

Deal Certainty in Times of Uncertainty

Reality or Myth?



Gisèle Rosselle

Outline

- Deal Certainty – what does it mean?
- The ‘Deal Certainty Tool Box’ – what’s in it?
- Selected Tools – how can they enhance certainty?

Deal Certainty

What does it mean?

- Political risks
- Slow economical growth
- Financial crisis aftermath
- Disruption around the corner
- \$ 376 billion in failed US M&A in 2016
- Cash-rich companies
- Dealmakers await a spark of confidence

“There is a pressure to do deals but the problem is that uncertainty is high” *(Goldman Sachs, Financial Times, 2 April 2016)*



Deal Certainty ⁽²⁾

What does it mean?

Buyer



Seller

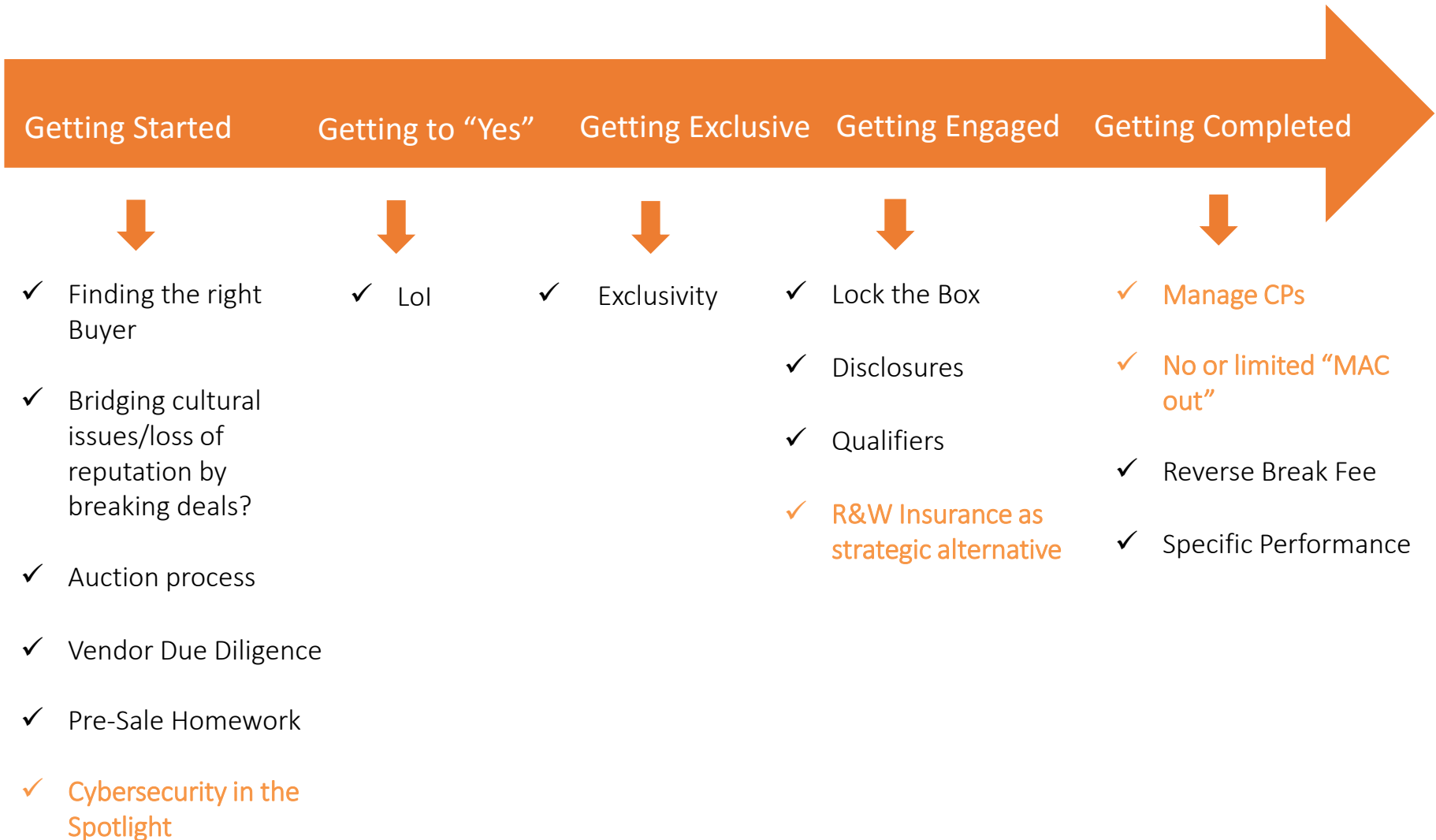


- ✓ All information to assess risk
- ✓ Pay the right price
- ✓ Avoid having to get the money back through indemnification procedure

- ✓ Deal Certainty
- ✓ Protect purchase price against price adjustment, or indemnification

Deal Certainty

The 'Deal Certainty Toolbox' of the Seller – what's in it?



Cybersecurity In the Spotlight

What?

- A growing risk
- Target, Yahoo, Cravath Swaine, BNP Paribas, Panama Papers
- 36% of businesses worldwide
- Costing global business \$400billion/year
- Disrupt operations, damage brand and erode corporate value
- Attracting shareholder attention
- Europe lagging behind
- EU Data Protection Reform – Digital Single Market
- Growing awareness but risks generally not addressed during deals



Cybersecurity in the Spotlight ⁽²⁾

Some Suggestions

- Take cybersecurity out of IT and into the boardroom
- Develop 'cyber hygiene', know your vendors, protect 'crown jewels', practice incident response plan, develop cyber-threat monitoring and info-sharing team, get cybersecurity insurance
- Assess level of cyber risk in the same way as any other risk

R&W Insurance as Strategic Alternative

What?

- Re-allocating the R&W risk
- Bridging the “warranty gap”
- Sellers & Buyers have distinct motives
- Seller/Buyer-side R&W policies
- A third more policies globally in 2015 - Auctions
- PE (61%), Real Estate or Infrastructure Fund deals
- Credibility increase
- General increase in risk aversion



R&W Insurance as Strategic Alternative (2)

Some Suggestions

- Consider R&W Insurance in the following scenarios

Seller

- Reduce exposure risk
- Permit clean exit
- Facilitate auction process
- Protect passive investors

Buyer

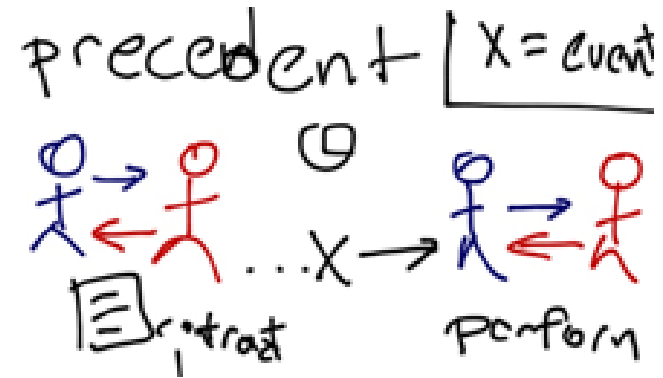
- Supplement indemnification SPA
- Extend survival period
- Distinguish bid in competitive auction
- Ease collection concerns

- Look into R&W Insurance proactively
- Contemplate R&W Insurance as early as possible in Transaction process (Auction context)

Manage Conditions Precedent

What?

- Future and uncertain event
- About 50% of the Transactions
- Regulatory approvals, change of control, bank finance
- Purely discretionary condition is null



Manage Conditions Precedent ⁽²⁾

Some Suggestions

- Limit CPs to a strict minimum
- Test viability CPs
- Check validity CPs
- Avoid general and broad CPs
- Narrow CPs precisely
- Tackle CPs timely
- Actively monitor fulfilment CPs
- Link CPs to a Reverse Break Fee: pay not to play

No or limited 'MAC out'

What?

- Something occurs that upsets the economics of the Transaction between signing and closing
- Buyer can walk out without any penalty or renegotiate price and/or terms and conditions
- Origin in the USA – used in 95%
- Brexit Break Clauses
- Belgium – used in 50% (> EUR 100 million)
- CP / R&W / termination clause
- Contractual freedom, **≠** Force Majeure or Hardship
- From boilerplate to heavily negotiated and carefully drafted clause



No or limited 'Mac Out' ⁽²⁾

Some Suggestions

- Careful drafting to avoid purely discretionary conditions
- Narrow scope through 'carve outs' which Buyer will want to limit through 'exclusions'
- Provide a precise and exhaustive list of events and make sure that the intention of the parties is well reflected
- Avoid spending too much time on negotiation as the courts apply a highly restrictive reading and in practice very rarely successfully triggered

Deal Certainty in Times of Uncertainty

Reality or Myth?

