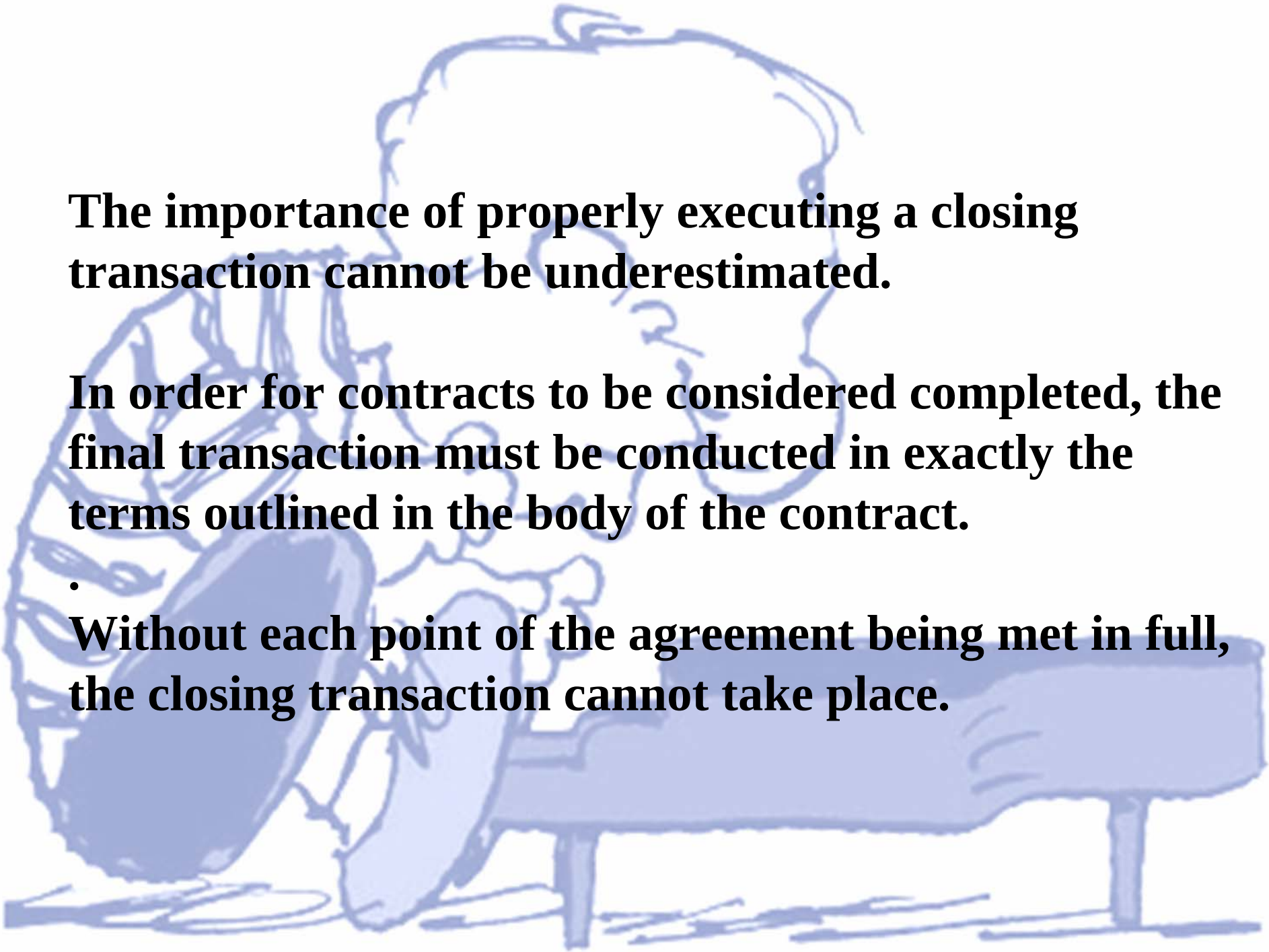
Generally, each detail of the contract must be met in order for the closing transaction to take place, and thus complete the business deal.

Closing

- **The terms and conditions of an SPA or a APA agreement will vary depending on whether the transaction is structured as a simultaneous signing and closing or as a deferred closing.**
- **In a simultaneous signing and closing, the parties sign the transaction documents and close on the deal at the same time (infrequent).**
- **In a deferred closing, the agreement is a preliminary and binding agreement which does not entail the transfer of the ownership of the shares; the transfer itself is usually subject to:**
  - **the signing of a notarial deed**
  - **Certain conditions precedents which have to occur or to be waived in accordance to certain modalities before closing.**

Closing

At closing all the activities to be performed, pursuant to the stock purchase agreement, must be treated as a single transaction.



The importance of properly executing a closing transaction cannot be underestimated.

In order for contracts to be considered completed, the final transaction must be conducted in exactly the terms outlined in the body of the contract.

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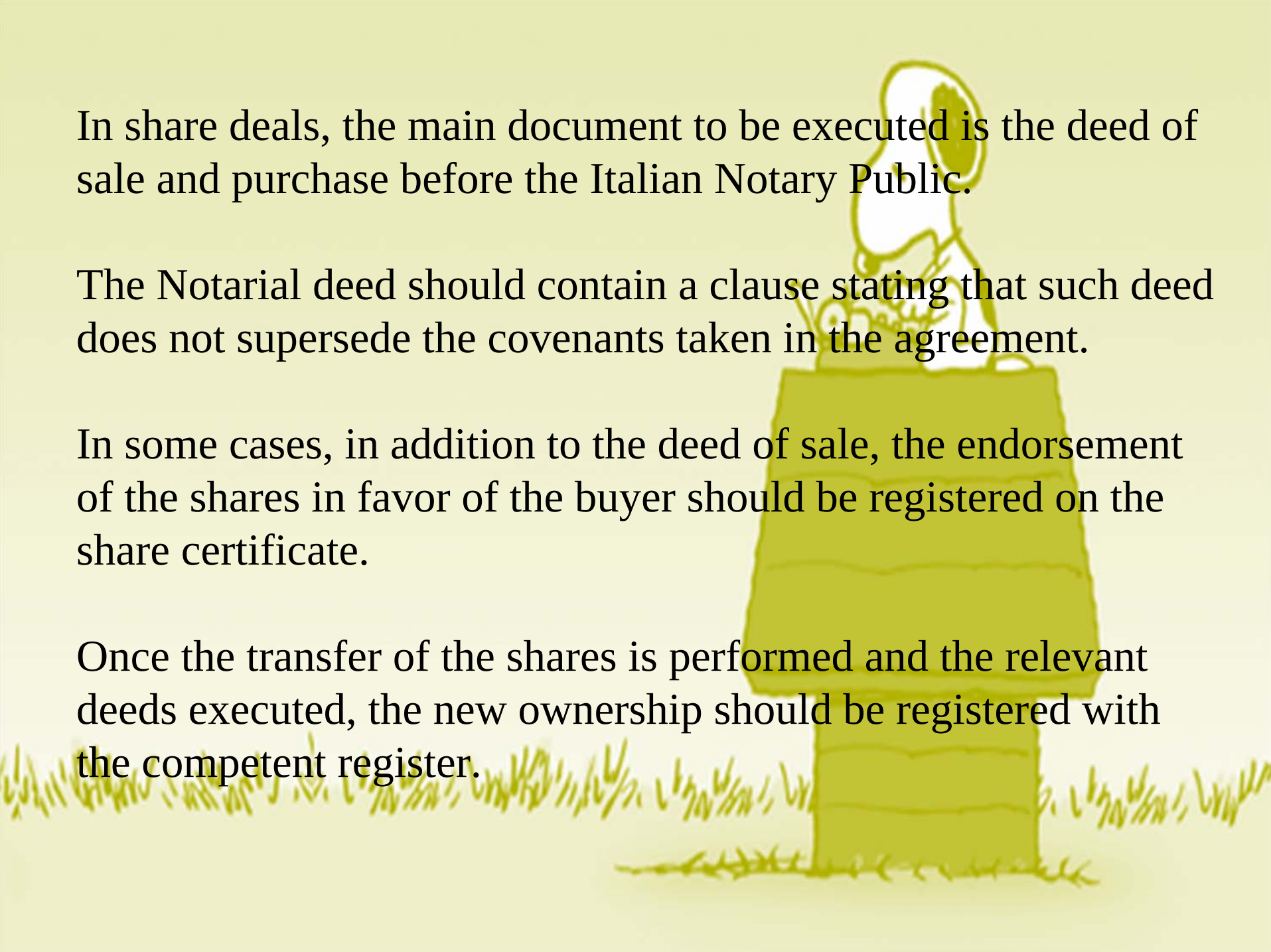
Without each point of the agreement being met in full, the closing transaction cannot take place.

In share deals, the main document to be executed is the deed of sale and purchase before the Italian Notary Public.

The Notarial deed should contain a clause stating that such deed does not supersede the covenants taken in the agreement.

In some cases, in addition to the deed of sale, the endorsement of the shares in favor of the buyer should be registered on the share certificate.

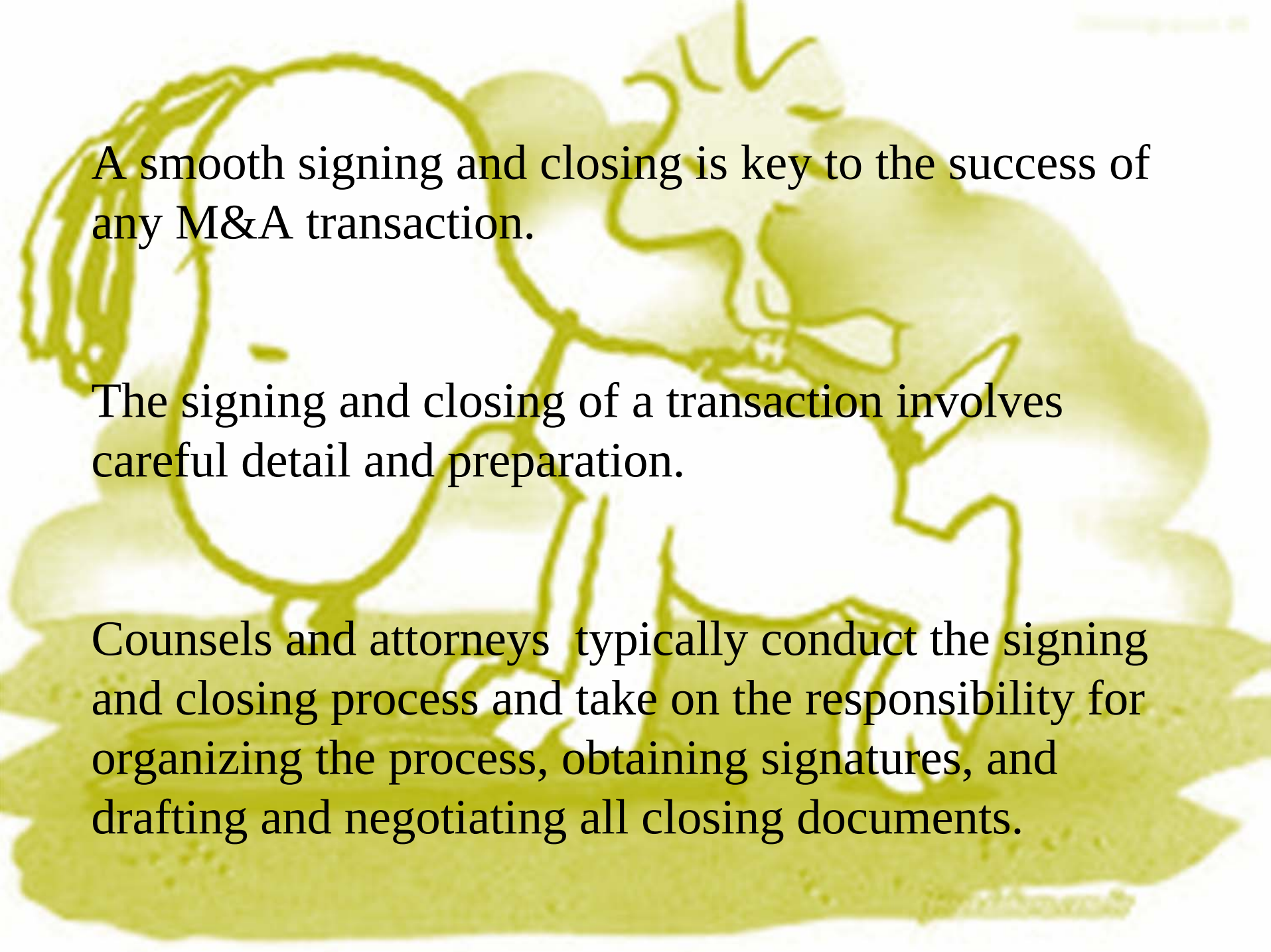
Once the transfer of the shares is performed and the relevant deeds executed, the new ownership should be registered with the competent register.



POST CLOSING OBLIGATIONS

- The parties' obligations will often not end at closing.

- Covenants restricting its conduct for a defined period of time after closing.
  - ❑ Non competition obligations
  - ❑ Covenant regarding the target employees.
  - ❑ making certain state filings (such as articles of merger or an amendment to the party's certificate of incorporation to change the company name),
  - ❑ filing press releases,
  - ❑ obtaining third-party consents not received at closing.



A smooth signing and closing is key to the success of any M&A transaction.

The signing and closing of a transaction involves careful detail and preparation.

Counsels and attorneys typically conduct the signing and closing process and take on the responsibility for organizing the process, obtaining signatures, and drafting and negotiating all closing documents.

The signing and closing of M&A transactions require continuous assistance by counsels through the entire process, from the initial preparation through the post-signing and post-closing activities. The assistance of counsels and M&A attorneys, providing for all the relevant documents help to make the signing and closing a smooth process.

