Private M&A 2020

Contributing editors
Will Pearce and John Bick
Davis Polk & Wardwell LLP

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Lexology Getting The Deal Through is delighted to publish the third edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Sudan and the United Arab Emirates.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and John Bick of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

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Comparing UK and US private M&A transactions

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In the M&A cycle that has followed the financial crisis, the volume and value of cross-border private M&A transactions has grown, deal terms and documentation have been harmonised and controlled sales processes and seller-friendly terms have prevailed, driven undoubtedly by the availability of private capital and the approach taken to deals by financial buyers and sellers.

In this environment, one of the key decisions for a seller has remained the choice of governing law and market practice for the transaction documents and auction process. While it is not uncommon for a seller simply to choose the governing law and market practice of the jurisdiction with the closest nexus to the target company (for example, country of incorporation), from a legal perspective, a seller generally has complete freedom of choice of governing law for the transaction agreements even if such law has no connection with the target. Specifically, there may be tactical advantages for a seller in relation to this choice as a particular law or usual market practice may provide it with a better outcome for the transaction as compared with the law of the target's jurisdiction; for example, greater deal certainty and price certainty and reduced exposure to warranty liability under the transaction agreements. Alternatively, choosing a particular law and market practice that will be most attractive to the universe of potential buyers and allow them to work with their regular advisers may drive a smoother, quicker process or a higher price for the seller.

Most, but certainly not all, cross-border transactions tend to either follow UK and European norms or US market norms. When deciding between these two sets of well-established norms, a seller should consider the impact of its choice on the sales process, form and content of transaction documents, the need for deal certainty, how the deal will be priced and the form and extent of recourse under the agreement (for example for breach of representations and warranties). While there may appear to be little, if any, difference in the approach taken in the UK and Europe on the one hand and the US on the other, there are a number of points to be considered.

Running a successful controlled sales process

While there are no substantive differences in how an auction process is run, in the UK and Europe, a seller will often take a number of steps designed to maximise the price they can get from bidders and to ensure a speedy sale of the relevant target company, all of which involve additional upfront time and costs for the seller. These are less commonly seen in a US-focused process.

Vendor due diligence

Typically, a UK/European seller will commission a number of advisers to prepare 'vendor due diligence reports' covering financial, tax and legal diligence matters. These reports will be made available to bidders in the auction process on a non-reliance basis under the terms of a release letter. More importantly, the bidder that succeeds in the auction will be able to rely on these reports in accordance with the terms of reliance letters issued by the relevant diligence providers. Such reliance will normally be subject to monetary caps on the advisers' liability for any deficiencies in respect of such reports and other customary liability limitation provisions. Ultimately, such reliance is designed to form part of a buyer's recourse in respect of the transaction.

The use of the vendor due diligence report is meant to speed up the bidders' processes by flagging the key due diligence issues that warrant further investigation by bidders and their advisers or that go to price. In theory, they also reduce the cost for buyers of participating in a process and allow a seller to reach out to a greater number of potential buyers without stretching target management too thinly.

Non-binding indications of insurance cover

A UK/European seller and its financial advisers will often work with an insurance broker to put together a pre-arranged warranty and indemnity insurance package for bidders to consider alongside the transaction documentation. Again, this is uncommon in a US-led process. Specifically, the insurance broker will prepare a report that sets out non-binding indication of terms (for example, covering details of premium, policy limit and retention amounts) from a number of insurers based on the representations, warranties and indemnities, as the case may be, set out in the auction draft of the transaction documents and other information that will be made available to all potential buyers such as the target's accounts and any information memorandum. The non-binding indication of terms is then shared with potential bidders.

Obtaining the indication of terms and making it available to potential buyers allows a seller to take the approach of limiting meaningful recourse against it (or target management) under the transaction documents, while, at the same time, offering some form of recourse to a buyer under an insurance policy. It is difficult for a buyer to dispute the availability of recourse in such circumstances if a seller has already spoken to an insurance broker to check the extent to which and the terms upon which transaction insurance would be available.

Further, a seller will be keen to maintain control and confidentiality of its competitive sales process. By sourcing the non-binding indication of terms itself, a seller can restrict buyers from approaching insurers in the non-disclosure agreement entered into at the start of the process and avoid any buyer disrupting its pre-ordained sales timetable to go off and source an insurance quote. In addition, a seller will hope that by stapling insurance coverage to a set of representations and warranties that it (or target management) are happy to provide, it will succeed in minimising the extent of any negotiation of the same by potential buyers.