- Uncertain times are probably the only certainty
- Requiring a constantly adapting approach, both legal and non-legal
- Revisiting traditional Deal Certainty Toolbox
- Requiring innovative response within legal context
- Lawyers to play additional, non-legal roles



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« To rule or not to rule? »

Benoît Malvaux

Overview

The Ruling practice

- I. The Ruling Commission
- II. The Ruling procedure
- III. Timing

Ruling and M&A: a quick overview

To Rule or not to Rule?

The Ruling practice

I. The Ruling Commission

The Ruling Commission

- **The Service for Advance Decision or Ruling Commission** (Service des Décisions Anticipées / Dienst Voorafgaande Beslissingen)
 - Created by the Act of 24th December 2002
 - 6 board members and +/- 90 assistants (appointed for 5 years renewable)
 - **Independent office** within the FPS Finance
 - **Advance Ruling** = legal act whereby the Ruling Commission determines, in accordance with the provisions in force, how the legal provisions will apply to a particular situation or transaction that has not yet produced any tax effect

The Ruling Commission

➤ The Ruling Commission in figures (1/2)

Année	DEMANDES						PREFILING					
	IN			OUT			IN			OUT		
	TOTAL	NL	FR	TOTAL	NL	FR	TOTAL	NL	FR	TOTAL	NL	FR
2003	241	-	-	-	-	-	-	-	-	-	-	-
2004	217	-	-	-	-	-	-	-	-	-	-	-
2005	375	-	-	-	-	-	-	-	-	-	-	-
2006	570	-	-	-	-	-	-	-	-	-	-	-
2007	553	373	180	583	385	198	643	415	228	-	-	-
2008	465	330	135	472	328	144	689	462	227	636	425	211
2009	500	364	136	543	398	145	742	524	218	708	495	213
2010	576	407	169	493	356	137	866	627	239	716	517	199
2011	592	445	147	633	471	162	951	640	311	863	639	224
2012	548	401	147	550	404	146	941	614	327	868	626	242
2013	647	478	169	641	470	171	1103	747	356	906	682	224
2014	756	557	199	739	552	187	1186	786	400	1427	824	603 ⁵

The Ruling Commission

➤ The Ruling Commission in figures (2/2)

	DEMANDES		PREFILINGS	
	IN	OUT	IN	OUT
Plus-values internes	125	136	197	179
Prix de Transfert	74	70	78	122
Abandon de créances	16	20	23	22
Réorganisations	100	97	110	142
Revenus Mobiliers	60	58	88	114
Rémunérations	105	103	99	114
Frais Professionnels	42	40	41	49
Brevets (art. 205 ³ CIR 92)	14	12	9	14
Stock Options	14	14	7	12
Tax Shelter	12	12	21	38
Intérêts notionnels (art. 205 bis CIR 92)	2	1	2	2
Tonnagetax	8	8	4	4
Contributions Directes - Autres	85	73	101	142
TVA	61	54	103	127
Enregistrement/Succession	28	26	40	58
Douanes	0	1	0	0
Autres	1	1	1	3
Indéterminé	9	13	262	285
TOTAL	756	739	1186	1427

Annual Report 2014, pp. 139-140

The Ruling practice

II. The Ruling procedure

The Ruling procedure

✓ When....

Starting from

a concrete operation/transaction is contemplated (anonymous base)

Until....

The transaction has produced its tax effect (eg. filing of the tax return)

The Ruling procedure

✓ **Dedicated Team:**

- Allocation of the case to a **member of the board** depending on :
 - Language of the prefiling request/formal demand,
 - The taxes or sections of taxes involved
- Appointment of the **coordinator(s)** (senior) (by tax field) and of the **file manager(s)** (junior)

✓ **A two steps procedure (1/2):**

✧ ***The Prefiling***

- Can be described as a meeting prior to the introduction of a formal demand,
- Is an option – no obligation
- Informal and constructive
- Can be held with lawyer on an anonymous base
- Very useful because gives a first impression of the point of view of the Ruling Commission
- Referrals with PFS Finance / Board (if matters of principles / no-name) – the local tax officer is not informed

The Ruling procedure

✓ A two steps procedure (2/2)

✧ *The Filing (official ruling request)*

- The law requires that the formal demand contains :
 - the **identity** of the applicant and of the parties involved in the operation or transaction,
 - description of the **activities** of the applicant and of **the intended operation or transaction** ,
 - **applicable tax sections** for the taxes involved,
 - if there is a formal demand introduced in another country on the same topic, a copy of said demand or decision.
- The team members submit a proposition of decision to the responsible board member who validates and defends it at the meeting of the board (in principle, every Tuesday).
- The decision **binds the Tax administration** (except changes of legislation, applicant didn't comply with the conditions of the decision, applicant gave incomplete or non-correct description of the transaction....but amendment possible) and is **valid for 5 years** but renewal possible.

The Ruling procedure

✓ Important to know

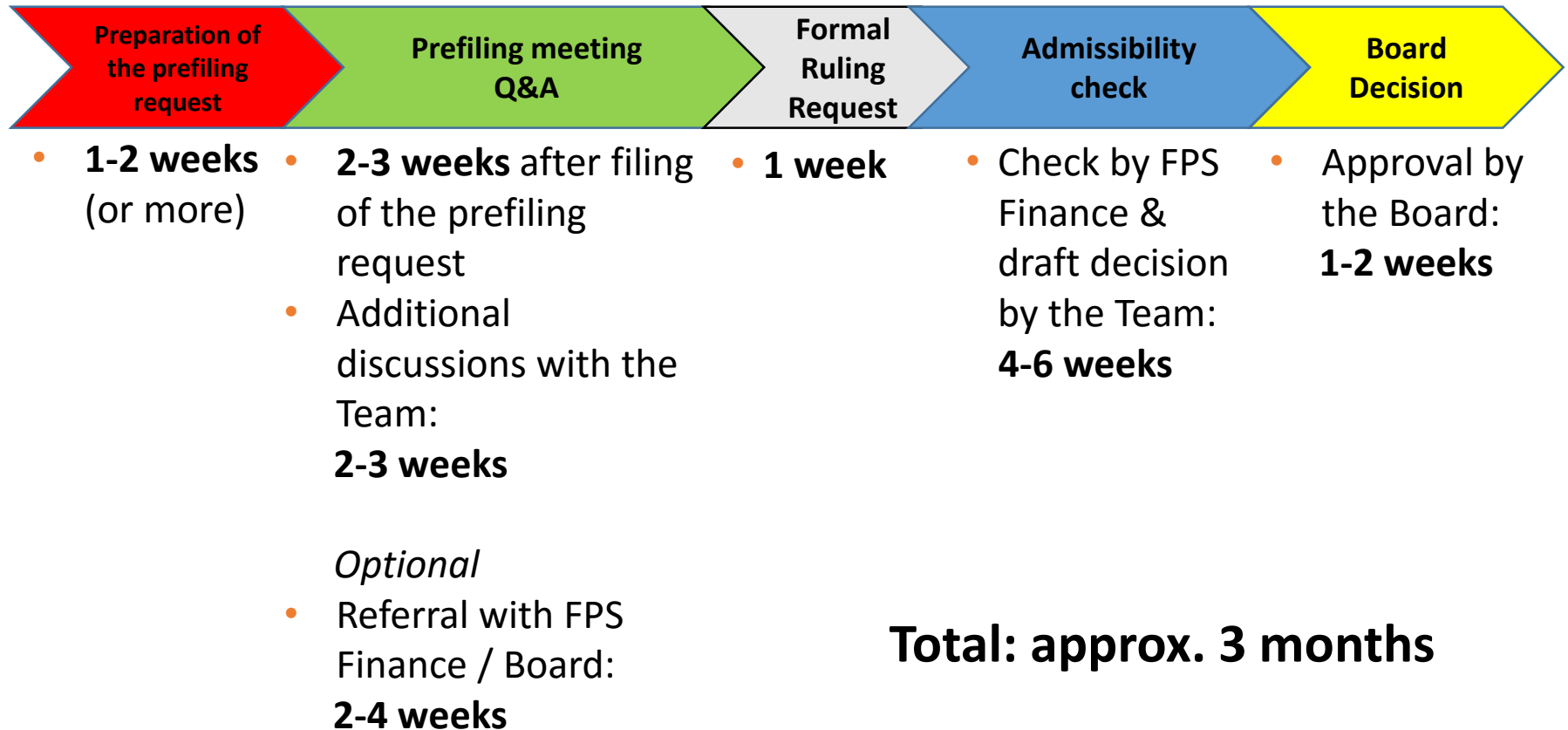
- ***Admissibility conditions***
 - Advance character (Corporate tax >< VAT)
 - No prior identical situation with the applicant
 - No transactions linked with non-cooperative tax heavens
 - Lack of substance in Belgium
- ***Language of the ruling procedure***
 - Individuals => choice
 - Legal entities => place of their seat
- ***Disclosure of the ruling decision***
 - Publication in anonymised form / compliance with business secrecy requirements
 - Publication within 3-4 months (unless duly justified deferment notice)
 - Publication exemption in (very) unusual cases

