Confirmed Trends in Transaction Legal Advisory

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Post-pandemic trends in transaction legal advisory look set to mark a fundamental shift in the general assistance model.
The transactional legal work is by now legitimately expected by clients and stakeholders to remain lighter, faster, and of course better, while keeping up with the economic structural transformations.
The "lighter-faster-better" approach is already the norm in terms of transactional due diligence scope and standard of review, project structuring, transaction documenting. Legal risk hedging has reached its golden years. Let us expand on the building blocks of this new approach.

Due Diligence Scope and Standard of Review

The usual suspects around critical impact clearances have traditionally been assessing and handling the relation with the relevant regulators or control authorities. More recently and acutely we are seeing an ever-pervasive intervention by the states with Aid Measures and Stimulus Packages, as well as by opening new Taxation roads, all justified by recourse to the better public good. In this context, checking the mechanism for analysing and authorising foreign investments from outside of the EU space has become of increasing importance. Together therewith, and of course related thereto, the assessment of conducting business bans and restrictions, as for example limitations of rights to partner or bid, limitations of capital expenditures or investment, including profit repatriations, are getting a central role in the diligence review. The same is applicable in case of the risk of state intervention by means of regulation or administrative actions, or by indirect competition more generally.
Assessment from an FDI protection perspective became of a momentous importance. Irrespective of the international treaty instruments that one is looking at, all such legislative state aid measures, subsidies and tax pieces are typically host state measures taken within a state's right to regulate. It is true that the right to regulate remains a largely recognized qualifier to any standard of protection of investment, but the test against all basic protection standards to determine if measures could get effectively expropriatory, or discriminatory, or disproportionate to the objective that they intend to achieve must be made.
Careful review of change of control provisions of all nature, scale and effect, and at all levels, remains a key concern, including with respect to the risk to trigger a hostile action or a take-over or a mandatory procedure of any kind as a result of the prospected transaction. Nonetheless, at the same time the compliance package – "The ABC Review" – and the reputational assessment, including issues in the public-private relation, got equally important. Same goes with what I refer to as "The Triple K Analysis" or the KYP – KYS – KYC Assessment [know your partner, your supplier and your customer]. All these require an even more pervasive investigation when it comes to publicly funded contracts, joint venture agreements and consortia or contractor or sub-contractor agreements in relation to public to private contracts, which will add a layer of complexity where there is 'PEP involvement'. Scrutiny of contractual arrangements where politically exposed persons are involved has always been a hot point in the DD, but the standard of review got elevated notably. As it is the case with the assessment of conflicts of interest.
I would add here three other major trends. One refers to rating the stability of the target core business from a legal standpoint, which entails the legal review of matters relevant for the target's supply chain security, but also for key customer retention or the labour and expert capital stability. With it, the retention rate and review of relations in view of contracting or restating contracts with senior management is also a must. A second one purports to a shift of focus in the analysis of project target indebtedness regime, a re-prioritizing of the assessment over the quality of the financing, the risk of cross default and the solidity of senior collateral securities regime. Open-ended arrangements with