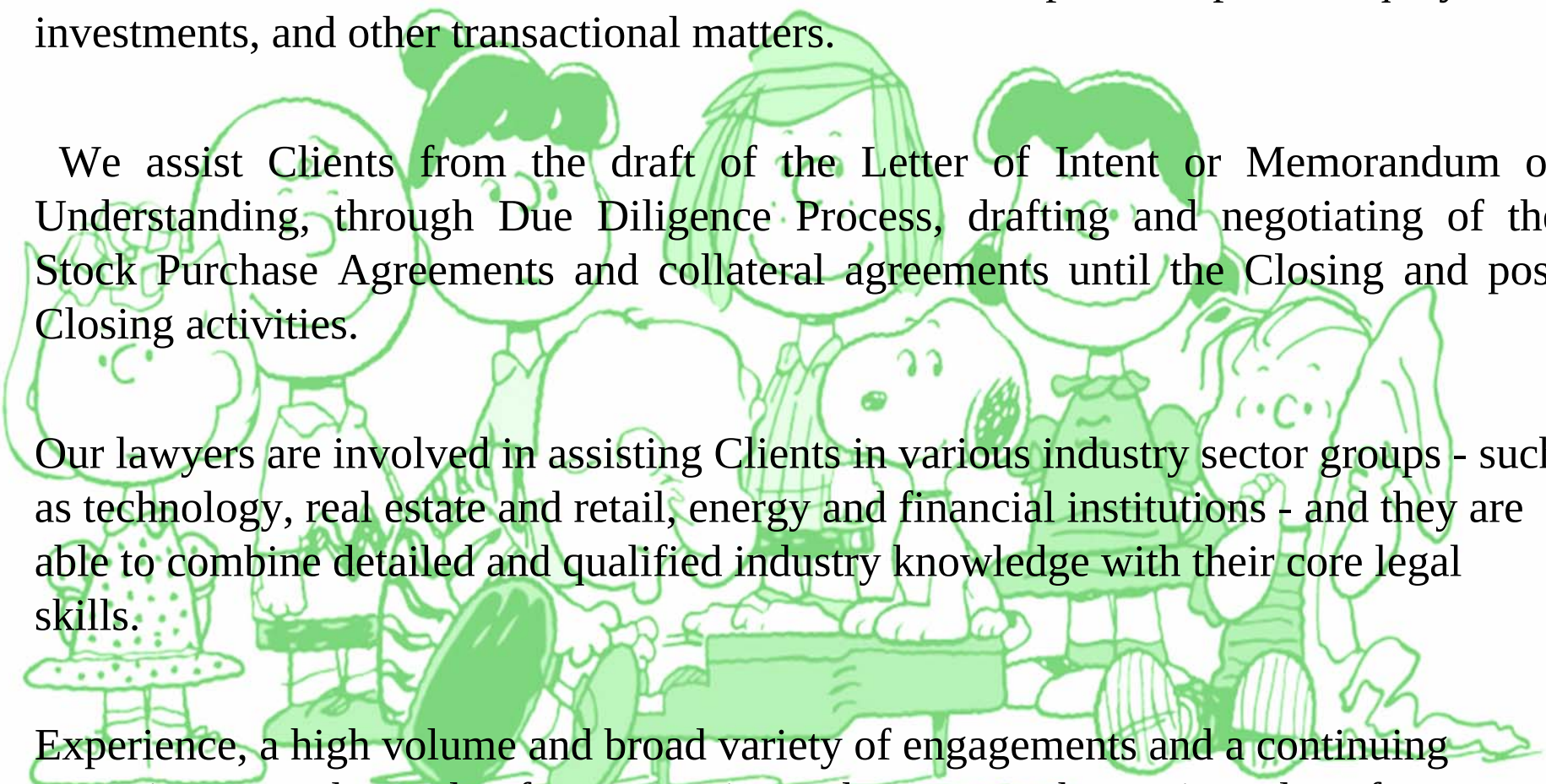
- Cocuzza & Associati is a Milan-based boutique law firm.

- Our Corporate and M&A Team has focused its collective experience to assist our Clients, with reference to internal and cross borders mergers and acquisitions, either in the form of share deals and of assets deals, venture capital and private equity investments, and other transactional matters.

- We assist Clients from the draft of the Letter of Intent or Memorandum of Understanding, through Due Diligence Process, drafting and negotiating of the Stock Purchase Agreements and collateral agreements until the Closing and post Closing activities.

- Our lawyers are involved in assisting Clients in various industry sector groups - such as technology, real estate and retail, energy and financial institutions - and they are able to combine detailed and qualified industry knowledge with their core legal skills.

- Experience, a high volume and broad variety of engagements and a continuing commitment to the study of corporate issues keep us on the cutting edge of new trends and developments in the sector.



COCUZZA & ASSOCIATI

Studio Legale

Boels
Zanders
Advocaten

The Netherlands

Luuk Hendriks
Maarten van Dooren

advoc

howden

Boels
Zanders
Advocaten

Holland offers a highly competitive fiscal climate

- dividend withholding tax rate of 15%
- wide tax treaty network: avoidance of double taxation No withholding tax on outgoing interest and royalty payments
- CIT rate of 25% (20% for first EUR 200,000)
- practical procedures for obtaining advance tax rulings (i.a. wrt Transfer Pricing)
- tax allowances wrt Innovations, R&D and sustainable energy
- favorable participation exemption regime
- fiscal unity regimes for CIT, Wage Tax and VAT
- liberal loss carry-over facilities (carry forward for nine years; carry backward for one year)

The Netherlands – Gateway to the world

- generally good command of languages (English, German and French)
- agreements and formal deeds (e.g. share transfer documents) may be drafted in English
- arbitration: popular and effective (New York Convention)
- recognition and enforceability of court judgments (wide treaty network outside EU)
- disclosure of documents in English: generally no translations required

Introducing: the Modernised Dutch BV

2012 Corporate Law Reforms

The BV characteristics:

- a private limited liability company
- capital divided in shares
- extremely flexible
- perfectly suited for private equity transactions and joint ventures

The Dutch BV - general

- optional one tier or two tier board of directors
- shares with high or low (or no) profit rights
- optional non-voting shares
- nominal value and share contribution in foreign currency allowed
- transfer restrictions tailor made
- shareholders meetings outside of the Netherlands
- financial assistance rules abolished

Simple incorporation

- no notification / governmental authorization required
- foreign ownership permitted / no domestic partner requirement
- no minimum capital requirement
- executive board may consist of a foreign entity

Limited liability

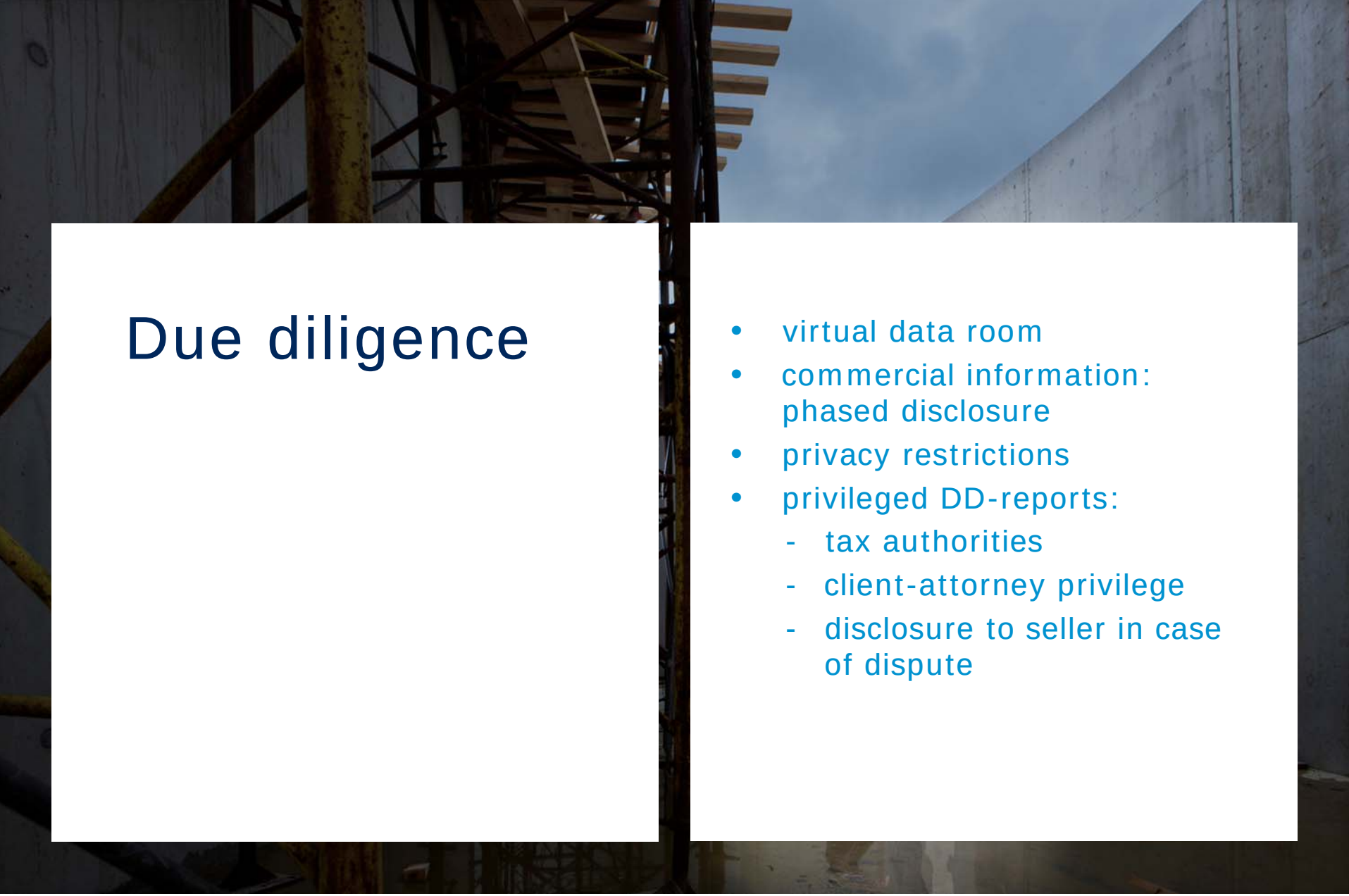
- generally no piercing of the corporate veil
- principles of directors liability
- distributions: obligation to observe reasonable solvency and liquidity ratios
- limited shareholders liability for received dividends

Special court: the Enterprise Chamber

- specialized chamber of Amsterdam court of appeals
- any type of dispute wrt a company
- between shareholders or between company and any shareholder
- accessible by a shareholder or by the company itself
- very effective / vast array of potential measures
- active judge

Negotiations

- walking away
- court order / liability for costs or lost profits
- *"subject to contract" - "subject to board approval" - "non-binding"*
- importance of an adequate Letter of Intent
- break-up fees
- non-solicitation



Due diligence

- virtual data room
- commercial information: phased disclosure
- privacy restrictions
- privileged DD-reports:
  - tax authorities
  - client-attorney privilege
  - disclosure to seller in case of dispute

Contract

- purchaser's obligation to investigate vs. seller's obligation to disclose
- important case law (Hoog Catharijne doctrine)
- tendency towards strict interpretation of agreements
- customary liability limitations (thresholds etcetera)
- specific indemnities (e.g. tax)
- W&I insurance
- non-compete

Timescales

General:

- average time to complete transaction
- share transfer by a civil-law notary
- proxies: apostille
- opening bank account

Timescales

Works Council consultation wrt:

- change of control
- removal / appointment of managing directors
- important financing

Potential ramifications: stand still by court order

Notification of Trade Unions

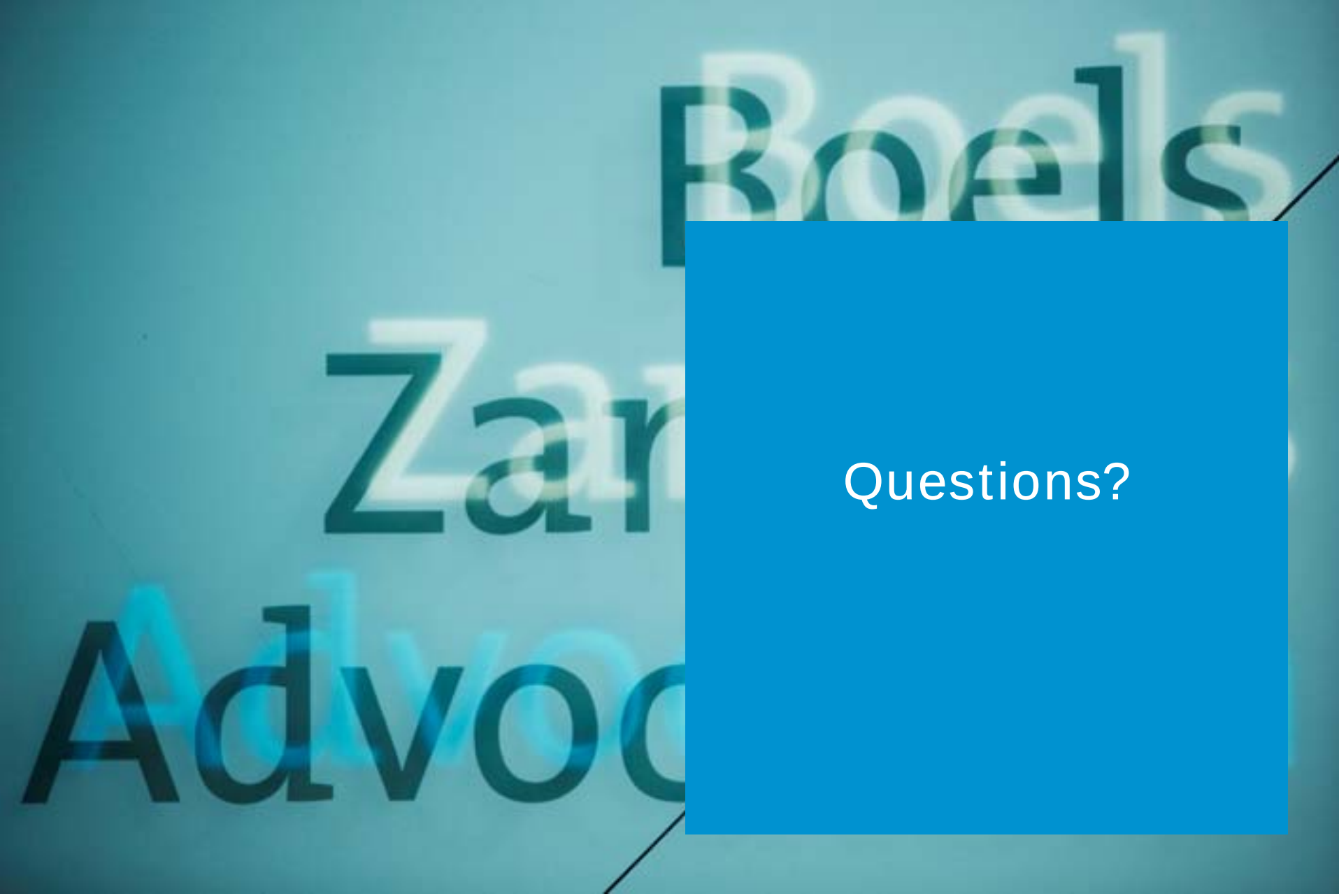
Timescales

Notification requirements

- anti-money laundering and anti-terrorist financing act (WWFT)
- merger control (national or EU) – key criteria
- industry specific: Healthcare Authority, Energy Chamber, National Bank, Authority for Financial Markets

Costs

- no stamp duty
- generally no VAT wrt asset transfers
- costs civil law notary
- typical fee arrangements M&A lawyers
- if applicable: market survey wrt merger control



Questions?