Stapled financing

In UK/European processes, particularly in secondary or tertiary buyouts where management wish to retain a substantial equity stake or otherwise minimise business disruption and ensure continuation of financing relationships, a seller and its financial advisers may well provide information to potential bidders of pre-arranged acquisition financing packages that third-party banks or alternative lenders have agreed in principle to provide to the successful bidder in the auction. This package is normally referred to as 'stapled financing'.

The terms of this package (usually in the form of a commitment letter and term sheet) will be pre-negotiated between on the one hand, a seller and its advisers, and on the other hand, the debt provider. The debt provider will be provided with information on the target (including, for example, the vendor due diligence reports that will be made available to potential bidders) and will be expected to have its internal approvals in place (subject to customary approval of the identity of the buyer and final documentation) before the financing terms are provided to potential bidders.

Stapled financing helps a seller keep control and confidentiality of the sale process and helps to speed up the bidders' processes for obtaining acquisition financing for the transaction as a considerable amount of the preparatory work (including diligence by the debt providers) would be done by the seller on behalf of potential bidders as part of the pre-auction process. By sourcing the stapled financing itself, a seller can then restrict buyers from approaching lenders in the non-disclosure agreement entered into at the start of the process and avoid any buyer disrupting its pre-ordained sales timetable to go off and source acquisition finance. Further the practice supports the general desire of, and the established market practice for, a seller in a UK/European process to require potential bidders to demonstrate availability of certain funding ahead of entering into transaction documentation.

Choosing the form of the transaction documents

Broadly speaking, cross-border private M&A transactions tend to use either US -tyle transaction documents (typically governed by Delaware or New York law) or UK/European-style transaction documents (typically, but not always, governed by English law). There is a widely held perception that a UK/European-style agreement and related market practice is seller-friendly. By contrast, a US-style agreement and related market practice is regarded by some as more buyer-friendly. One fundamental reason for this difference is that UK/European market practice tends to regard economic risk as transferring from the seller to the buyer at the point of signing the acquisition agreement rather than at closing, whereas, in contrast, US market practice tends to regard economic risk as transferring to the purchaser at the point of closing.

Set out at the end of this chapter is a comparative table showing some of the key differences (and similarities) between the approach taken in a UK/European style transaction governed by English law and a US-style transaction governed by New York law, in each case assuming a willing trade buyer and trade seller of equal bargaining power. Clearly, the opening position of a financial seller in a controlled sales process will be far more seller-friendly, regardless of jurisdiction or established market practice.

In the US, regardless of the nature of the seller, acquisitions and disposals of privately owned companies are typically effected by way of either a direct purchase of the equity of the company from its shareholders (often called a stock deal) or pursuant to a merger. If implemented by way of a stock deal, a purchase agreement would be used. If implemented by way of a merger, a merger agreement would be used. Warranties (both fundamental (eg, title to shares and capacity to sell) and business (eg, on tax, litigation, intellectual property) warranties would be given by the sellers (including financial sponsors) in these agreements.

In contrast, in the UK and Europe, the distinction between a financial and trade seller may have an impact on the transaction documentation. For the latter, this would be the same as in the US in that a share purchase agreement would be entered into by the parties and the sellers would provide both fundamental and business warranties in the agreement.

However, if the key seller is a financial rather than trade seller, there will normally be a share purchase agreement between seller and buyer that will set out the fundamental warranties to be given by the seller and a management warranty deed between target management and buyer, which will set out the business warranties to be given by the target management. This reflects the position adopted by financial sellers in Europe that they will only provide fundamental warranties to a buyer, as day-to-day responsibility for running the business has been left to the target management team (which may or may not have an equity stake in the target company) who are better placed to provide business warranties to the buyer.

Ensuring deal certainty

Conditionality and termination rights

There is generally greater deal certainty for a seller in a UK/European process: usually transactions are subject to a very limited range of closing conditions and a seller (unless it is in a weak negotiating position) will only accept those conditions to closing that are required by applicable law or regulation (such as receipt of mandatory antitrust approvals or, for a UK premium-listed buyer, shareholder approval if the transaction is a Class 1 transaction under the UK Listing Rules). A UK/European seller is very unlikely to accept a 'no material adverse change' condition, any condition that requires warranties to be accurate at closing or any financing condition. By contrast, these types of conditions are typical for a US law-governed acquisition agreement.

