

MINUTES OF GGI M&A PRACTICE GROUP MEETING

Saturday 23 June 2012

Held: Conrad Hilton Miami FI

Chair: Helen Robinson
Presentations: David Surprenant
Jeremy Lederman

Agenda: The M&A Practice Group's progress since the meeting in Cannes.

The practice group's website

Presentation 1 – EU Entities in the UK – Helen Robinson

Presentation 2 – Indemnities and Warranties in the UK – Helen Robinson

Presentation 3 – Selected Items from 2011 ABA M&A Deal Points Study – David
Surprenant

Presentation 4 – When transactions go wrong – Jeremy Lederman (there was not
time for this presentation).

Attendees:

Helen Robinson – Global Vice Chair – Wedlake Bell LLP

David Surprenant – North American Regional Chair

Jeremy Lederman – Wedlake Bell LLP

Gary J Freedman – Ervin Cohen & Jessup LLP

Randy Leff – Ervin Cohen & Jessup LLP

Oliver Biernat – Benefitax

Steven Braun – Drucker & Scaccetti

Nick Domburg – Limes International

Don Christopher – Baker Donelson

Gustavo Traversoni – Traversoni & Bengolea Abogados

Rich Devine – Smart Devine

Ugo Girardi – Refidata srl

Angel G. Viso – Viso, Rodriguez, Cottin, Medina, Ramirez & Asociados

Ady Nordman – Soroker Agmon

Berud Tremml – Wendler Tremml

Toon Hasselman – Limes International

Richard Mastrocola – Tonneson & Co

Richard Isham – Wedlake Bell LLP

Apologies: Tim Van Der Meer, Global Chair

In opening the meeting Helen asked all those present to say who they are, which firm they are with and how they are involved in M & A. The Group was a mixture of pure M & A lawyers, some specialists (eg: employment and tax) and some litigators.

The M&A Practice Group's progress since Cannes

1. Helen ran through the various points of progress that had been made.
2. Helen handed out a print out of what the contents of the web site would look like.
3. Concerns were raised in relation to the name of the Group's website – it was thought that the website may work better if it was titled "MandA" (if it is all lower case it looks like a girl's name "manda". Helen said she would discuss this with the Group's Global chair, Tim.
4. Helen made the point that, in order to be effective, the website will have to be maintained. The proposal was that members of the Group would contribute €100 per month towards the costs of maintaining the website (approx USD 120). There will be a contribution from GGI – for instance, GGI give the Group a payment per head for those that attend the Group's Practice Meeting. This money will be used to help fund the website. The website would be the Group's project – it was considered that the website would be more useful in generating business than a book or other publication.
5. It was suggested that the Group could have advertisers on the website to help sponsor it. Concerns were expressed that this may upset GGI's main sponsors. Again, Helen to discuss this possibility with Tim.
6. Helen confirmed that the website would be GGI branded not branded in the names of the various firms that form the Group. The intention is to have the website up running and live for the world conference in Rome.
7. Members of the Group should have their profiles on the website. A standard form of profile will be prepared and circulated.

Presentation 1 – Legal Entities in the UK

8. Helen ran through her presentation which was in a PowerPoint format and is available for all delegates.
9. There was a discussion about LLPs. Representatives from California confirmed that LLPs were traditionally used for professional firms. For non professional firms, it was common to use the LLC (Limited Liability Company). The representatives from California confirmed that an LLC can either operate as a company or a partnership.
10. Other representatives from the US confirmed that the Limited Partnership was commonly used in the US. For example, Limited Partnerships were used by private equity firms and often times the Limited Partnership would be incorporated in Delaware as that state has a very business friendly court system.
11. It was noted that most hedge funds operate through Limited Partnerships in the US because they are tax efficient (tax "pass through" or transparent structures).
12. The General Partner (GP) in a Limited Partnership would usually be a corporation or an LLC. The control of the partnership would rest with the GP.
13. It was noted that in relation to corporate entities, state law differs. For example, in Pennsylvania, a Limited Partnership is required to have an incorporated GP.

Presentation 2 – UK AML requirements

14. Helen ran through her slides in relation to AML and identification issues in the UK. The slides are available to the Group.

Presentation 3 – Selected Items from 2011 ABA M&A Deal Points Study

15. David ran through the handout that he had prepared and that he gave to each member of the Group.
16. David made the point that the Deal Points Study is indicative of the "market" - in negotiations in the US, it is common to take commercial points so that they are either "market" or "not market".
17. In relation to closing purchase price adjustments, David said that it was common to use net worth or working capital as the baseline.
18. If working capital is the baseline, it follows that if the working capital goes up, the buyer will pay more; if the working capital goes down, the buyer will pay less.

19. David made the point that, at closing, estimated payments were made on account and this was then followed by a “true up” by the buyer's accountant – this is done post closing.
20. David made the point that it was inadvisable not to have the methodology in relation to the preparation of a closing balance sheet set out in the sale and purchase documentation.
21. There was a discussion about earn outs and it was noted that:
 - 21.1. They were commonly used when the seller wanted a price, for example, \$16m, based on anticipated sales. An amount will be paid over on closing and then further amounts, stage payments, will be made depending on whether or not the sales figures are achieved.
 - 21.2. The point was made that other criteria or earn out conditions can be imposed – for example cost of sales (which would expose whether or not the target had a poor inventory), or payroll costs (which would expose the use of sub-contractors).
 - 21.3. Although the graph at slide 21 of the Study indicated that most earn outs were over a 36 month period, the consensus of those in the Group was that it would be between 18 and 24 months.
22. David ran through the “sandbagging” provisions – those pro sandbagging have the provision at slide 75 of the Study, which makes the point that, even if the buyer is on notice of the fact that there is an error in the representations made by the seller, this will not prevent the buyer from pursuing its rights under any indemnity.
23. The opposing position, the anti-sandbagging provision, is at slide 76 of the handout. This provides that no party will be able to seek indemnification if that party had knowledge of any inaccuracy or breach of any representation or warranty.
24. David ran through slide 90 of his presentation, being the methods of capping and/or collaring indemnity claims – deductible (being the aggregate amount of all losses before indemnities can be called on and then the indemnity covers the losses over and above the deductible), threshold (being the aggregate amount of all losses and if the threshold figure is reached the indemnity is triggered in respect of all losses regardless of the threshold) or a combination of both.
25. There was not time to hear Jeremy's presentation but he had prepared supporting slides which can be circulated to the Group or alternatively Jeremy can do his talk on another occasion.