Boels
Zanders
Advocaten

Howden

Joe O'Brien

Howden Insurance Brokers
Transactional Risk Insurance
January 2014

Contents

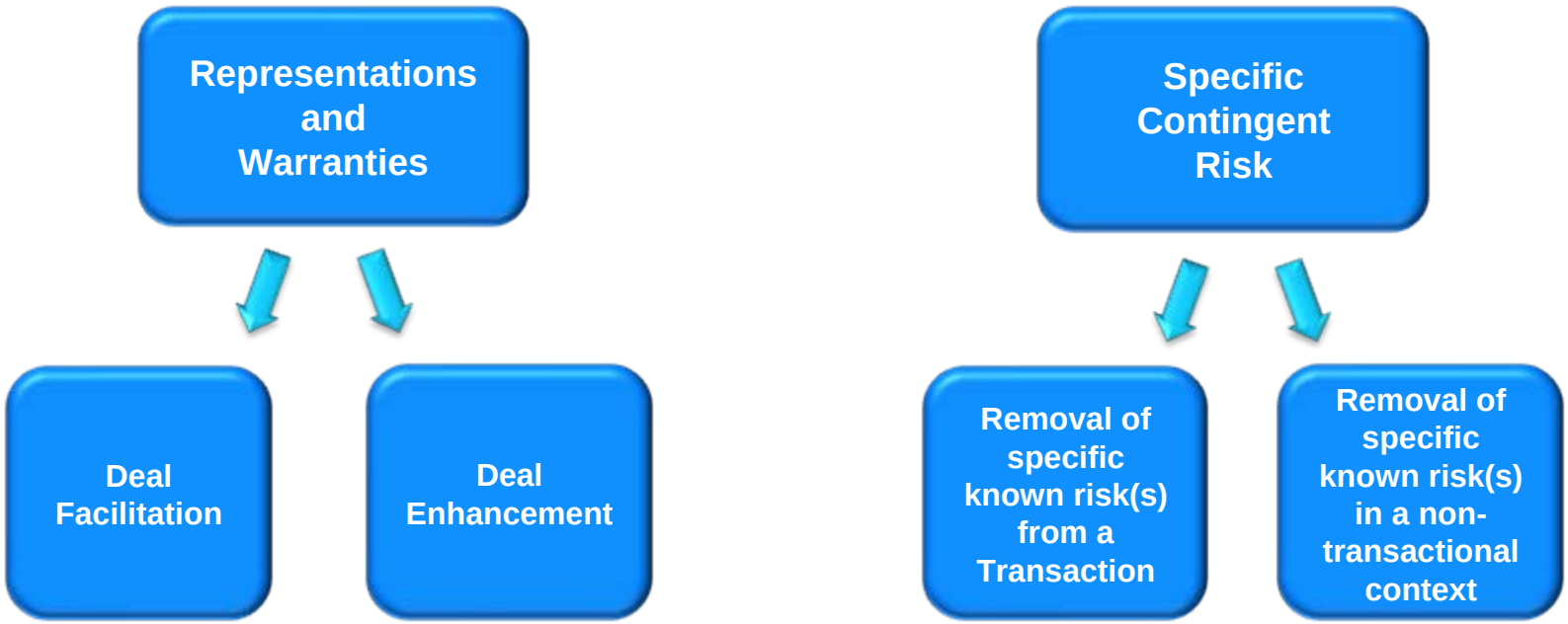
Howden Broking Group

$650 million placed
$4 billion deal value

46 offices
22 countries

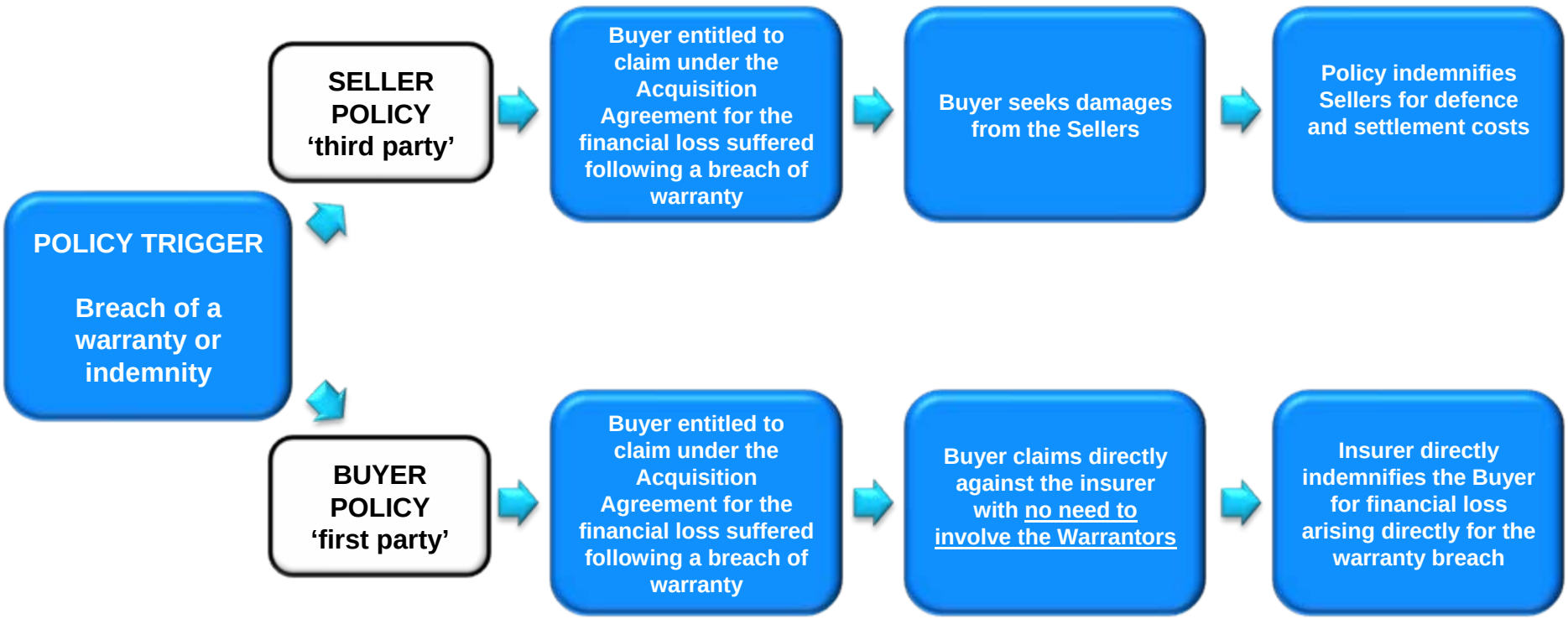
What is Transactional Risk Insurance?

- An umbrella term encompassing **Representations & Warranties Insurance** (W&I) and **Specific Contingent Risk Insurance**:



Representations and Warranties Insurance

- Reps and Warranties policies can be Buy Side or Sell Side:



Evolution of the product

Mid 90s

This insurance developed as a 'sell-side' product. Whilst the idea was right, a limited scope of cover, high premiums and an intrusive process saw limited demand for the product.

Late 2000s – Early 10s

The process of obtaining insurance became non-intrusive as insurers employed corporate lawyers to underwrite the business.
Pricing also fell as competition between insurers strengthened.

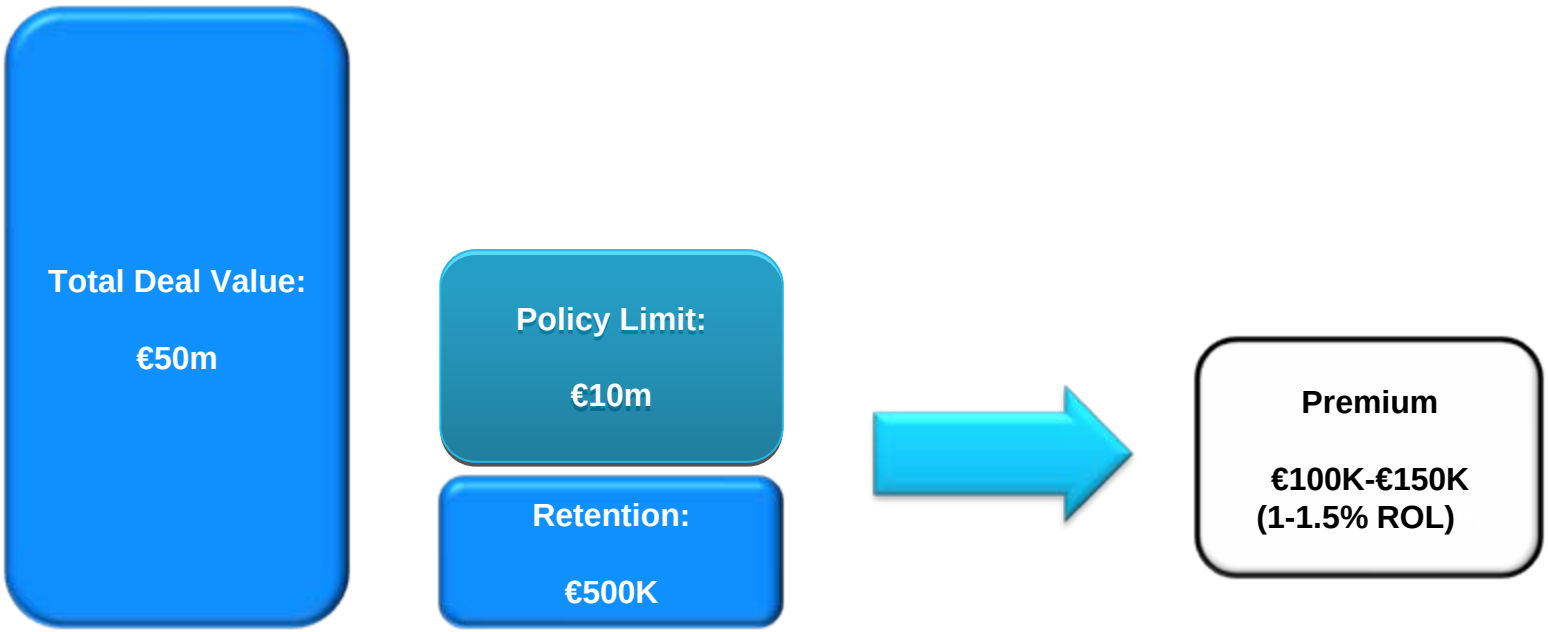
Early-Mid 2000s

The product developed somewhat, with the concept of 'buy-side' policies taking hold. Prices were however still high (circa. 10% of policy limit) and the process still lengthy.

Present Day

Competition has driven prices down to 1-1.5% of policy limit for Western-European deals and 1.5-2% elsewhere.
Insurers are also far more willing to underwrite higher risk transactions.
11 markets now providing pricing. Insurers specializing in certain areas

Costs

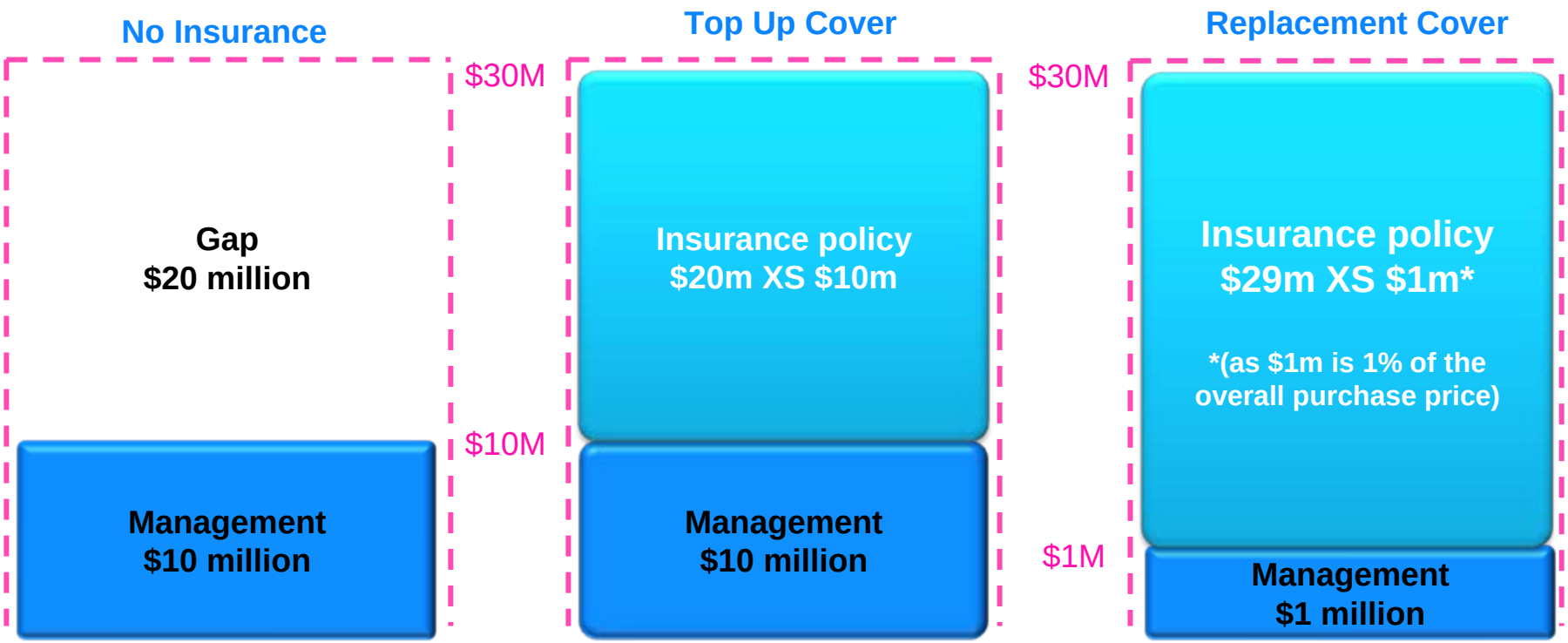

Total Deal Value:
€50m
Policy Limit:
€10m
Retention:
€500K
Premium
€100K-€150K
(1-1.5% ROL)

Example - Management 'Top-up'

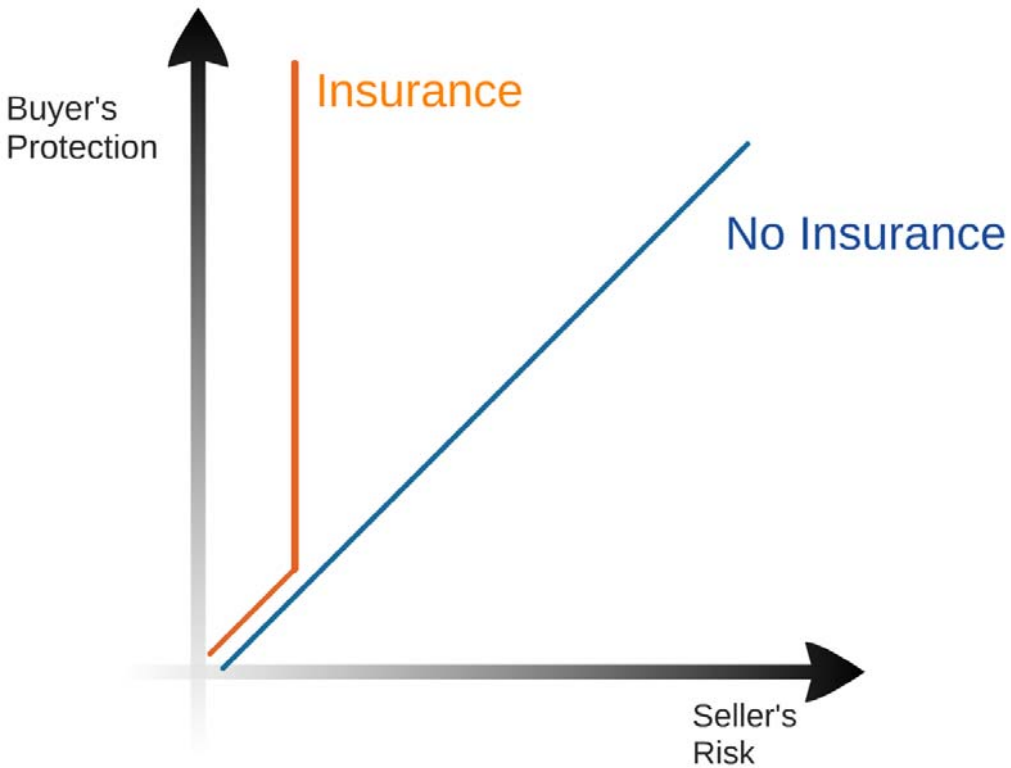
- Purchase Price - $100m
- Buyer demands $30 million warranty cover