Certain funds

Specifically in relation to financing and as noted above, a UK/European seller will often require a buyer to proceed on a 'certain funds' basis. In practice, this means that the buyer must be able to demonstrate the availability of financing prior to entering into the transaction and a seller will not allow the buyer to walk away from the transaction after signing an agreement even if its lenders decide not to fund the acquisition. In some cases, especially if the buyer's home jurisdiction imposes capital controls on the flow of its funds out of such jurisdiction, a seller may even require the buyer to pay a deposit or to put a small percentage of the purchase price in an escrow account at the signing of the transaction. Such funds would then be forfeit if the buyer is unable to complete the transaction.

By comparison, US market practice tends to regard the gap between signing and closing as a time for a buyer to put its acquisition financing in place, with a seller normally willing to accept a material adverse change condition to match the corresponding material adverse change condition in the buyer's financing documents.

Pricing the deal – locked box versus closing accounts

The use of a locked-box mechanism is now a common feature in UK/European-style private M&A transactions. The purchase price is set by reference to an agreed balance sheet (referred to as the 'locked-box balance sheet'), struck as at an agreed date in advance of signing (referred to as the 'locked-box date'), often the previous financial year-end date or the date of the most recently available management accounts. The equity price paid by the buyer at closing is essentially calculated by adding cash and deducting debt and debt-like items represented on that balance sheet from the headline price. The seller will confirm in the acquisition agreement that it has not received any value or benefit from the target (referred to as 'leakage') in the period between the locked-box date and signing, and is then restricted from doing so in

the period between signing and closing. To support this protection in favour of the buyer, a seller will typically provide an indemnity to the buyer for any leakage during this time.

The locked-box mechanism offers the advantage of price certainty for the seller in that there is limited scope for any adjustments to the purchase price after closing. It ensures as clean a break as possible and, in the case of a financial seller, enables the full proceeds of a sale to be distributed by the seller to any underlying fund or other investors upon closing (without any requirement for a retention to cover any post-closing adjustments).

In contrast, while the locked-box mechanism is used in the US, it is still more usual for US private M&A transactions to use closing accounts as the mechanism to determine price. In other words, the buyer would pay a purchase price at closing of the transaction that is calculated based on an estimate of the target's working capital or net assets as at the closing. Closing accounts would then be produced by the buyer in the period post-closing to determine the actual working capital or net assets, with adjustments made to the purchase price to reflect the difference between the actual working capital or net assets and the estimated working capital or net assets. Accordingly, there is a potential for the purchase price paid to the seller at closing to be adjusted after closing and for disputes to arise between the parties as to how such adjustments are determined.

Effective recourse for representation and warranty claims

In UK/European style private M&A transactions, a financial seller will always cap its liability for breach of fundamental warranties at no more than the consideration it actually receives and, as mentioned above, it will not provide business warranties. Where target management step in to provide business warranties, it is usually on the basis that their liability is capped at a low level (as low as €1 or £1), not least as they often have a much smaller stake in the target's equity and therefore receive a smaller percentage of the overall sale proceeds than the financial seller. In addition, management may well be continuing in their employment with the target after closing of the transaction, making it counter-productive for a buyer to bring a warranty claim against them. To address these issues and bridge the recovery gap, buyers increasingly use warranty and indemnity insurance to provide real recourse for any breach of warranty and, absent fraud, to avoid having to bring an action against management.

In short, warranty and indemnity insurance provides cover for losses discovered post-closing arising from a breach of warranty or in certain cases under an indemnity. Such insurance aims to offer 'back-to-back' cover for any liability arising from a breach of warranty or for liability under any tax covenant, or both, in each case where the matter giving rise to such claims has not been fairly disclosed or was not known to the insured. Typically, warranty and indemnity insurance policies purchased by a buyer provide cover in a range between 10 to 30 per cent of enterprise value with net premiums between 1 and 1.5 per cent of the value of the policy. In general, insurers will require the insured to bear an excess of between 0.3 and 1 per cent of the enterprise value at their own risk before the insurance policy attaches; however, increasingly, for a higher premium, insurers are willing to provide insurance cover with no excess. This ties in with the desire of target management to seek to limit their liability for business warranties to €1 or £1 in that the very first pound or euro of loss for the buyer could be recovered directly from the insurer.