The Ruling practice

III. Timing

Timing

➤ Legally: 3-months (non-binding)



Ruling and M&A: a quick overview

What are the topics?

Ruling and M&A: a quick overview

➤ Most frequent topics

- Merger / demerger
 - In-depth analysis of the tax down-sides and up-sides
 - In-depth analysis of the economic motivations
 - Prevention of debt-push down scenarios
 - Intention to sell => commitment to reinvest
- Change in control
 - Inside the group => no change in control
 - Keeping jobs & activities
- Transfer pricing issues
 - Transfer pricing issues stricto sensu
 - Scope of the Patent Income Deduction (PID)
- In-house capital gains (“plus-value interne”)
 - Creation of an holding structure
 - Repatriation through capital decrease (future)

To Rule or not to Rule?

Is it worth to go for a ruling?

... of course !

To Rule or not to Rule?

➤ The key benefits are:

- ***Flexibility***
 - No-name base approach
 - Negotiated process – possible to withdraw the demand at any time
 - Publication of the decision on a no-name base but non-publication in exceptional circumstances
- ***Complexity***
 - Thorough analysis of each case
 - At the edge of the tax sophistication
- ***Certainty***
 - Binding effect
 - Framework-ruling practice
 - Highly valuable toward third parties



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Acquiring Distressed Companies

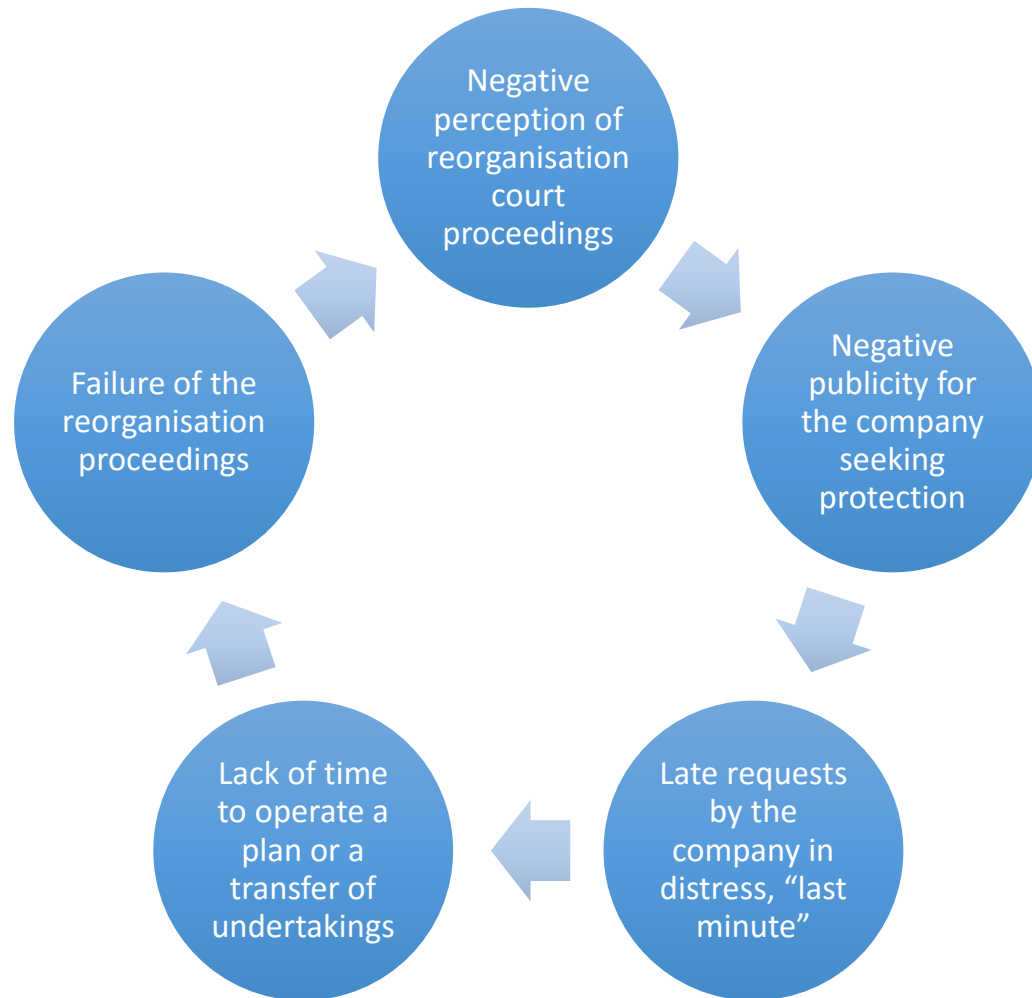
A “No Go” or a hidden opportunity?