- Management Ownership 10% - unwilling to provide more cover than this

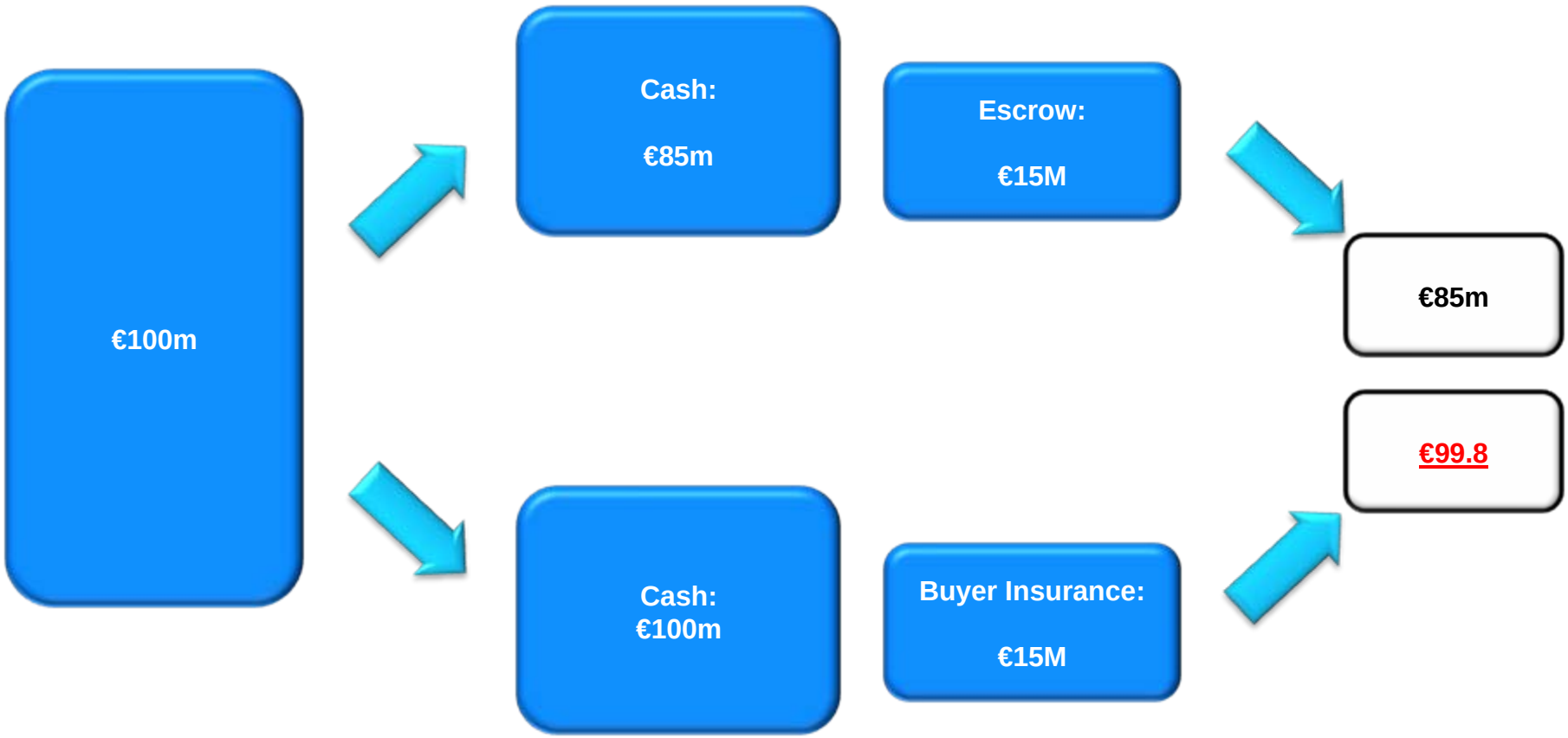
- Management can reduce liability to deductible of policy-1% of purchase price



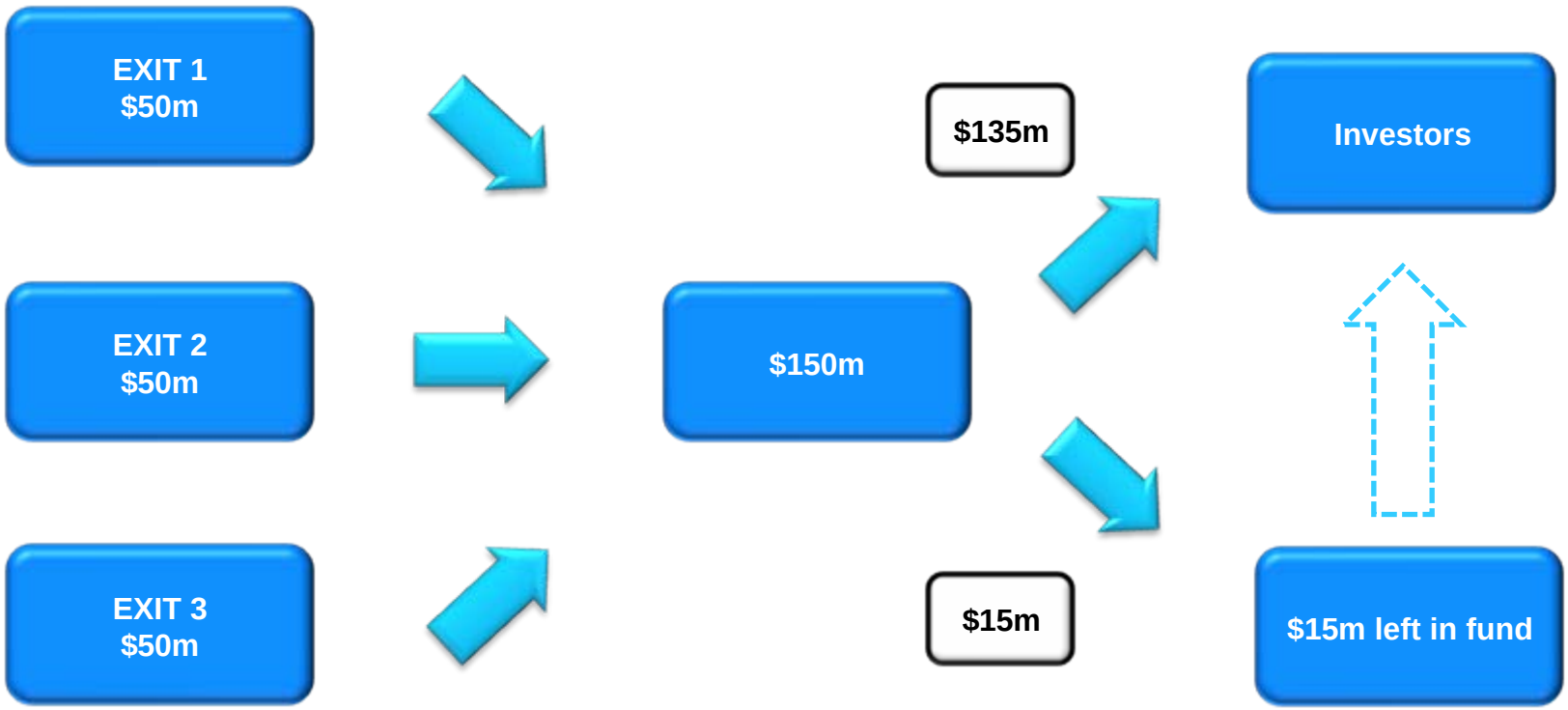
Benefits



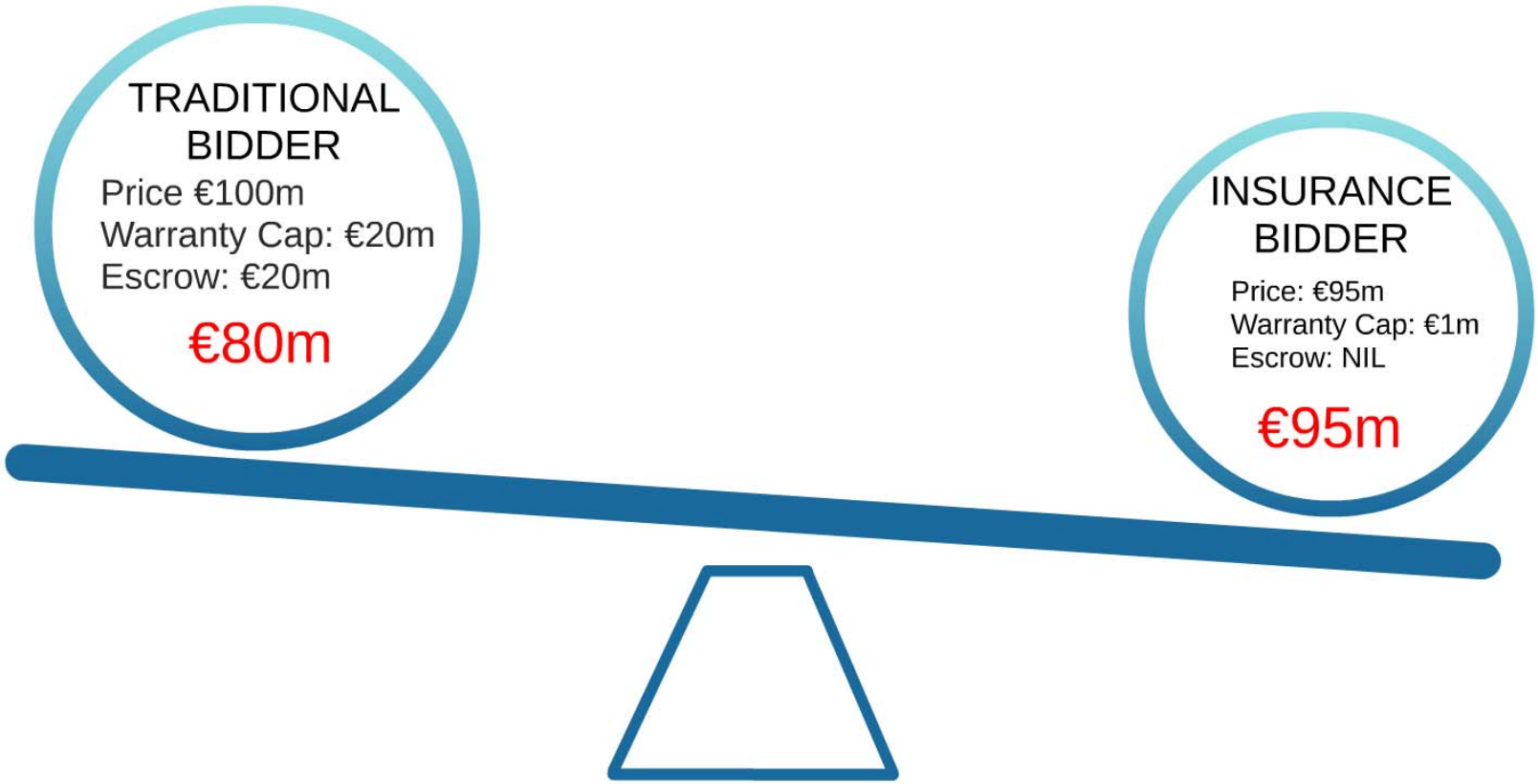
Avoiding Escrow



Wrap-Up


EXIT 1
$50m
EXIT 2
$50m
EXIT 3
$50m
$150m
$135m
$15m
Investors
$15m left in fund

Auction Tool



The Underwriting Process

2 weeks

- Initial approach to Howden with insurance enquiry
- Howden engage insurance market
- Non-binding indications obtained within 48-72 hours
- Client instructs Howden to proceed with preferred insurer
- Preferred insurer conducts due diligence and may engage external counsel
- Conference call between preferred insurer, the client and client's advisors
- Full policy wording issued, negotiated and cover confirmed as being in place

INITIAL SUBMISSION REQUIREMENTS

- Underlying Acquisition Documents
- Information Memorandum
- Available Due Diligence reports

INSURER DUE DILIGENCE – non intrusive

- Access to the data room required for preferred insurer
- Conference call between preferred insurer and the deal team/lawyers to discuss deal specifics
- May engage specialist external counsel where necessary

Representations and Warranties Insurance - Policy Structure

- **Process of placing a policy** – polices can be placed pre or post deal completion;
- **Size of a policy** – generally 10-50% of the enterprise value (EV) but can be up to 100% of EV;
- **Deductible** – ordinarily 1% of the enterprise value;
- **Price** – a one-off premium payment of approximately 1-2% of the policy limit;
- **Period** – matches that of the SPA/APA but can be extended up to 10 years;
- **Scope of cover** – bespoke to each deal; intended to be 'back-to-back' with the SPA/APA;
- **Exclusions** – generally limited to forward-looking warranties and fraudulent behaviour of the insured;
- **Subrogation –** insurers forgo the right subrogate against the Sellers under buy-side policies, except in the case of fraud.