In UK/European-style private M&A transactions where the seller is a trade rather than financial seller, liability for warranty claims is generally capped at consideration for breach of fundamental warranties and at less than 20 per cent of consideration for breach of business warranties. Warranty and indemnity insurance is sometimes used to provide a buyer with additional protection.

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In the US, liability for warranty claims is generally capped at consideration for breach of fundamental warranties and at between 10 to 20 per cent of consideration for breach of business warranties. It is still common for escrow mechanisms to be used for such transactions (including in relation to private equity and management sellers) with sellers depositing about 5 to 15 per cent of the equity value in an escrow account to settle claims against the buyer. That being said, representation and warranty insurance is increasingly prevalent in US private M&A transactions particularly with respect to divestitures by financial sponsors who insist on 'no seller indemnity' deals in which representations and warranties expire at closing and there is no ongoing exposure. Such insurance is also often used in conjunction with 'public company-style' private M&A transactions in the US where, as is the case for US public M&A transactions, the buyer will have no claim under the acquisition documents against any seller other than in relation to breach of fundamental representations or covenants or fraud. 'Public company-style' private M&A transactions in the US are still uncommon but there has been a steady increase in its use over the years in a seller-friendly market environment.

Arguably, an escrow provides better protection for the buyer as it is a source of actual funds that it can access if there is a breach of warranty. Administratively, it is also an easier process to seek the release of funds from an escrow agent compared with having to bring a claim under a warranty and indemnity insurance policy, not least as such cover is subject to various exclusions (eg, fines and penalties, environmental liabilities and cyber-attack liabilities), and there will always be a degree of mismatch between the loss suffered by a buyer as a result of a breach of warranty and the loss that a buyer can actually recover under such insurance.

English law-governed acquisition documents	Key provision	US law-governed acquisition documents
• General principles: freedom to contract, caveat emptor, no positive duty to negotiate in good faith • Parties sometimes agree high-level letter of intent before SPA • Stapled financing and vendor due diligence (VDD) reports are commonly used (particularly in auction processes) • Distinctive UK-style sale and purchase agreement (SPA), sometimes with separate management warranty deed (for financial sponsor exits) and usually with a separate disclosure letter	**Transaction documentation and process**	• Similar general principles to UK • Parties sometimes agree more detailed heads of terms (in the form of a term sheet) before the SPA • Use of stapled financing and VDD reports is rare • Distinctive US-style SPA or merger agreement with tax indemnity and disclosure schedule included as part of the agreement
• Payment is generally made at closing, with post-closing adjustments based on closing accounts: may see caps and collars on adjustments • Prevalence of 'locked-box' structure, particularly in auctions and where there is a financial sponsor seller: the structure places increased importance on pre-signing diligence and the scope of permitted leakage	**Price mechanisms**	• Similar position to UK • While increase in use, 'locked-box' structure is not as common as closing accounts
• Escrow arrangements are sometimes used to give the buyer comfort on recovery of warranty claims against individuals, or multiple sellers • Uncommon for financial sponsor sellers	**Escrow arrangements**	• Similar position to UK, but escrow arrangements usually cover closing adjustments as well as other claims under the SPA • Often the first or only source of recourse against a seller
• Closing may be subject to regulatory or shareholder or third-party consent, but rarely subject to a financing condition • If there is a gap between signing and closing, conditions to closing will be limited and a seller is unlikely to agree to a 'no material adverse change' condition (with termination right)	**Conditionality and termination rights**	• Similar conditions to UK save that financing conditions are more common and low Hart–Scott–Rodino thresholds mean that US deals are often subject to regulatory clearances • If there is a gap between signing and closing, a 'no material adverse change' condition is common and would give rise to a termination right (albeit a material adverse change can be difficult to establish)
• If there is a gap between signing and closing, a seller will generally covenant to carry on the target's business in the ordinary course: a buyer may argue compliance with this covenant should be a condition to closing, but this is usually rejected by a seller	**Pre-closing covenants**	• Similar position to UK
• Legal distinction between warranties and representations: rescission is available for a breach of representation • Repetition is resisted by a seller: accuracy of warranties is rarely a condition to closing • Warranty package can be extensive (more limited in auction processes or where financial sponsor seller) and a buyer is unlikely to accept materiality qualifiers (as a broad scope of disclosure against the warranties is permitted) • Warranties are given subject to general disclosures (those matters of public record or knowledge) and specific disclosures (set out in a separate disclosure letter) • Parties generally agree that to be effective disclosure must be 'fair' (matters must be fairly disclosed with sufficient detail to enable a buyer to identify the nature and scope of the matter disclosed), reflecting the position established by the English courts • A seller will seek to qualify warranties by reference to all matters disclosed (and may argue the data room and vendor due diligence reports should be treated as disclosed against all warranties) • A seller will seek to restrict a buyer's ability to claim for a breach of warranty where it was aware of the matter resulting in the breach	**Scope of warranty protection and disclosure against warranties**	• No legal distinction between warranties and representations • Repetition is common practice: accuracy of warranties is often a condition to closing • Warranty package is extensive, but warranties are often given subject to a level of materiality • General disclosures against warranties are not common • A seller's disclosure against warranties is limited to particular matters set out in a disclosure schedule to the SPA • A buyer is often not restricted in the SPA from claiming for a breach of warranty where it was aware of the matter resulting in the breach: where the buyer is restricted, the provision is referred to as an 'anti-sandbagging' clause
• Damage for a breach of warranty is generally assessed by the English courts by looking at any reduction in the value of shares acquired as a result of the breach • Warranties are generally not given on an indemnity basis, but it is common for a buyer to ask for specific indemnities to cover specific liabilities that have been identified: these indemnities may be capped in amount or subject to a time limit for claims • If warranties are given as both 'representations and warranties', then a breach may give rise to a right for a buyer to rescind the SPA • Obligation on a buyer to mitigate its losses for a breach of warranty: unless an indemnity provides for it, there is no common law duty to mitigate losses under an indemnity	**Liability of a seller**	• Warranties are generally given on an indemnity basis, facilitating dollar-for-dollar recovery for any loss suffered by the buyer • Quantum of recovery is often calculated by discounting any reference to materiality in the body of the warranties (referred to as a 'materiality scrape') • As no legal distinction between warranties and representations, no right to rescind an SPA arises • Similar to UK, with an obligation on a buyer to mitigate its losses