Bart De Moor

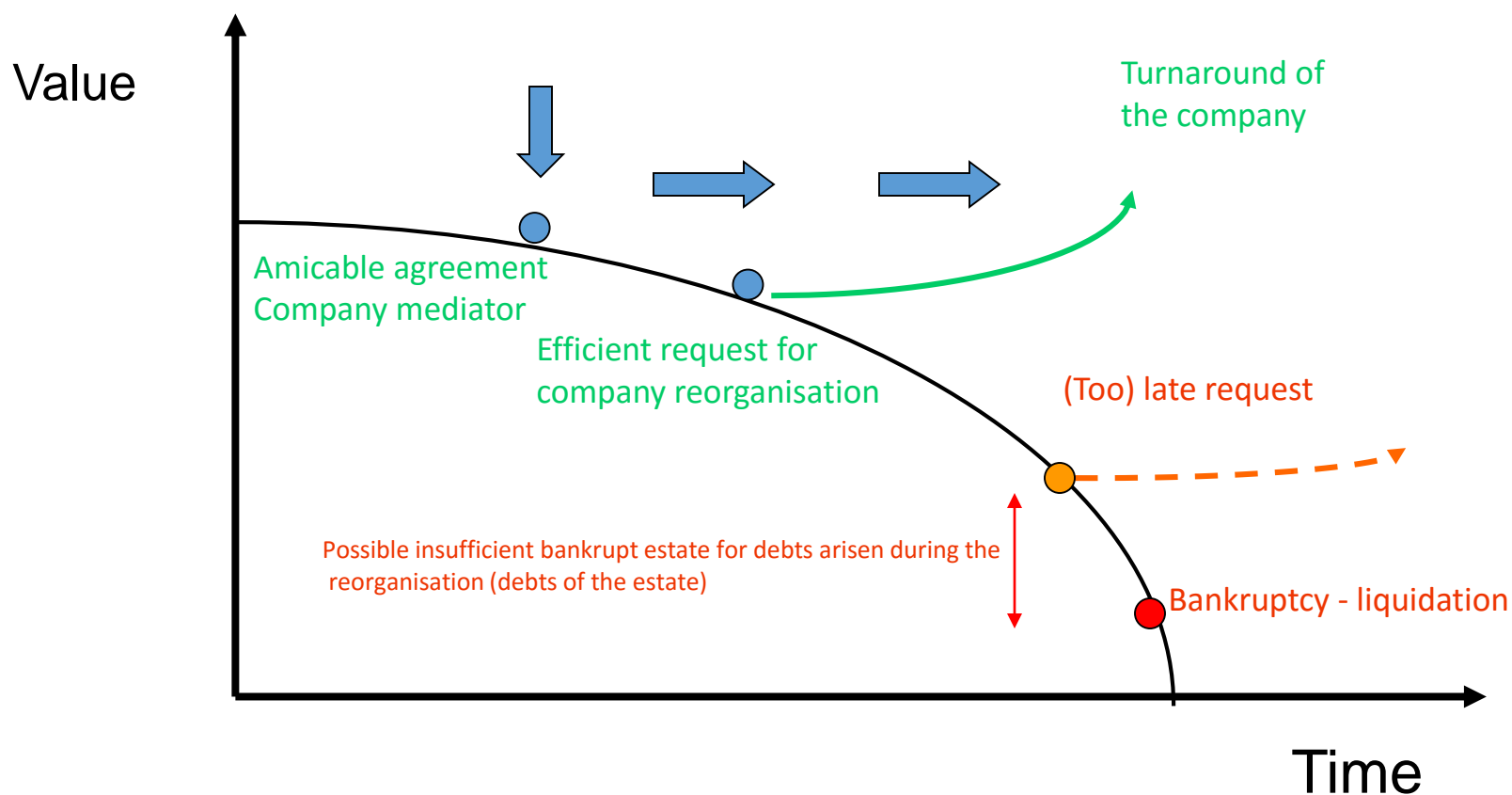
About reorganisation proceedings

- New law since 2009 : “Law concerning the continuity of enterprises”
- Many more applications since 2009
 - ✓ turnarounds of companies preserving the legal entity
 - ✓ transfers of undertakings
- Not well known by the M&A professionals
 - ✓ hesitating attitude in discussions
 - ✓ not seen on the market of the court ordered auctions
- Debtor in possession proceedings : the directors keep control over the company (fraud and mismanagement excepted)
 - ✓ in principle no insolvency practitioner (administrator) is appointed
 - ✓ in case of a transfer of undertakings: an insolvency practitioner is appointed, in charge of only the organisation of the auction

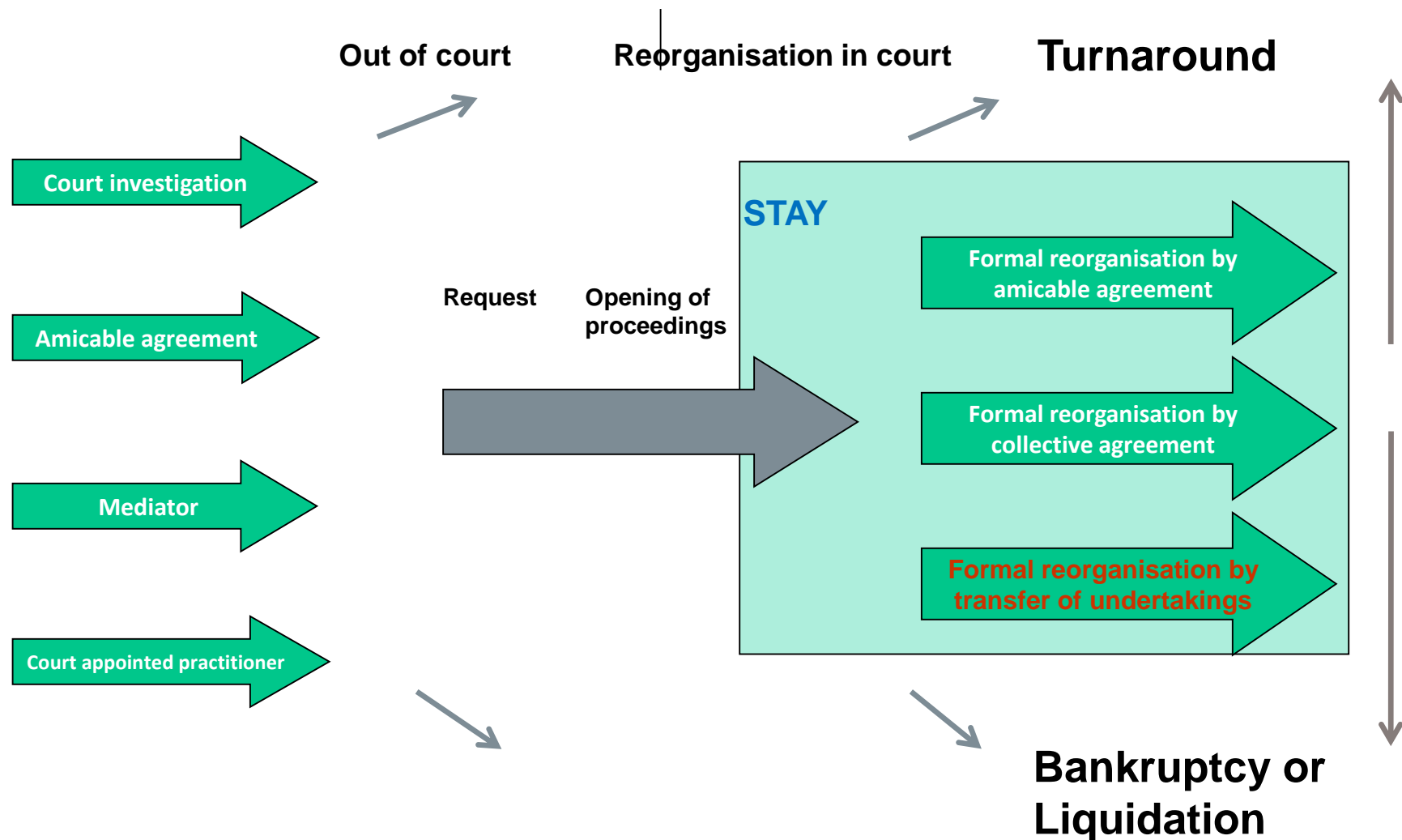
Why we do not like reorganisation proceedings



Scheme of the distress of a Company



Scheme of the procedure of juridical reorganisation



Opportunities in M&A

- Restructuring by amicable or collective agreement
 - ✓ common application
 - ✓ acquisition of a company while being reorganised
- Restructuring by a transfer of undertakings (activities)
 - ✓ common application
 - ✓ can be initiated by a candidate purchaser of the activities (when the continuity of the enterprise is threatened)
 - ✓ acquisition by anyone, including shareholders and directors, is allowed
 - ✓ sale of one part of the activities can generate the funding of the other, remaining part
 - ✓ a transfer of the entire viable activities can be followed by an insolvent voluntary liquidation instead of bankruptcy
- Combined applications are possible
 - ✓ transfer of the undertakings for one part followed by the reorganisation by collective agreement of the other part of the company

Opportunities – Managing the risks

- Preparation prior to the opening of the proceedings
 - ✓ Collective agreement :
 - assessing the voting attitude of the creditors
 - restructuring the debt before the proceedings : a strategic approach of the payment rather than a reactive approach
 - payment before opening of the proceedings or at least before the vote excludes creditors from voting (small creditors, public creditors e.g.)
 - advantage of paying the enemy
 - no equal treatment of creditors required
 - short duration of proceedings
 - ✓ Transfer of undertakings
 - contacting candidate purchasers before the auction

Opportunities – Financing the Proceedings

- Reorganisation proceedings - especially following a late request - often run out of money... Solutions?
- ✓ No proper legislation in Belgium for DIP financing (debtor-in-possession financing)
- ✓ Alternative solutions, varying from case to case :
 - Contractual financing ensuring first pay-out
 - due payment for new engagements posterior to the opening of the proceedings
 - conflicting creditors with rights in rem
 - Subordinating existing bank funding to new funding through a contract between the (possibly same) funding bank and an investor (possibly shareholder)
 - Funding through the partial transfer of undertakings in combined proceedings



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Price

How inventive can you be... and still have a valid deal?