Contact Details

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Lunch & Networking

The next session will promptly begin at 14.30

CHEANG & ARIFF

Malaysia

Ming-Li Tan

advoc

howden

M&A and Due Diligence Practices : "*A Malaysian Perspective*"

Global M&A Conference

27 January 2014

Grange St. Paul's Hotel, London

advoc

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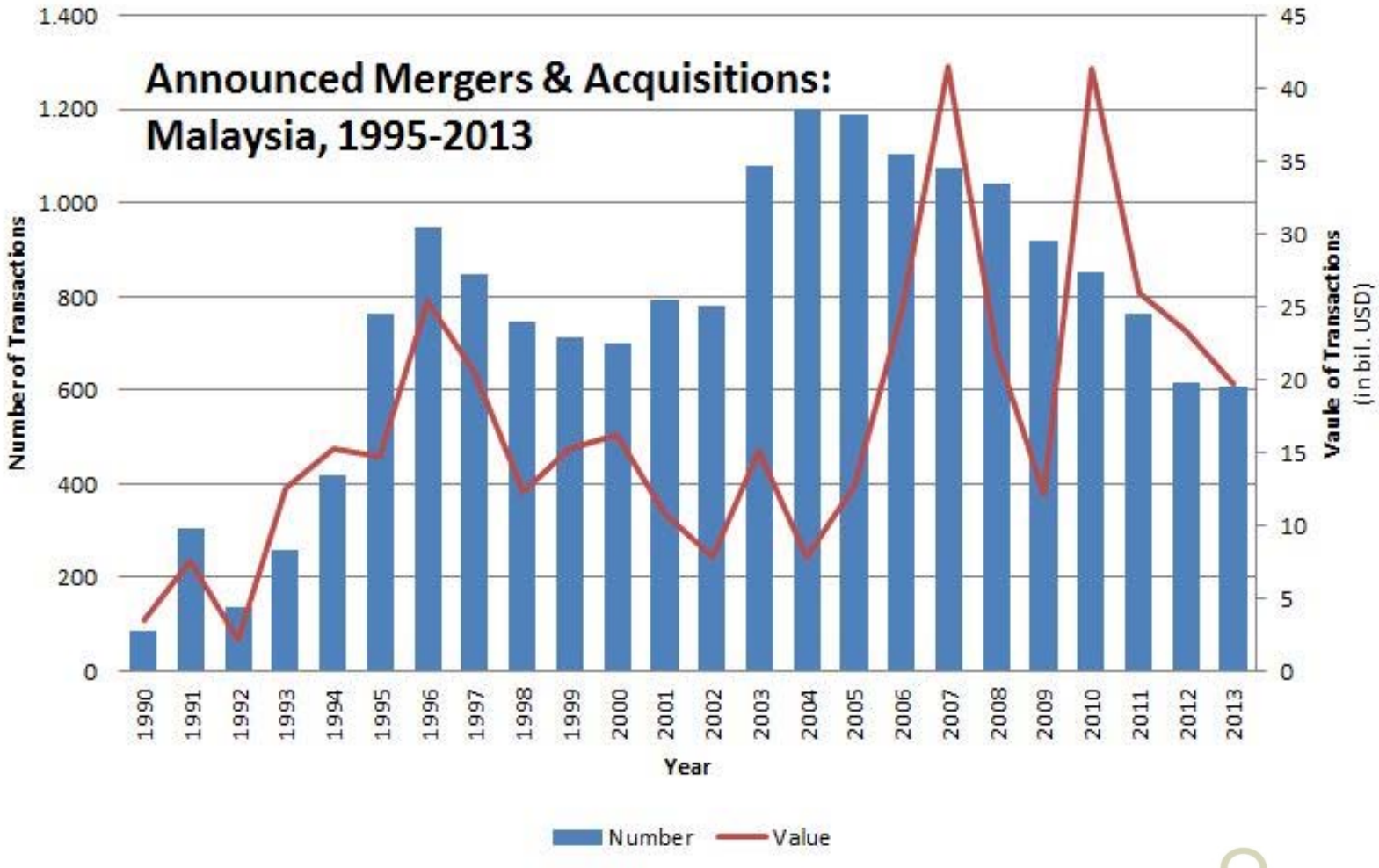
M&As Market Landscape - Malaysia



Source: Institute of Mergers, Acquisitions and Alliances

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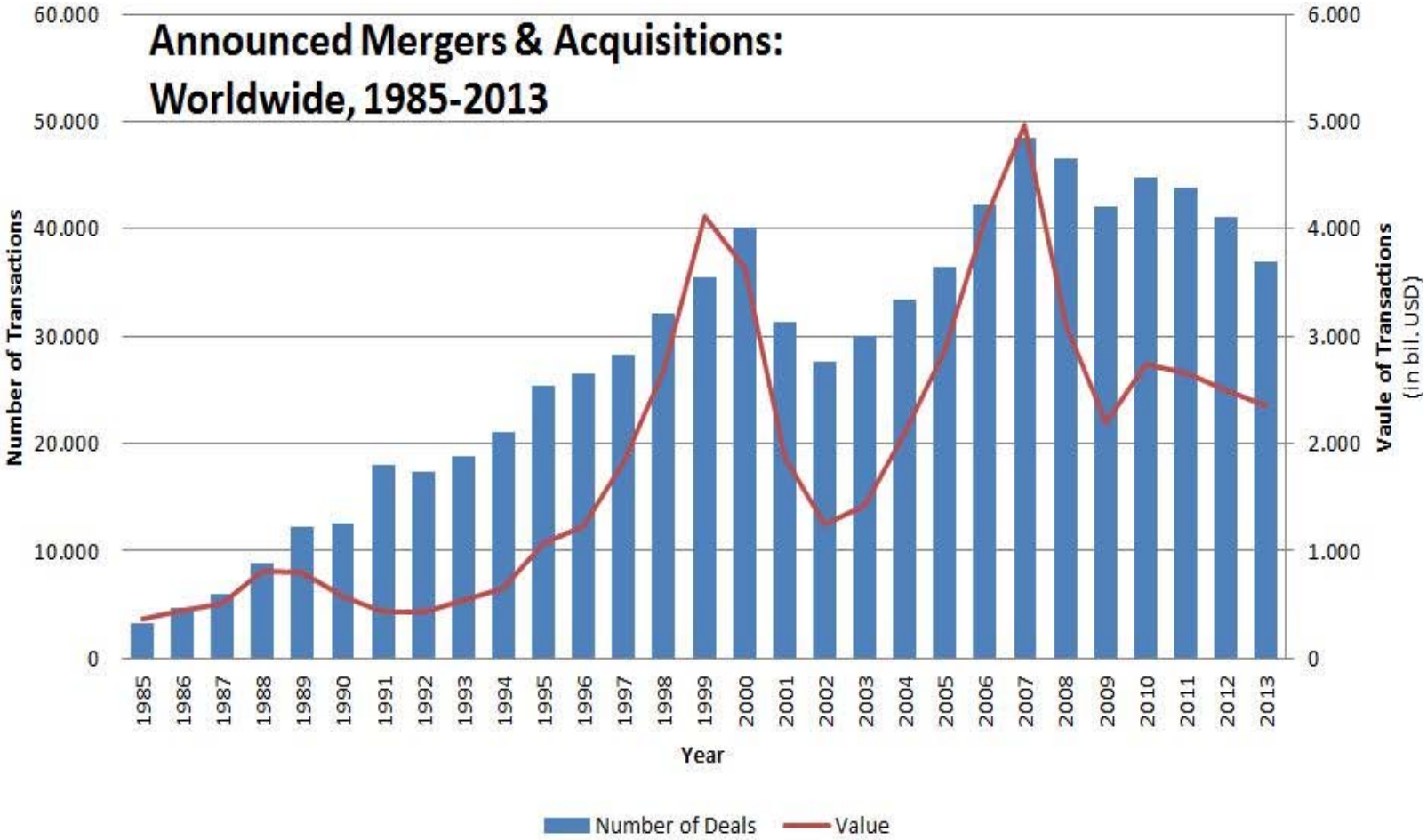
M&As Market Landscape - Worldwide



Source: Institute of Mergers, Acquisitions and Alliances

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M&As Market Landscape

- Downward trend but more or less mirrors worldwide M&A landscape

- Liberalisation of Various Business Sectors in 2009 and more recently in 2012 – opens up the Malaysian market to foreign acquisitions

e.g. Telecommunications, Financial Services sectors

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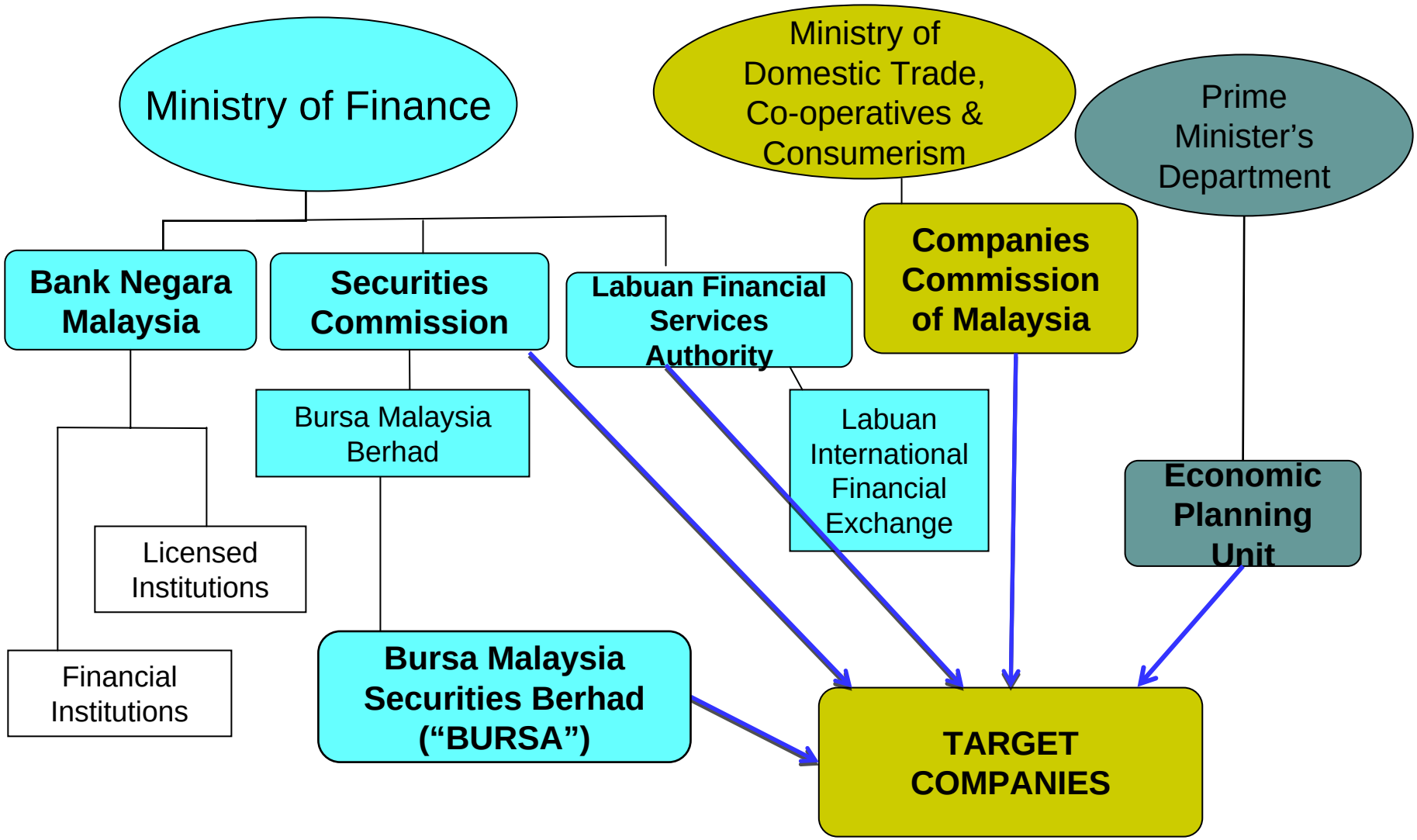
Regulators You Will Encounter



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Common Forms of M&A Methodology in Malaysia

- Selective / Open Tender Process – usually offered through an investment bank
- Direct Negotiations
- Takeovers by way of voluntary or mandatory general offers

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Timing to Complete

- 6 to 12 months from the time seller decides to sell up to the time agreement is signed.
- Expect time to run if:
  - Regulatory and other licensing approvals are required
  - Approval from shareholders of Vendor is required
  - Counterparty is a private entity

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Approval Timeframes

- Bursa approval required to issue Circular to Shareholders. Approval takes 10 to 14 days.
- Circulars must be despatched 14 days prior to shareholders meeting to approve transaction.
- SC approval required for issuance of securities. SC has given a commitment to revert on approvals within a specified timeframe.

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SC Time Charter

Type of Application	SC's committed response time (working days)
Public Offerings and Listings	
Main Market IPOs: Market Capitalisation of < RM500 million	60 days
Large Cap IPOs : Market Capitalisation of ≥ RM500 million ACE Market IPOs	40 days

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SC Time Charter

Type of Application	SC's committed response time (working days)
Acquisitions and Disposals of Assets	
Acquisitions of assets financed by issuance of equity / equity-linked securities	21 days
Acquisitions or disposals of assets resulting in a significant change in the business direction or policy of a listed company	60 days

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SC Time Charter

Type of Application	SC's committed response time (working days)
Secondary listings of foreign corporations	21 days
Issue of Securities by Listed Companies	
Stand Alone Rights Issue	5 days

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SC Time Charter

Type of Application	SC's committed response time (working days)
Issues of securities under general mandate	1 day
Other issues of securities	21 days
Structured Warrants	
Master proposals (base prospectus)	21 days
Specific launch proposals (term sheet)	4 days

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SC Time Charter

Type of Application	SC's committed response time (working days)
Proposals by Distressed Listed Companies	60 days
Transfer Listing	21 days
Private Debt Securities	14 days
Takeovers and Mergers	21 days
Mandatory General Offer Exemptions	1 working day

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How to Prepare for M&A

- **ASSEMBLE TEAM**

- Legal Counsel (local and foreign)
- Reporting Accountants
- Investment Bankers / Advisers
- Company Secretaries
- Tax Advisers and Other Specialist Consultants, where required

Things to look out for…

Reputation / Recommendation from foreign counterparts, Credentials, Experience, Response Time, “Best Fit”

KEY ACTION ITEM :
Execute retention and confidentiality agreements with external professionals

How to Prepare For M&A

Communicating with Malaysian Advisers & Counterparties

In a Malaysian context, bear in mind the cultural and language barriers.

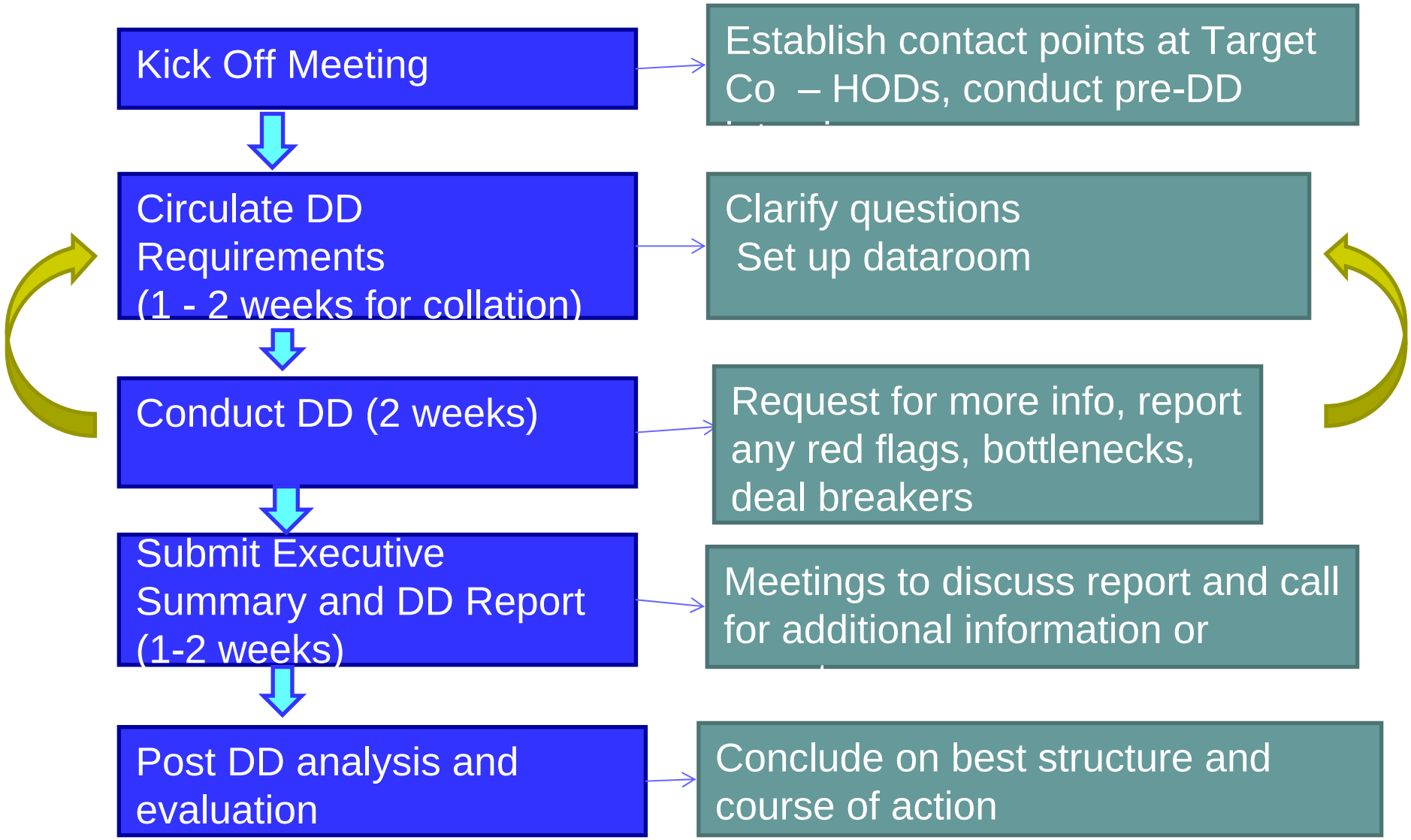
Confirm in writing to avoid miscommunication which is a common cause for delay.

