



## Purchase and Sale Agreements

By  
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# Purchase and Sale Agreements

**10th Negotiating and Drafting  
Major Business Agreements Conference**

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# Overview

- Background
  - reasons for the transaction
  - threshold structure issues
- The Agreement
  - essential terms
- Summary

# Background

- Motivation of Buyers/Sellers
  - *Seller*:
    - time to “cash out”
      - lack of successor
      - liquidity event
    - future growth prospects difficult w/o capital
    - change in business or regulatory environment
    - survival

# Background

- Motivation of Buyers/Sellers
  - *Buyer.*
    - strategic expansion opportunities
    - geographic expansion opportunities
    - “eat or be eaten”
    - capacity issues
    - opportunistic buys

# Background

- Threshold Issues
  - Structure
    - assets vs. shares
    - other combination structures
  - Approval hurdles
  - Deal risk

# Background

- Threshold Issues
  - Structure
    - tax driven
      - transaction proceeds
      - use of losses in target
    - target liability concerns
    - shareholder issues
    - jurisdiction (cross-border or domestic)

# Background

- Threshold Issues
  - Approval Issues
    - competition/antitrust pre-merger clearance
    - securities law compliance
    - industry specific regulatory compliance
    - foreign ownership restrictions
    - key non-regulatory third party approvals



# Background

- Threshold Issues
  - Deal Risk
    - Is the target in difficulty
    - Is the purchaser able to complete (ie obtain financing; purchase dependant on stock price...)

# Background

- Threshold Issues
  - Structure Options
    - Asset Purchase
    - Share Purchase
    - Squeeze-out
    - Statutory consolidation (plan of arrangement; amalgamation)

## Background

- Process – Establishing the Terms of a Transaction
  - protection of/commitments to protect, confidentiality
  - LOI/MOU
  - exclusivity/standstill provisions
  - access/due diligence
  - expenses
  - timing and document drafting

# Background

- Who takes the pen?
  - Typically purchaser's counsel
    - Most terms of an agreement are there for the purchaser's benefit
  - Auction process

# Agreement

- Essential Terms
  - description
  - purchase price
  - representations and warranties
  - indemnification
  - limitations of liability

# Agreement

- Essential Terms
  - covenants
  - conditions of closing
  - closing mechanics
  - termination
  - boilerplate

# Agreement

- Purchase Price
  - how determined?
  - allocation of purchase price
  - cash on closing or deferred payments
  - adjustments
    - working capital adjustments
    - adjustments based on target / other value determinants
  - hold-back; escrow

# Agreement

- Representations and Warranties
  - risk allocation
  - due diligence / disclosure
  - confirmation of key issues and value drivers
  - industry-specific considerations
    - Particular representations and warranties
    - Tolerance for agreement structure



# Agreement

- Qualifying Representations and Warranties
  - ‘materiality’ threshold
  - knowledge qualifier

# Agreement

- Covenants
  - Pre-closing
    - obtain consents (third party/regulatory)
      - seller and purchaser responsibilities depending upon what is required
    - pre-closing reorganizations
    - Positive/negative covenants to protect the business
  - Post-closing
    - filings
    - non-competition

# Agreement

- Survival
  - principal negotiation issue for vendors
  - different categories of representations and warranties
    - general
    - tax; environmental
  - exclusions from survival limits

# Agreement

- Closing Conditions
  - consents
  - key employee retention
  - financing
  - confirmation of all reps/warranties
  - delivery of all required documents
  - external events

# Agreement

- Closing Mechanics
  - when/where
  - what is required to convey assets/shares and payment
  - escrow arrangements
  - financing requirements
  - post-acquisition requirements (e.g. amalgamation after the transfer of control)
  - bringing reps/warranties forward & confirmation of covenants

# Agreement

- Indemnities
  - who is standing behind representations and warranties
    - affected by structure
    - on-going relationship with sellers
    - enforcement
    - several or joint and several
  - extent of indemnities
    - coverage and exclusions
    - misrepresentation or absolute
  - mechanics of indemnification

# Agreement

- Limitations on Liability
  - survival of representations and warranties and indemnities
  - maximum exposure
  - *de minimus* thresholds
    - *Deductible or \$0*
  - exclusions
  - other terms (post tax and insurance benefit)

# Agreement

- Post-Closing Matters
  - audit
  - purchase price adjustments
  - dispute resolution (purchase adjustments, indemnification, earn-out mechanics)
  - filing requirements (e.g. regulatory)



# Agreement

- Termination
  - conditions
  - outside date
  - costs
  - post-termination surviving obligations (confidentiality)
  - break fee

# Agreement

- Boilerplate
  - Blah blah blah

# Summary

- Summary of the Process
  - make sure the structure is right from the outset
    - deal terms are negotiated on the basis of a particular structure
  - don't let the sellers walk away
  - tailor reps and warranties – keep your eye on due diligence

## Summary

- assess the strength of indemnities and need for security
- in a 75 page acquisition agreement, you will spend 95% of your time negotiating 1/10th of it
- walk through the adjustment mechanics – several times
- even though it's a long agreement – find a way to keep you client engaged in the document

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