Olivier Clevenbergh

Agenda

- Reminder of some basic - but important in practice - legal requirements relating to the price
- The most common price mechanisms in Belgian and international transactions
- Some ideas on other ways to bridge the expectation gap on price ... and beat the competition

In competitive context (for buyers), need to be creative

In difficult context (for sellers), need to be flexible

Validity

Validity requirements regarding the price

- One condition - the price must be:
 - ✓ determined, or
 - ✓ capable of determination
- Sanction - the sale is null and void
- Various situations
 - ✓ Fixed amount
 - ✓ Capable of determination : the price can be established on the basis of the agreement, based on objective elements that are independent from the will of the parties
 - ✓ The price is to be fixed by a third party
 - On the basis of objective elements given by the parties
 - By a third party specifically identified by the parties
 - By a third party to be appointed by a certain authority



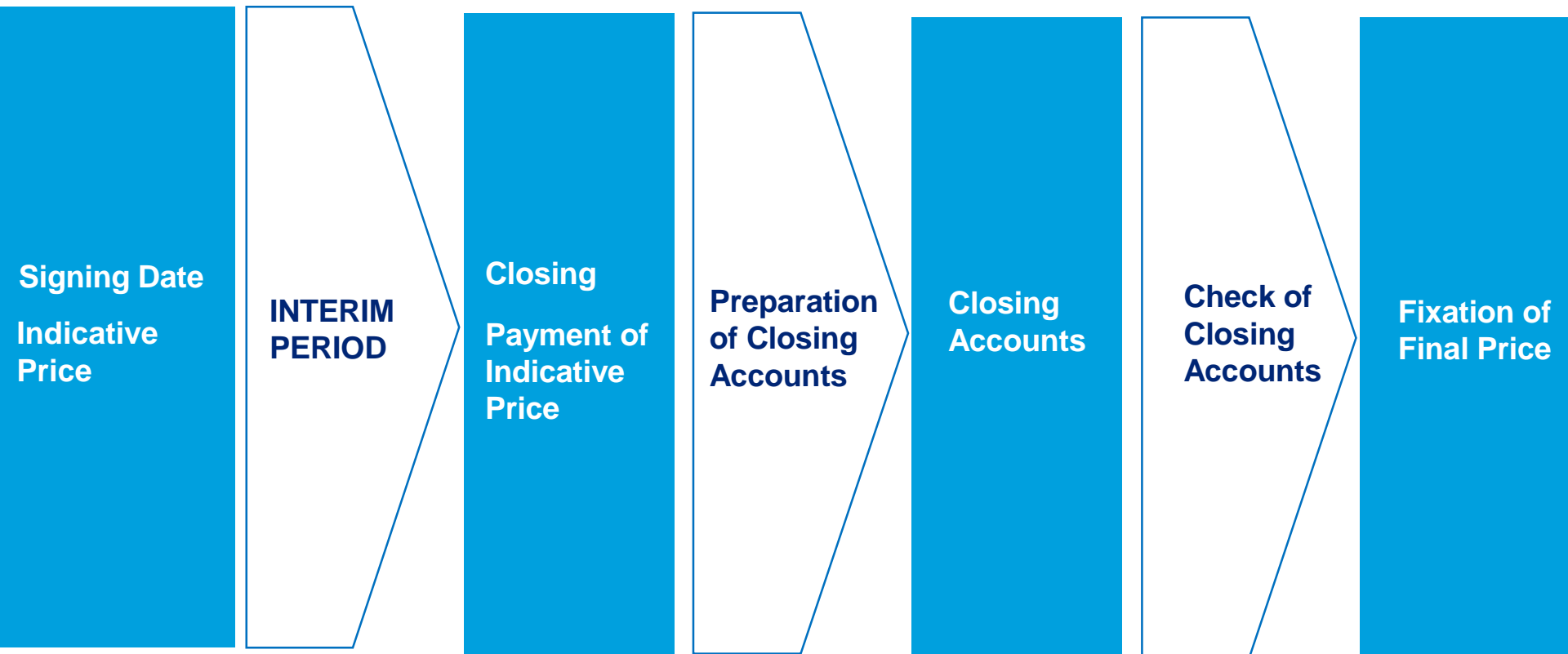
The most commonly used price mechanisms

- Increased sophistication of the price mechanisms under the Anglo-Saxon influence
- Main issues
 - ✓ Time gap between available financial statements and effective transfer of the shares
 - ✓ Uncertainty of future results of Target
- Most commonly used mechanisms
 - ✓ Post Closing / Completion adjustments
 - ✓ Locked Box
 - ✓ Earn-out



Closing Accounts

Closing Accounts Mechanism: key principles



The Closing Accounts mechanism (1)

- “Closing” or “Completion”?
- The price is adjusted on the basis of a comparison of estimated figures with the “actual” figures at Closing (the Closing Accounts)
- **Price based on actual value of assets and liabilities at Closing**
 - ✓ *For the Purchaser*
 - Price is based on the accounts “as warranted”
 - The Seller will not take away value from the Target after agreement on the price
 - ✓ *For the Seller*
 - Benefit from potential increase in value of the Target taking place after agreement on the price

The Closing Accounts mechanism (2)

- Comparison with estimate is made on the basis of Closing Accounts prepared according to the bases set out in the SPA
- Various criteria of adjustment are possible: net assets, working capital, ...
- Adjustment is usually on a €1 for €1 basis - Possibility to have a threshold
- May be “downward” adjustment only or (less frequent) “two ways” adjustment
- Possible “walk away” right
- Precise procedure for the parties to control the Closing Accounts (who, when, on what basis?)
- Procedure for possible disagreement on Closing Accounts (notification of objections, third party expert ...)
- Link with R&W (no double claim)

Closing Accounts – Payment considerations

- Payment of initial (estimated) price at Closing
- Need of additional payment / reimbursement depending on the final price
- Security for payment / repayment

The Cash Free / Debt Free concept – Principles

- DCF method (e.g. WACC)
- DEV method
- Multiples valuation

Enterprise value/Base price (value of operating business)

-

Net financial debt (= financial debt – cash), including Normal Working Capital

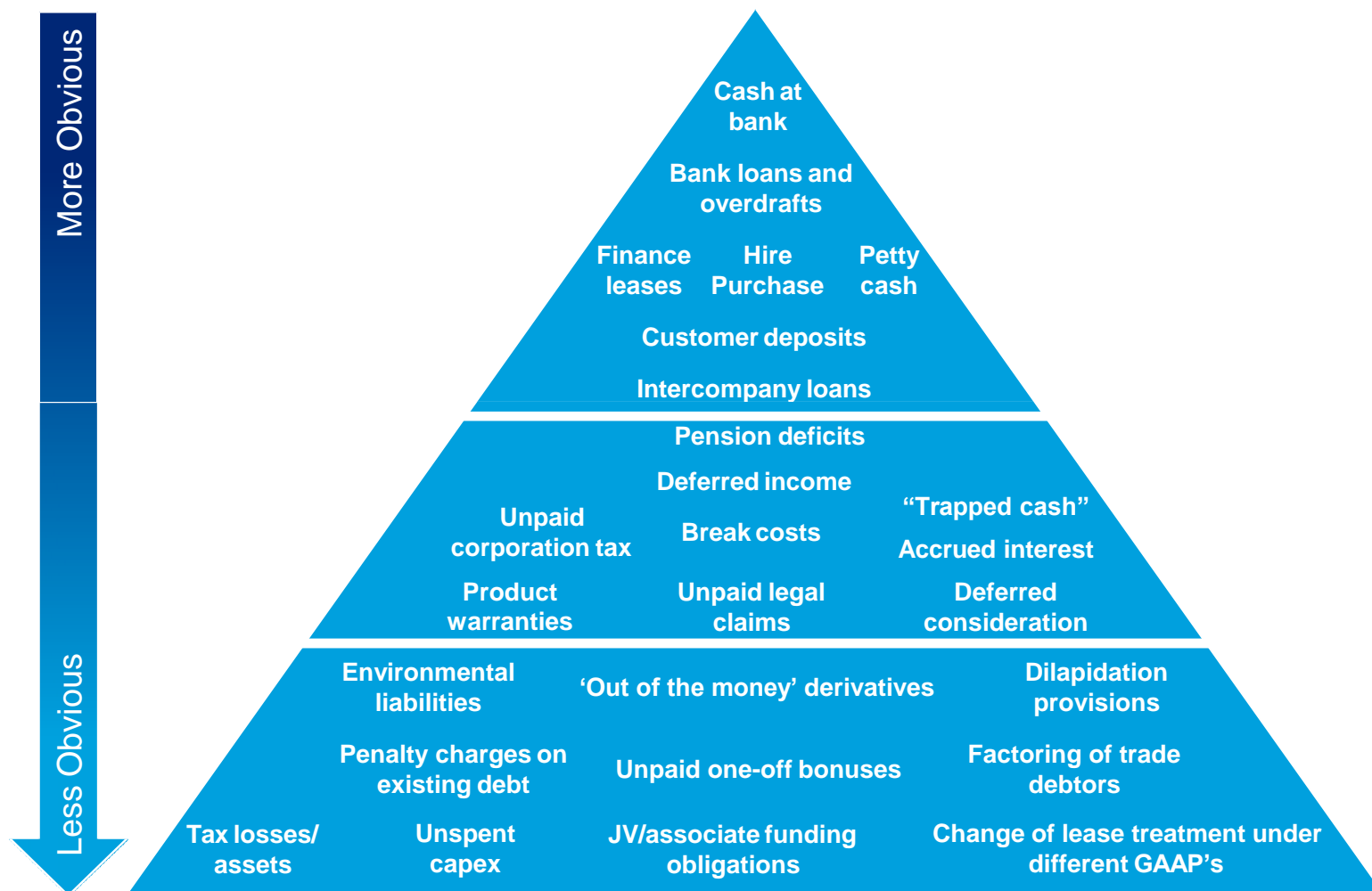
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Share purchase price (equity value)