Malaysian corporates may not be as sensitive to timelines as their European / US counterparts

KEY ACTION ITEM :

Bear in mind cultural barriers on target side. Get confirmation in writing where possible.

Typical DD Process



Malaysian M&As Considerations

- Equity Restrictions and Regulatory Compliance

  - Is the target co carrying on business in an area where there are specific equity requirements?
  - What are the conditions attached to licenses critical to the target co?
  - Are approvals required for change in ownership? How long will it take?

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Equity Restrictions

Business Sectors	Restrictions
Manufacturing sector	None
ICT	None
Telecommunication	
Education and Industrial Training Services	None
Energy Related Services	Up to 49% Foreign Equity
Medical and health care services	None
Management consultancy services	Up to 70% Foreign Equity

Equity Restrictions

Businesses Sectors	Restrictions
Banking and financial sector:	
• Investment banks, insurance & takaful companies, existing Islamic banks	Up to 70% foreign equity
• New Islamic banks	Up to 100% foreign equity
• Conventional commercial banks	Up to 30% foreign equity
Oil and Gas:	
• Engineering, architectural and surveying consultancy services	Companies intending to provide engineering and architectural services to PETRONAS must comply the stipulated Bumiputera equity requirements, i.e. either 30%, 51% or 100%.

Malaysian M&As Considerations

- Tax Implications : Analyse Interaction of the Tax Regime in Different Jurisdictions

  - **Which jurisdictions have the most attractive tax treaties with the Malaysian target company?**
  - **How can that be structured to maximise tax benefits?**
  - **Consider Labuan as an option..**

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Malaysian M&As Considerations

- Other Tax Implications

  - Stamp duty is chargeable for a transfer of shares from vendor to purchaser at 0.3% of the value of the shares transferred

  - Note : Subscription of shares – zero stamp duty

  - Real property gains tax is chargeable for disposal of property or a real property company as follows:

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DISPOSAL PERIOD	RPGT Rates		
	Company	Individual (citizen & PR)	Individual (non-citizen)
Disposed within 3 years	**30%**	30%	30%
Disposed in the 4th year	**20%**	20%	30%
Disposed in the 5th year	**15%**	15%	30%
Disposed in the 6th and subsequent years	**5%**	0%	5%

Malaysian M&As Considerations

- Repatriation of Funds

- There is no approval required from BNM for non-residents to remit out divestment proceeds, profits, dividends or any income arising from investments in Malaysia. Repatriation, however, must be made in foreign currency.
- There is however, a requirement to notify BNM of the repatriation and the reason for such repatriation.

Malaysian M&As Considerations

Investment in Malaysia

- Non-residents are free to invest in any form of ringgit assets either as direct or portfolio investments.

Borrowings in Malaysia

- Non-residents are free to borrow foreign currency from Malaysian banks.

Malaysian M&As Considerations

- Restrictions on DD : Insider Trading Provisions

- Any due diligence prior to acquisition could be deemed to be an “insider trading activity”.
- S 188 of CMSA states that an insider is a person who possesses “information not generally available which on becoming generally available” could “have a material effect on price or value of securities”
- So any due diligence carried out has to be done carefully to avoid contravening this provision.

Penalty : Imprisonment of up to 10 years and not less than RM1 Million fine or both

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Malaysian M&As Considerations

- Title to Property
- Checks need to be conducted at the land registries to confirm the ownership of real property by target.
- Recent incidences of forged titles.
- Check to ensure that all buildings have been issued certificates of completion issued to avoid problem of illegal structures.

Malaysian M&As Considerations

- Labour Laws

  The DD must set out and advise on :

  - What are the labour law requirements when there is a change in shareholders?
  - What is the impact of staff retrenchment on your post acquisition cost?

    Retrenchment benefits are 10 – 20 days for each year of employment
  - What is the compulsory retirement age?
    - In Malaysia it is 60.

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Malaysian M&As Considerations

- Intellectual Property Rights
  - Does the target company own the IP Rights?
  - Are the IP Rights properly registered or documented?
  - Have the development costs been properly booked in?
  - Malaysian laws on intellectual property rights are well developed but there is a lack of awareness of the importance of IP protection due to inadequate enforcement

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Malaysian M&As Considerations

- Dispute Resolution

- Court process – adversarial system based on case law and precedents.

  Pros : UK and Australian case law highly persuasive in Malaysia. Court proceedings can be conducted in English

  Cons : Process can be lengthy and may drag

  However, now much faster than before – increase no of cases being settled through mediation by the judges

- Arbitration process – Common form of alternative dispute resolution. Again, can be a lengthy process

Conclusion : Court process still preferred arbitration in a separate neutral jurisdiction an option

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Country Specific Risks

- Main Cultural Risks

  - Delay in approvals – bottleneck at the authorities' level
  - Delay in due diligence due to communication problems or incomplete paper trails
  - Delays in completing due to slow rectification of issues

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Country Specific Risks

- Main Legal Risks

Pay particular attention to these issues:

- Foreign ownership restrictions
- Regulatory approvals and licensing
- Labour laws
- Intellectual Property matters
- Title to Property
- Financial reporting requirements differ

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Conclusion

- Malaysia is an excellent inroad into S.E.A and North Asia
- Lots of incentives for in-bound M&A
- Crucial to have strong local legal, financial and business teams that work well together

  - On ground knowledge of local counsel and strong network with stakeholders key to ensuring a speedy and successful venture

CHEANG & ARIFF

THANK YOU

TAN MING-LI

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www.cheangariff.com

Brief Introduction to Labuan

Located near the north-west coast of Borneo, approximately 123km from the Sabah state capital, Kota Kinabalu

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Labuan on the Map

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Labuan Financial Park

Labuan International Business & Financial Centre (Labuan IBFC)

- Labuan IBFC was established in 1990 and envisioned to become an international financial centre
- To provide development of business and financial activities:
  - Banking ;
  - Insurance;
  - Trusts;
  - Public and Private Funds;
  - Fund Management;
  - Investment Holding; etc.
- Supervised by the Labuan Financial Services Authority (Labuan FSA)
- Separate and specific Labuan legislation

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Labuan FSA

- A one-stop statutory supervisory authority established in 1996 to regulate and supervise the industry in Labuan

- Administer and enforce Labuan financial services legislation

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Summary of Labuan Legislation

Acts	Scope of Act
Labuan Companies Act	Incorporation, registration and administration of Labuan and foreign Labuan companies in Labuan
Labuan Business Activity Tax Act 1990 (“LBATA”)	Imposition, assessment and collection of tax on a Labuan business activity carried on by a Labuan entity in or from Labuan
Labuan Trusts Act 1996 (“LTA”)	Creation and recognition of Labuan trusts including a Labuan Purpose Trust, Charitable Trust & Special Trust
Labuan Financial Services and Securities Act 2010 (“LFSA”)	Licensing and regulation of financial services and securities in Labuan
Labuan Islamic Financial Services and Securities Act 2010 (“LIFSA”)	Shariah governance and licensing requirements for Islamic banking, insurance (i.e. *takaful* and *retakaful* activities), Islamic trusts and foundations.

Summary of Labuan Legislation (cont'd)

Acts	Scope of Act
Labuan Limited Partnerships & Limited Liability Partnerships Act 2010 ("LLLP")	Establishment, regulation and dissolution of Labuan limited partnerships and limited liability partnerships Conversion of Labuan limited partnership to Labuan limited liability partnership
Labuan Foundations Act 2010 ("LFA")	Establishment, regulation and dissolution of foundations in Labuan

Note: Common law principles also applies

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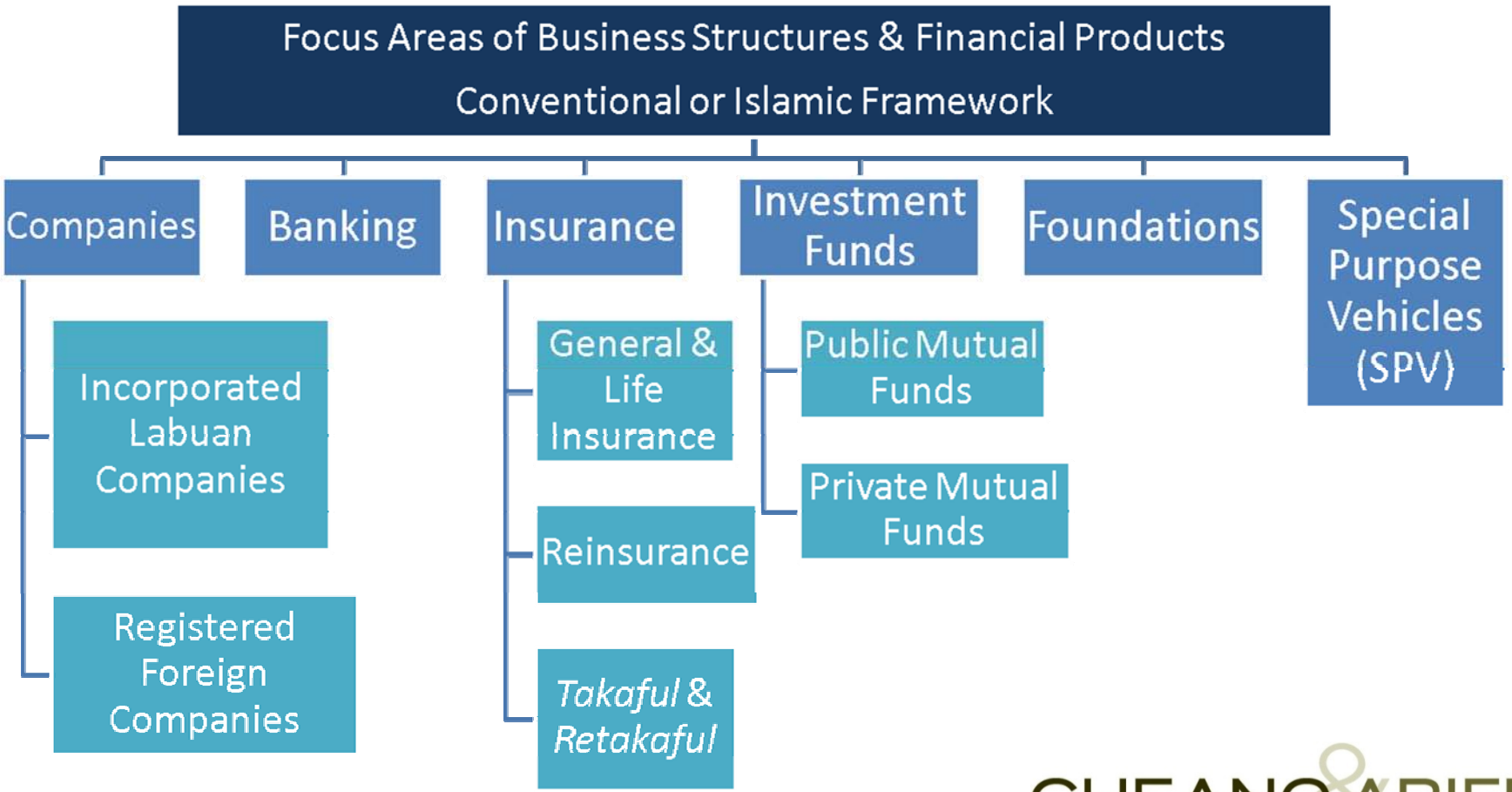
Key Focus Areas of Business Structures & Financial Products in Labuan



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Labuan Taxation System

Labuan entities may elect to be taxed under:

i. Labuan Business Activity Tax Act 1990 ("**LBATA**")
ii. Malaysian Income Tax Act 1967 ("**ITA**")

Tax Treatment under LBATA

- 3% of net profits reflected in audited accounts for the year of assessment (Section 4(1) LBATA); or
- Elect within 3 months from the commencement of the year of assessment to be taxed RM20,000.00 (equivalent to approximately £3,600.00) for that year of assessment (Section 7(1) LBATA). No need for filing of audited accounts.

Tax Treatment under ITA (Section 3A LBATA)

- Facilitate international tax situations where the Labuan entity prefers to be taxed under ITA
- Irrevocable election
- Advance ruling provisions available to Malaysia resident companies under ITA would also be available to Labuan entities under LBATA

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Summary of Tax Treatments

Description	Tax Treatment
Labuan Non-Trading Activity This includes holding of investments in securities, stock, shares, loans deposits or any other properties by a Labuan entity on its own behalf	Not subject to tax
Labuan Trading Activity This includes banking, insurance, trading, management, shipping operations, licensing or any other activity which is not a Labuan non-trading activity	3% of net profits per audited accounts; or RM20,000.00 upon election
Entities carrying out Both Labuan Trading and Non-trading activities will be deemed to be Labuan Trading Activity	3% of net profits per audited accounts; or RM20,000.00 upon election
Non-Labuan Business Activities	Tax under ITA (i.e. corporate tax at 25% as at year of assessment of 2011)

Benefits

- No stamp duty or indirect tax
- 50% tax exemption on foreign staff in managerial positions
- No tax on foreign director fee
- No capital gain tax
- No estate or inheritance tax
- Access to Malaysia's Extensive Double Tax Agreements
- No tax imposed for Labuan non-trading companies
- No foreign exchange control rules
- No foreign ownership limitations
- Strategically located in Asia Pacific
- Common time zone with major Asian cities

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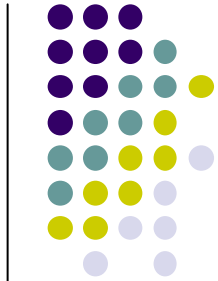
Malaysia's Double Taxation Agreements (DTA)



- Malaysia's DTAs currently in force in 72 countries (Source: Official Website of the Inland Revenue Board of Malaysia http://www.hasil.gov.my/goindex.php?lgv=2&chg=1)

- If Labuan entities elect to be taxed under the ITA instead of the LBATA, it MAY facilitate access to benefits under some of Malaysia's DTAs

- Some of Malaysia's DTAs specifically **exclude** Labuan entities from the relief of double taxation (e.g. UK, Luxembourg, Sweden, Netherlands, Japan, Australia, South Africa, Spain, Indonesia)

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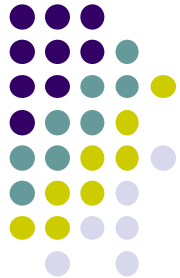
List of Malaysia's DTAs Currently in Force

Europe	Sweden, Denmark, Norway, United Kingdom, Belgium, France, Switzerland, Germany, Poland, Romania, Italy, Finland, Russia, Netherlands, Hungary, Austria, Albania, Malta, Czech Republic, Ireland, Croatia, Luxembourg, Spain, San Marino
Asia	Singapore, Japan, Sri Lanka, India, Thailand, South Korea, Philippines, Bangladesh, Pakistan, China, Indonesia, Iran, Sudan, Turkey, Jordan, Mongolia, Vietnam, United Arab Emirates, Kuwait, Egypt, Uzbekistan, Kyrgyzstan, Myanmar, Bahrain, Saudi Arabia, Morocco, Lebanon, Hong Kong, Mongolia, Brunei, Syria, Kazakhstan, Turkmenistan, Qatar, Laos
Oceania	Australia, New Zealand, Papua New Guinea, Fiji
America	United States of America, Canada, Argentina, Chile, Venezuela
Africa	Mauritius, Zimbabwe, Namibia, South Africa

Labuan Companies



- A Labuan Company may be limited by shares, limited by guarantee or unlimited.