English law-governed acquisition documents	Key provision	US law-governed acquisition documents
• Period for claims is generally limited to between 12 and 24 months (statute of limitation for tax claims) but for competitive auction processes or financial sponsor seller, usually 12 months for all claims (including tax claims) • Liability of a non-financial sponsor seller is generally capped at consideration for fundamental breaches (breach of title warranties) and often at less than 20 per cent of consideration for other breaches. • Liability of a financial sponsor seller is generally capped at consideration for fundamental breaches. Liability of management often capped at a very low cap (as low as £1) for business warranty breaches with the expectation that the buyer will seek recourse from warranty and indemnity insurance • Claims are subject to individual (often up to 0.1 per cent of consideration) and overall (often 1 to 2 per cent of consideration) de minimis • Range of other limitations on claims commonly negotiated, including matters disclosed in accounts, sums recovered from insurance or third parties, and loss from changes in law or a buyer's actions • Separate claim periods and thresholds often apply to claims under tax covenant and for breaches of tax warranties. Unusual for financial sponsor seller to provide tax covenants	**Limitation of a seller's liability**	• Period for claims is generally limited to between 12 and 36 months (statute of limitation for tax claims) • Liability of the seller is generally capped at consideration for fundamental breaches (breach of title warranties) and between 10 and 20 per cent of consideration for other breaches • Claims subject to individual de minimis (often US$25,000 to US$100,000) and overall deductible (often 1 to 2 per cent of consideration): 'tipping baskets' are not uncommon • Range of other limitations on claims commonly negotiated, including matters disclosed in accounts, sums recovered from insurance or third parties, and loss from a buyer's actions
• A buyer will request post-closing covenants from a seller to protect its interests in the business it is acquiring: these covenants generally include non-compete, non-solicit of customers, suppliers and employees, and confidentiality. Financial sponsor sellers will not accept non-compete covenants due to the nature of their business. • Post-closing covenants will generally be for a period of 12 to 24 months	**Post-closing covenants**	• Similar position to UK • Post-closing covenants will generally be for a period of two to five years for the non-compete and 12 to 24 months for the non-solicit and other covenants

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