The Cash Free / Debt Free concept - Issues

- What does « debt » or « cash » mean?
- What is the « normal level of working capital »?
- Risks of cash maximisation by the Seller, e.g.
 - ✓ Defer capital expenditures
 - ✓ Accelerate payment by debtors
 - ✓ Delay payment of creditors

Definition of Net Debt



Locked Box

Locking the Box: key principles (1)

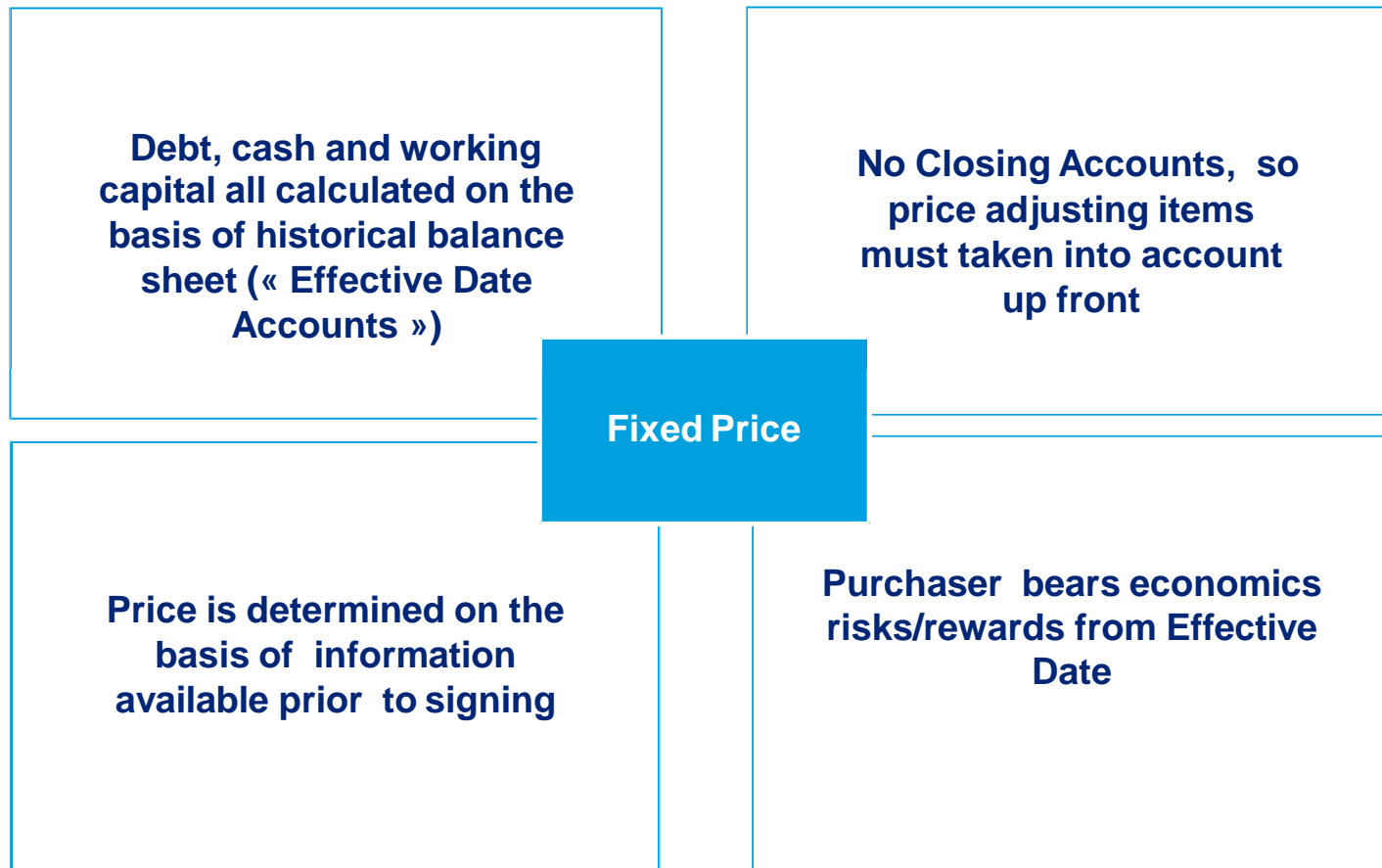
- The price is fixed at signing
- Appeared in the UK in the early 2000's.
Is now increasingly used in the US and throughout Europe
- Its main advantage is its simplicity
- Is more and more used, especially in the context of auctions



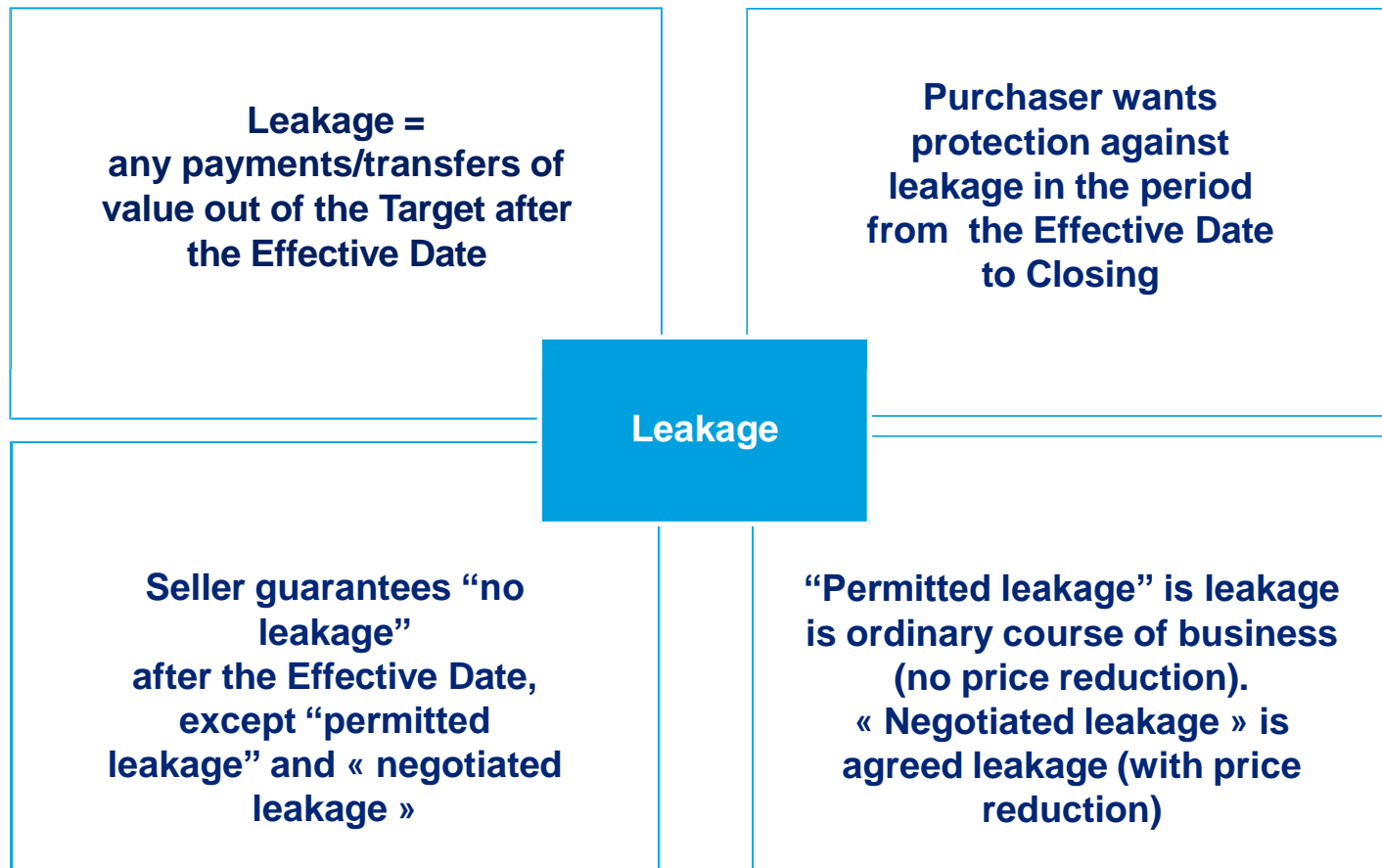
Locking the Box: key principles (2)