- Formation of Labuan companies through:

i. Incorporation of a Labuan company under the LCA; or

ii. Registration of a foreign company incorporated outside Malaysia as a foreign Labuan Company

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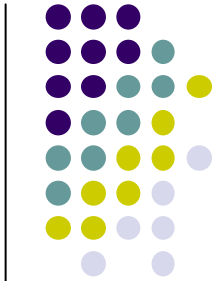
Examples of Labuan Company Structures



Holding Companies

- Tax position enshrined in LBATA;
- Investment income arising from a **Labuan non-trading activity** - not subject to tax under LBATA;
- Income arising from a **Labuan trading activity** – 3% of net audited profit or a fixed rate of RM20,000.00;
- No capital gains tax;
- Payment of dividends, interest, service fees and royalties by the Labuan Holding Company to non-residents exempted from Malaysian withholding tax if a DTA is signed and not specifically excluded.

Trading Companies

- Labuan is strategically located in the Asia Pacific region;
- Share a common time zone with many major Asian cities;
- Member of the ASEAN Free Trade Area (AFTA) trade bloc;
- Permanent Establishment Article in DTAs – allow companies to mitigate risk of creating a taxable business presence in other countries.

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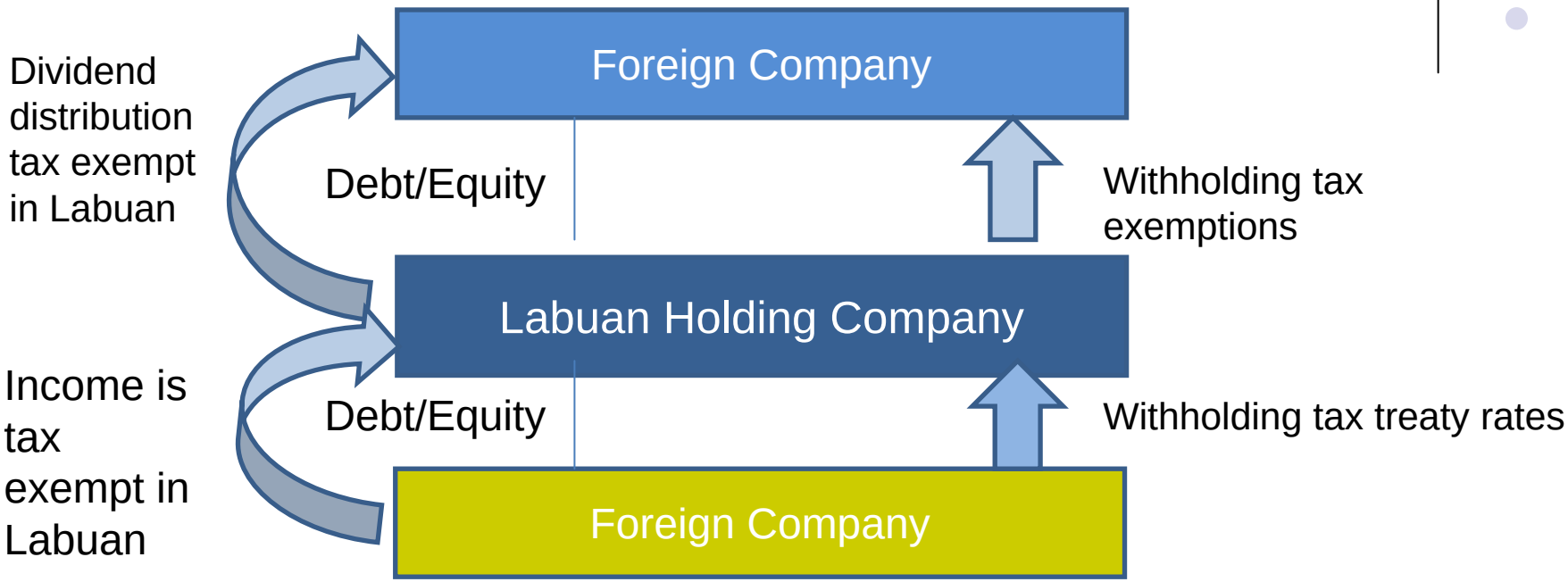
Holding Companies



Tax Profile:

- Income from investments is not subject to tax in Labuan;
- Able to enjoy certain tax exemptions (e.g. no withholding tax on dividends/interest/royalty payments from Labuan Holding Company to Foreign Company);
- No exchange control in Labuan;
- No stamp duties on instruments executed by Labuan Holding Company;
- Access to benefits under Malaysia's DTAs

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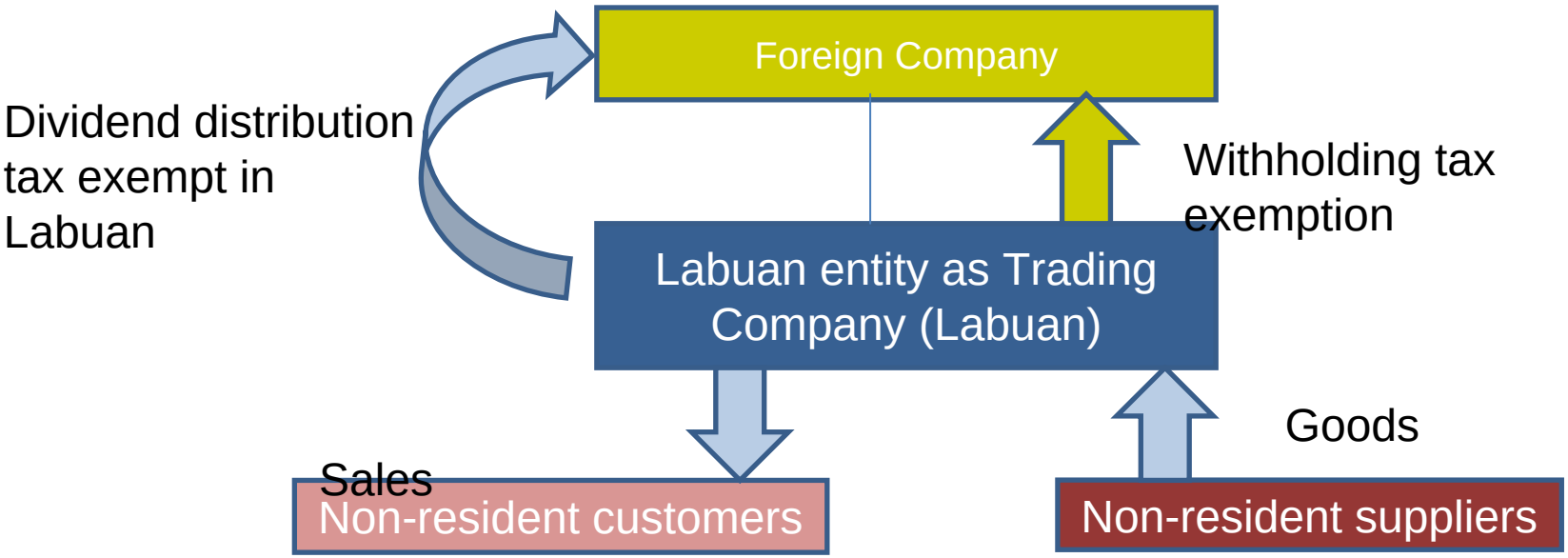
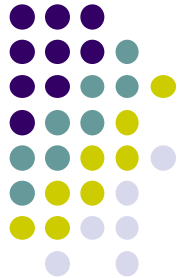
Trading Companies



Tax Profile:

- Labuan entity can enjoy minimum tax under the LBATA (i.e. 3% of nett audited profit or RM20,000.00);
- Able to enjoy certain tax exemptions (e.g. no withholding tax on dividends/interest/royalty payments from Labuan entity to Foreign Company);
- No exchange control in Labuan;
- Access to benefits under Malaysia's DTAs, in particular Permanent Establishment Protection

Labuan Companies Operating in Malaysia

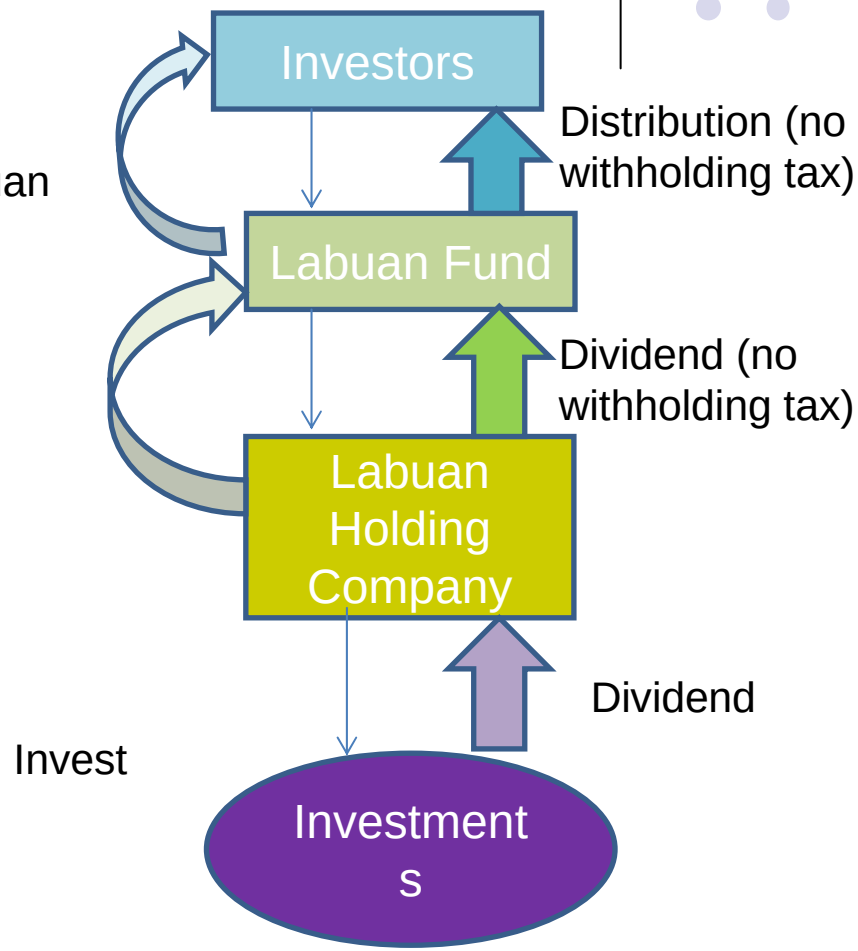


- Can apply to Labuan FSA to set up marketing offices in Kuala Lumpur or Johor Bahru
- Marketing offices can carry out marketing activities without tainting the Labuan company's business activity status
- A Labuan holding company can apply to Labuan FSA to co-locate its operational & management office in Kuala Lumpur to facilitate its business – subject to making an irrevocable election to be taxed under ITA instead of LBATA
- The co-located office is allowed to provide management services (e.g. administrative, human resource, accounting, etc.), management of surplus funds and provision of credit facilities, trading and invoicing

Investment Funds

Tax Profile:

- The Labuan Fund and Labuan Holding Company can enjoy minimum tax under the LBATA;
- No withholding tax on distributions from Labuan Fund to Investors;
- No withholding tax on dividends/interest/royalty payments from Labuan Holding Company to Labuan Fund;
- Liberal exchange control environment in Labuan;
- Access to benefits under Malaysia's DTAs



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Why Labuan

- Summary on tax benefits:
- ✓ Tax rate of 3% or a flat rate of RM20,000.00 for Labuan companies carrying on a trading activity;
- ✓ No tax for non-trading companies, no capital gain tax
- ✓ Access to Malaysia's DTAs

- Legal Infrastructure
- ✓ Highly developed legal infrastructure
- ✓ 4 new legislations passed in 2010 to protect business interests & assets

- Strategic location and optimal time zone
- English is the main business language
- Established business structure including technology, skilled workforce & resources
- One-stop centre for banking, leasing, ship registration & insurance services
- Internationally accepted standard of practices, overseen by professional bodies (IMF, World Bank and Organization for Economic Co-operation & Development)

Why Labuan

- Flexibility for Labuan Holding Companies to conduct business in designated areas of Malaysia
- Dealings between Malaysians and Labuan Holding Companies are permitted
- Labuan companies may carry out lawful business in Malaysia in, from or through Labuan
- Situated close to financial centres (i.e. Tokyo, Hong Kong, China, Indonesia, Brunei, Philippines, Australia and New Zealand)
- Strong economy
- Multilingual professional workforce
- Relatively low operational costs

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Sun, Sea & Beach of Labuan


ANY
QUESTIONS
?

CHEANG & ARIFF

Thank You

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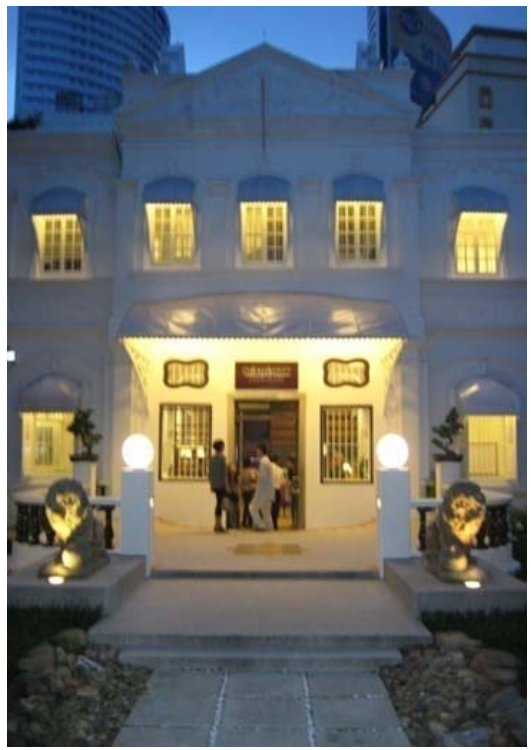

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GOVERNING LAW – *NOT ALWAYS OBVIOUS*

DATO' JUDE P. BENNY, PBM

SENIOR PARTNER

JOSEPH TAN JUDE BENNY LLP

CONTENTS

- Choice of Law / Jurisdiction Clauses

- Foreign law

- Key elements in thought process
  - Reliability of dispute resolution process
  - Enforcement mechanism
  - Costs

CHOICE OF LAW / JURISDICTION CLAUSES

- Selection of applicable forum/fora
  - Which country / countries?