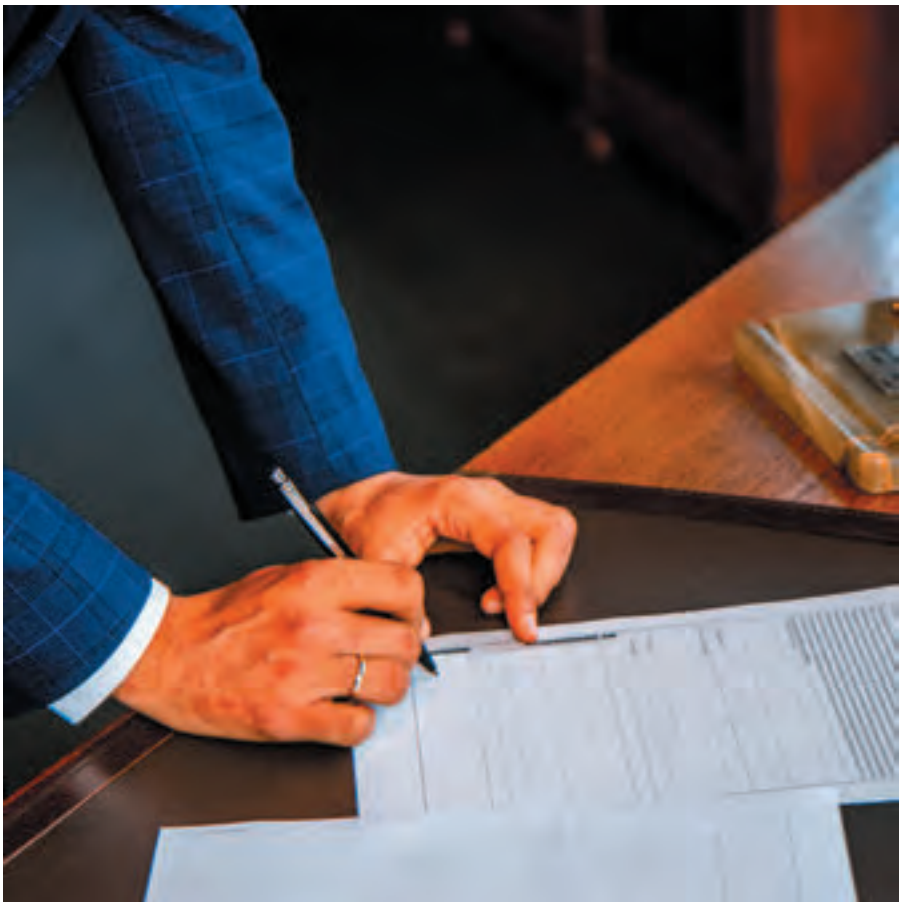
contingent liabilities, including partnerships, undertakings of loss compensation or gapping a guaranteed income, as well as previous mergers and acquisitions tail obligations, also represent a feature of the core business legal stability rating.
Thirdly, litigation due diligence turned more into assessing the dispute resolution conduct, resources and scoring of the target, based not only on the general dispute standing and representation, but also on the general performance of undertakings.

Project Structuring

Forum shopping in transaction structuring raises more challenges than ever. That is a more natural approach under which the jurisdiction of the target company and of the purchaser are first considered is preferrable. Alternatives for optimization are explored still, but aggressive planning charges are more realistic risks now than in the past. This said, project structuring sees the target jurisdiction and the core places of the business as the backbone of transaction mechanics, while the corporate or management legal quarters stay ancillary to it.
More often, transactions are structured as asset deals, or asset-based deals, with various and more complex caveats indeed, or as transfer of business (as a going concern). The number of transactions structured as neat share deals is significantly decreasing.
Contract culture seems to have finally absorbed the predicament that the best protection one can get in a deal does not come from the contract language, but from transaction structuring and, notably, from the project processes, carefully designed to govern the investment relationships from the initial ice-breaker talks to the most remote post-acquisition covenant.

Transaction Documenting

We are facing a new very complex evolution in the transaction legal documenting work, in itself a consequence of the shift in the due diligence scope and standard of review and originating in the structural transformations taking place in the economic sector. In our experience, transaction documenting is marked by five major factors of development.
First, there is an advent of "umbrella agreements", definitely more often used nowadays than previously. Secondly, transaction mechanics see a certain preference for one-step completion structures, as opposed to two-step structures where signing and closing used



to be detached. Thirdly, the architecture of conditions precedent is changing dramatically, as only fully objective, material CPs get their way through now, and mainly those related to regulators, clearances or certifications. Fourthly, a 'demise of the MAC clause' is taking place, with material adverse change and material adverse effect provisions being resisted more and more successfully on the sale or commitment side. Fifth, gun-jumping and conduct covenants contract menus are also notably reduced.

Legal Risk Hedging

But, to end with, the most spectacular change of recent years which seems able to yield permanent effects consists in what I tag as the legal risk hedging. Against a background where the specific performance of the undertakings is favoured towards collection of liquidated damages, new tools for managing transaction failure or loss risks have been developed. The most popular so far include Transaction Risk Insurance, Representations, Warranties and Indemnity Insurance, but also various ADR Mechanisms, such as Expert Board Determinations, as well as third party driven work-out or compensation methods.

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