Locked Box Mechanism: Fixed Price



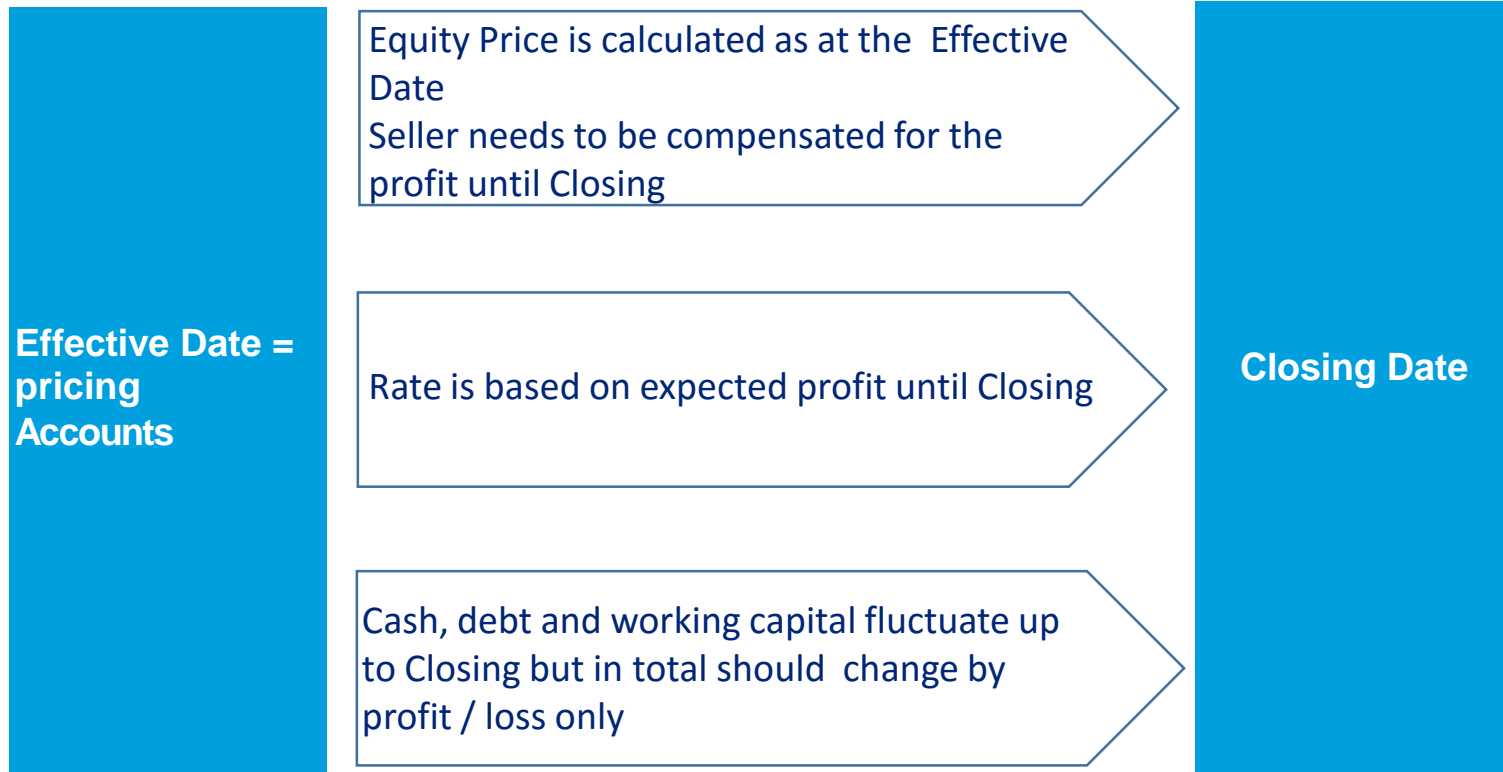
Locked Box Mechanism: Leakage



Locked Box Mechanism: Permitted Leakage

- “Permitted Leakage” often used to cover both « normal leakage » and « negotiated leakage »
- Negotiated leakage is to allow some transactions between the Seller’s group and the Target in the interim period, in principle with a price reduction
- Examples of « normal leakage »:
 - ✓ Transactions in the ordinary course of business (under specified agreements - e.g. work agreements)
 - ✓ Arm’s length management charges
 - ✓ Amounts included in the Effective Date Accounts
- Examples of « negotiated leakage »:
 - ✓ Specified level of dividends paid to the Seller
 - ✓ Bonuses up to capped amount

Locked Box Mechanism: Interest



Comparision Closing Accounts – Locked Box

Closing Accounts vs Locked Box - Timeline



Closing Accounts vs Locked Box – pro's and con's (1)

Closing Accounts – Pro's for both parties

Purchase price reflects value of Target on Closing date

R&W based on « agreed » Closing Accounts → in principle less risk of claim

Closing Accounts – Pro's for the Purchaser

Often it controls the drafting of the Closing Accounts and the adjustment process

Closing Accounts – Pro's for the Seller

If upward adjustment is provided ...

Closing Accounts vs Locked Box – pro's and con's (2)

Closing Accounts – Con's for both parties

Uncertainty of price at the time of the signing of the SPA

Complex procedure for the preparation of the Closing Accounts

Risk of renegotiation of the price / disputes on the adjustment

Risk of having a price which is not determinable

Closing Accounts – Con's for the Seller

Often the Purchaser controls the drafting of the Closing Accounts and the adjustment process and is not keen to pay more

Conclusion: Closing Accounts mechanism generally considered as favourable to the Purchaser

Closing Accounts vs Locked Box – pro's and con's (3)

Locked Box – Pro's for both parties

Price is certain as from the signing

Simpler and faster process – no need to prepare Closing Accounts

Less risk of disputes on adjustment of price after Closing

Locked Box – Pro's for the Seller

Easier to compare different offers, early in the process

Economical risk passes to Purchaser as from Effective Date (while Seller still owner and in control)

Closing Accounts vs Locked Box – pro's and con's (4)

Locked Box – Con's for both parties

Price is determined on the basis of historical accounts – less accurate

Still need to control the « leakage »

R&W given on the basis of historical accounts / no repetition at Closing

Need to agree on level of interest reflecting the expected profit during the interim period

Locked Box – Con's for the Purchaser

Purchaser bears the economic risk during the interim period, while Seller still in control

Increased importance (in theory) of due diligence and of R&W

Conclusion: Locked Box Mechanism is generally considered to be more favourable for the Seller (and more commonly used in auction sales)

Earn-Out

The Earn-out – Principles and objectives

- **Principle** - Part of the price is calculated by reference to post-Closing results (e.g. a multiple of the future profits of the Target)
- **Objectives**
 - ✓ Can bridge an expectation gap on price
 - ✓ Alignment of interests: incentive for the Seller to maximize future value of the Target (e.g. through management agreement, non-compete, non solicitation, customer relations)
 - ✓ Payment of price can be spread in time
 - ✓ Allows security for claims under R&W (possibility to set-off)