- Selection of dispute resolution mechanism
  - Arbitration / Litigation / Mediation

- Selection of applicable law / rules for dispute resolution
  - Substantive law governing the agreement
  - Rules to govern dispute resolution process

CHOICE OF LAW / JURISDICTION CLAUSES

- Choice of law and place for dispute resolution need not be the same:
  - English law / Singapore arbitration
  - Singapore law / Hong Kong arbitration
  - English law / subject to the Courts of Singapore
  - Myanmar law / Singapore arbitration

CHOICE OF LAW / JURISDICTION CLAUSES

- Sample choice of law clause:

  - This contract and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability shall be governed by and construed in accordance with English law.

CHOICE OF LAW / JURISDICTION CLAUSES

- Sample jurisdiction clause (litigation):

  - The courts of Singapore have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement. The parties to this agreement agree that the courts of Singapore are the most appropriate and convenient courts to settle disputes and accordingly no party will argue to the contrary.

CHOICE OF LAW / JURISDICTION CLAUSES

- Sample jurisdiction clause (arbitration):

  - Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The Tribunal shall consist of [*] arbitrator(s) and the language of the arbitration shall be English.

FOREIGN LAW

- Foreign law is a matter of evidence
  - Adduced by "experts"
  - Decided on a balance of probabilities

KEY ELEMENTS IN THOUGHT PROCESS – RELIABILITY

- Corruption, inexperience, time frame
- E.gs. Indonesia, India, Myanmar, Thailand

KEY ELEMENTS IN THOUGHT PROCESS - ENFORCEMENT

- Judgments
  - Reciprocal Enforcement of Foreign Judgments Act (only Hong Kong)
  - Reciprocal Enforcement of Commonwealth Judgments Act (Commonwealth judgments)

- Arbitration awards
  - New York Convention

- Practical considerations: too little too late?

KEY ELEMENTS IN THOUGHT PROCESS – COSTS

- A relevant factor for consideration
- Recoverability

Dato' Jude P. Benny, PBM.

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McKASSONKLEIN

USA

John McKasson

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Global M&A Conference

London, Monday, January 27th

the international network of independent law firms

Issues Unique to Cross-Border Transactions Involving the United States of America

JOHN MCKASSON, PARTNER

MCKASSON & KLEIN, LLP

Los Angeles, California, USA

McKASSONKLEIN

JOHN MCKASSON

International and Local M&A and Corporate Lawyer

25 Years of Experience Representing Clients in the U.S., Europe, Asia and South America

Boutique Firm with an International Perspective Focusing on Corporate Transactions, Litigation, Shipping, Import / Export Law, and Employment

Expert Testimony on U.S. and California Law in Foreign Proceedings

USA's Cross-Border Track Record

2011

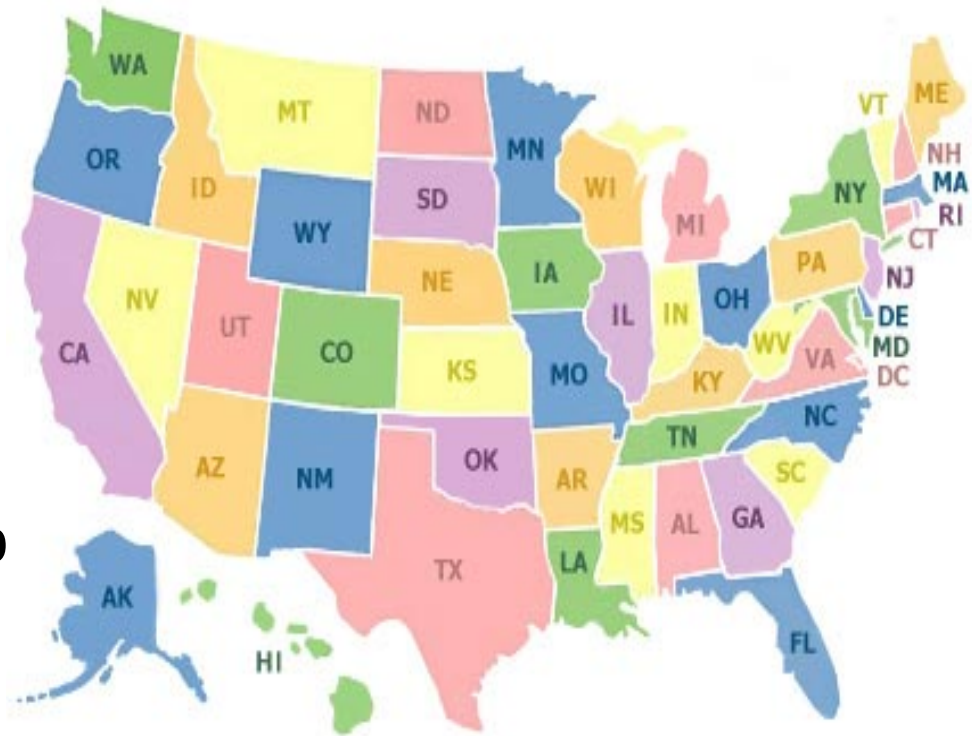
- $134 Billion Cross-Border Purchases by U.S. Companies
- $130 Billion Cross-Border Sales of U.S. Entities

State Selection

Not all 50 states are equal:

✓Top 10 states represent 65% of U.S. GDP and top 15 states represent 77%.

✓State-specific laws and regulations differ from state to state.



Assets vs. Stock

Analysis Does Not End at Evaluating Liability Exposure and Taxes

Who Takes the Liability?

- No one rule fits every transaction
- Large institutional buyers/sellers
- Medium to small companies

U.S. Rico and Foreign Corrupt Practices Act

Bribery Involving the U.S. (inside or outside U.S.)

Penalties & Forfeiture of U.S. AND Foreign Assets

Unique Due Diligence

#1 Non-Business Factor Affecting a Successful U.S. Acquisition: Securing Key Management and Customer Base

The Obstacle

- Non-Compete, Non-Solicitation
- Employment for Set Term

Mitigating Strategy

- Trade Secrets & Confidential Information
- Financial Incentive to Stay
- Employee Incentives
- Minority Stake

Cross-Border Transactions

ARGENTINA / AUSTRALIA / BELGIUM / BRAZIL / CANADA / CAYMAN ISLANDS / CHILE / CHINA
DENMARK / DUBAI / FRANCE / GERMANY / GREECE / HONDURAS / INDIA / IRELAND / ITALY / JAPAN
MALTA / MEXICO / NEW ZEALAND / PANAMA / NETHERLANDS / PAPA NEW GUINEA / SINGAPORE / SLOVENIA
SOUTH AFRICA / SOUTH KOREA / SWITZERLAND / TAIWAN / THAILAND / TURKEY / UNITED KINGDOM

Tea Break & Networking

The next session will promptly begin at 16.30

England

Simon Rous

ashfords

Global M&A Conference

England

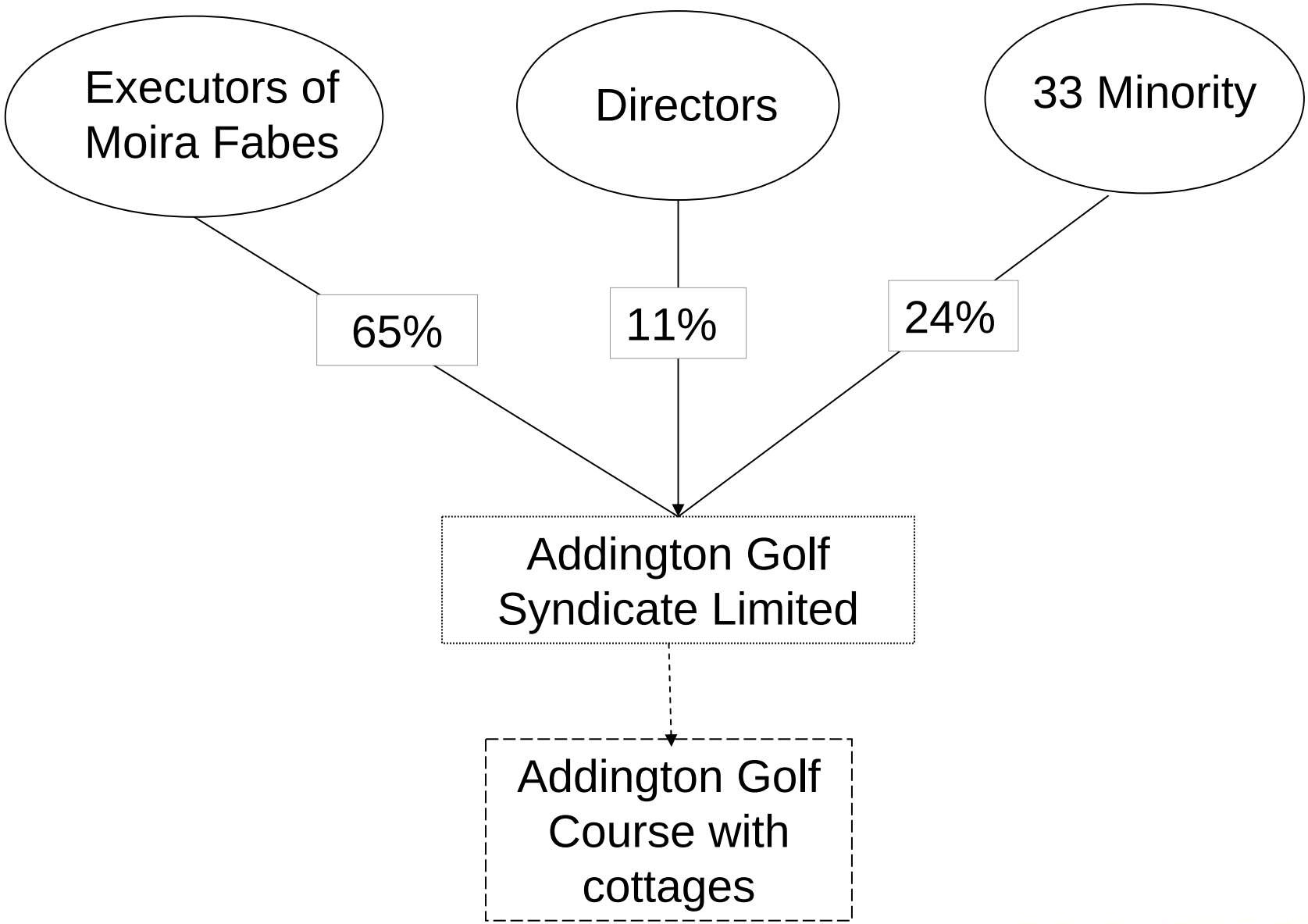
Simon Rous

Story Time

- All true – public domain - steps of M&A
- Rich Spinster
- Haughty Directors - Widows & Orphans
- Literature
- Royalty
- Show Biz
- Ruthless football promoter
- Golf course

The Story Begins

- Moira Fabes - unsound mind
- Court of Protection - Niece Will
- Executors
  - Niece & Husband
  - Accountant
  - Wiley Solicitor
- A year later MF died
- Portfolio - properties - main asset


Executors of Moira Fabes
Directors
33 Minority
65%
11%
24%
Addington Golf Syndicate Limited
Addington Golf Course with cottages

Immediate issues

- Comfortable life disrupted
- Directors claim pre-emption
- Ethos “golf as usual”
- Executors duty to beneficiaries
- Refuse to register
- Articles – majority - absolute
- 4 Executors directors & shares transferred
- Not takeover - Impact on business

Members Bid

- Probate granted
- Members bid **£70** “what Moira would have wanted”
- “Wishes” unless in will
- Obliged reject – establish market price
- Can bid again
- Gin and Tonics in Club House

Executors Quandary

- Assets or shares?
- No Merger control or Competition but FSA/FISMA
- 65% with uncooperative Board
- No ordinary vendor
- Directors obstructive - information for DD
- A robust buyer - Impact on price
- Price guides £288
- Directors stark choice

Choosing Agents

- Fees – International reach etc
- Dilemma property agents or CFAs
- Majority shares vs. Golf course
- Engagement 1% up to £288 + 1.5% anything over
- Delayed appointment till secure minority
- Meanwhile
- Informal marketing
- NDA and IM
- Virtual Data Room – standard enquiries

Offer to Directors & Minority

- Not less than £288 per share (4 x Members bid)
- Max 10% escrow costs & warranties
- 6 months lock in - transfers & certificates
- Disclaim duty of care
- If 90% Executors will only sell on Offer to all
- If < 90% then Executors free to sell independently
- FSMA - Circular by authorised person – another cost

Commitments & Marketing

- 98% commit - can sell at last – But how?
- IM (in data room) not prospectus - less than 100
- FSMA exempt - transfer control of company
- Agents glossy flyer – pointing to Data Room
- RN offer “subject to contract” – 4 week exclusivity
- 4 weeks precluded **selling** – continued to market
- Meanwhile Subs quarterly - salary & rent reviews
- All disclosed through VDR

Selecting the Buyer

- Agents Report - 100 press releases, 375 Brochures – 28 NDAs, IMs & Data Room – 5 offers
- Recommended RN offer
- In line with our procedure – gets it
- Agreed no warranties or retentions
- RN well funded
- 1 higher offer Agents bad experience & not in line
- Executors duty fulfilled
- Why even hesitate?

Ron Noades
(June 1937 – December 2013)

- Owner Crystal Palace FC
- MG recruitment business £20m - enthusiast
- 1998 RN sold Crystal Palace to MG £23.8m
- But Selhurst Park Stadium! - *Caveat emptor*
- Recruited Terry Venables £750K
- Financial backers withdrew - star players
- Crystal Palace called in Administrators
- MG declared bankrupt - Long spoon

Closing

- RN lawyers DD – easy
- General Offer to all £323 - compare £288 (& £70)
- Cash on acceptance - no warranties or retentions
- Acceptance authorises Execs deliver certificates
- And Buyer pay to Executors seller's share of costs
- Executors & Directors accepted, got cash and resigned
- The rest followed days later
- 2% compulsory purchased

Result

- **Timing:**
  - 98% – October (Probate) – April 98% (winter)
  - Market in May - Closed 4th August (3 months)
- **Price:** Market tested – 13% > preliminary market
- **Consideration:** Cash not e.g. Buyer shares
- **Clean Break**: No warranties, indemnities or RCs
- **Costs**: 4% (agents, Excs, Broker etc) shared by sellers

Quiz

Which bunker did PG Wodehouse give as his forwarding address?

Answers on a business card in the bowl

Bottle of Moët & Chandon for 1st successful answer drawn

Question & Answers Session

Networking Drinks Reception

In the Atrium

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