The Earn-out – in practice

- **In practice** most useful in
 - ✓ a people/knowledge business : ensures retention of key people and of knowledge
 - ✓ start-up situations/technology companies : can be based on milestones
- Often implies that the **Seller remains active** in the Target (or even in control)
- The **criteria** can be varied (and combined), such as
 - ✓ a certain level of EBITDA or of revenues
 - ✓ milestones
 - ✓ approvals by the authorities
 - ✓ retention of a certain number of key employees
 - ✓ a certain yield from the renting of the real estate of the Target
- Various possibilities
 - ✓ partial satisfaction or “all or nothing”
 - ✓ possibility to achieve earn-out at later stage

Issues with Earn-outs (1)

- Many disputes result from earn-out system
 - Need to take psychological elements into account: is the previous « boss » willing to continue to work under the instructions of the Purchaser?
 - Interests of the parties are not totally aligned
 - ✓ For the Purchaser: need to keep Target business separate – may prevent synergies (during the earn-out term)
 - ✓ Seller concerned only with short term profitability / Purchaser concerned with the long term
 - ✓ How are decisions which can have an impact on the earn-out taken?
 - ✓ What is the level of support required from the Purchaser in order to help achieving the targets?
- need to agree balanced intangibility clauses / acceleration clauses

Issues with Earn-outs (2)

- Difficult to remove management and/or to plan succession (« bad leaver » / « good leaver » regime)
- Delicate to claim against manager under the R&W
- Dispute on price can have an impact on the business
- Moving revenue/costs between accounting periods
- Moving revenue/costs between Purchaser's Group and Target (e.g. management fees)
- Tax / social considerations



Alternative Ways

Alternative ways to solve different pricing expectations - Principles

- In current context, need to be creative to accomodate the wish of both parties
- Solution depends on concrete hurdle(s), such as:
 - ✓ Different views on the future of the Target
 - ✓ Need for financing
 - ✓ Risk which needs to be covered
 - ✓ Insufficient knowledge of the Target
- Alternative ways may help in the financing and should be discussed with the banks
- Also think of alternative financing mechanisms (not considered as such here)



Alternative ways (1)

Reinvestment of part of purchase price

Part of the price is reinvested by the Seller in the Purchaser (Group)

➤ Objectives

- Alignment of (long term) interests
- Seller may cash in twice
- In PE situations (possibly in a special vehicle together with the sellers of other targets)
- Possibly includes a (non-executive) directorship - benefit of knowledge of / experience in the sector
- Provides additional financial means to the Purchaser

➤ Attention points

- The Seller becomes minority shareholder
- Shareholders agreement to be put in place, which organizes exit

Alternative ways (2)

Staggered sale

The sale of the shares takes place in various stages

➤ **Objectives**

- Allows better knowledge of Target by Purchaser
- Seller continues to benefit (partially) from profit of Target
- Financing of price is spread
- Spread of the risks between the parties (reduced R&W)

➤ **Attention points**

- Need to organize the various stages of the sale (put/call options, pricing, timing)
- What if (material adverse) change (of mind)?
- Need to guarantee solvability of Purchaser
- Need to organize efficient management of the company
- In case of option : « Pacte léonin » – « Leeuwen beding »

Alternative ways (3)

Participation of Seller in profit in case of on-sale of shares / business

The Seller participates through an additional price in the profit made by the Purchaser (or its shareholders) in the on-sale of the shares of the Target (or in the sale of the Purchaser) (or in other forms of exists such as an IPO)

➤ **Objectives**

- ✓ Evacuates risk that the Purchaser makes a bargain and resells at better price
- ✓ Incentive of the Seller in the value of the Target / the Purchaser's group
- ✓ Seller may cash in twice
- ✓ Possibly includes a (non-executive) directorship (benefit of knowledge of / experience in the sector)

➤ **Attention points**

- ✓ Conditions of additional price must be clearly defined
- ✓ Timing of the relevant exit must be agreed
- ✓ May lead to discussion as to the strategy
- ✓ Payor of additional price must have corporate interest

Alternative ways (4)

Specific Indemnities

The parties agree not to reduce the price with respect to an identified risk but the Seller undertakes to indemnify the Purchaser if such risk materializes

➤ Objectives

- ✓ Allows to resolve discussions as to likelihood of the risk becoming true and of its financial impact
- ✓ May help in the financing
- ✓ Incentive for the Seller to have a realistic approach of the risk in the negotiations

➤ Attention points

- ✓ Procedure for managing the risk must be carefully agreed (who does what? Conduct of process – choice of counsel, payment of fees...)
- ✓ Impact on risk realization must be clear
 - Usually no limitation – euro per euro
 - Neutralize tax impact
- ✓ Can last for many years – not convenient for all types of Sellers (e.g. PE firms)
- ✓ Need to ensure solvability of Seller – often escrow account or bank guarantee
- ✓ Can give rise to disputes between the parties

Alternative ways (5)

Hard Representations and Warranties

The price of a « perfect » Target is paid and the Seller agrees to compensate the Purchaser if the reality is different

➤ Objectives

- Allows the Seller to maximize the price when he is confident in the status of the Target
- May help in the financing (higher price is paid but potential claim against Seller can be pledged to the banks)
- May speed up process limited due diligence

➤ Attention points

- The Seller must be willing to accept extensive list of R&W and to waive (most of) the usual limitations (threshold, disclosures, exceptions, time limitations, etc.)
- Procedure for managing the risk must be carefully agreed (see specific indemnities)
- Can last for many years (e.g. dispute before the Belgian courts...) – not convenient for all types of Sellers (e.g. PE firms)
- Need to ensure solvability of Seller – often escrow account or bank guarantee
- Risk of disputes between the parties

Alternative ways (6)

Vendor Loan

Only part of the price is paid at Closing, the Seller lending the balance to the Purchaser

➤ **Objectives**

- ✓ Helps in the financing
- ✓ May provide better return for the Seller (interests on the loan)
- ✓ May provide solution for the security on the R&W
- ✓ Possibility to provide that loan is convertible in shares (to give further incentive to Seller)

➤ **Attention points**

- ✓ Need to ensure solvability of Purchaser
- ✓ Risk that Purchaser does not repay if is disappointed with the Target

Alternative ways (7)

M&A Insurance

The risk of claims under the R&W is covered by an insurance, taken out by the Purchaser or by the Seller

- See Gisèle Rosselle's presentation
- In combination with other mechanisms

Alternative ways (8)

Splitting up the company / Carve Out

Part of the activities / assets of the Target are taken out of the Target and kept by the Seller

➤ Objectives

- ✓ Resolves difference of opinions on the value of the activities / assets taken-out
- ✓ Resolves situation where the Purchaser is not / less interested in certain activities / assets (e. g. real estate)
- ✓ The Seller may sell activities / assets independently
- ✓ The Seller may receive other revenues (e. g. rent from leased real estate)
- ✓ Helps in the financing

➤ Attention points

- ✓ Various corporate techniques can be used: split, partial split, sale of business / assets, contribution in kind, division of ownership (usufruct, superficie, emphytéose), ...
- ✓ Tax aspects need to be considered (tax ruling)
- ✓ Labour aspects need to be considered (CBA 32bis)
- ✓ Deal becomes more complex

Alternative ways (9)

Other revenue streams for the Seller

The parties organize the possibility for the Seller to receive revenues in addition to the price, such as royalty payments, rent, management fees

➤ **Objectives**

- ✓ Reduce the amount of the price while maintaining a certain level of cash-in for the Seller
- ✓ Possibly in combination with carve-out of certain assets (e.g. real estate, intellectual property)
- ✓ Helps in the financing

➤ **Attention points**

- ✓ All consequences of chosen legal structure must be considered and accepted
- ✓ Tax aspects need to be considered
- ✓ Deal becomes more complex (interlinked agreements)

Alternative ways (10)

Non cash consideration

All or part of the « price » is paid by transferring shares (of the Purchaser or of another company) or another asset (e.g. a receivable)

➤ **Objectives**

- ✓ Helps in the financing
- ✓ Maintains incentive of Seller if he receives shares in the Purchaser's Group
- ✓ May be advantageous from a tax point of view (e.g. repayment of a transferred receivable)

➤ **Attention points**

- ✓ The Seller may want R&W on asset exchanged
- ✓ Possibly need of shareholders agreement
- ✓ Deal becomes more complex

Conclusions

- M&A transactions have not become as standard as sometimes said...
- Always take concrete circumstances into account to make better proposals / deals
- Beware of legal and tax consequences and of the litigation risk!



THANK YOU

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