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MERGERS & ACQUISITIONS 2018

VIRTUAL ROUND TABLE

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Introduction & Contents

Welcome to the mergers and acquisitions ("M&A") roundtable. We have brought together a panel of lawyers from around the world, including Brazil, Switzerland, Vietnam and the UK, to share their knowledge and opinions on M&A's and how they are affecting law practice today. Questions have been carefully picked to offer insight and understanding on the relevant topics and gain a well-rounded overview of the current global climate. Read on to learn more about dealing with international M&A's, how to retain trust in employees and customers after an M&A, and how technology is affecting the way M&A transactions are completed.

James Drakeford
Editor In Chief

Meet The Experts

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Shigeki Tatsuno is a partner at Anderson Mori & Tomotsune and specializes in the area of mergers and acquisitions, joint ventures, and cross-border investments. Mr. Tatsuno has extensive experience in advising venture companies and advising on PE funds. He also provides advice to foreign and domestic clients on intellectual property issues/transactions and general corporate matters. He is qualified in Japan and New York, and has received Bachelor of Law from University of Tokyo and LL.M. from New York University, School of Law.

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Stéphane Konkoly is partner at burckhardt Attorneys. His areas of expertise are contract law and corporate law with a specific focus on national and cross-border structured finance transactions and M&A transactions. He regularly advises national, foreign or international companies, group of companies and banks on corporate finance matters, secured or unsecured lending, project and acquisition finance (in particular the financing of movable equipment through leasing), often with respect to complex cross-border transactions covering several jurisdictions. He graduated from the University of Neuchâtel (1993) and from the New York University School of Law (LL.M. 1998). He was admitted to the bar in 1995.

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Lisa has been working in the information industry for over twenty years and has a detailed knowledge of both company financial information and M&A data. She holds a post graduate qualification in Business and Management from Salford University and in 2013 also sat and passed the Certified Merger & Acquisition Advisor (CM&AA) certification programme in the US.

Lisa is Bureau van Dijk's managing director for M&A products globally. She is their product expert in Global M&A and acts in an advisory role to the group's sales teams worldwide.

Lisa writes a regular blog providing insight on current deals and emerging trends. Other written contributions include an article in "Mergers and Acquisitions – A Practical Guide for Private Companies and their UK and Overseas Advisors" published by Kogan Page

Lisa is frequently asked to speak at international events on M&A trends both global and regionally.

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Martim Machado is a lawyer with over 25 years of experience representing international companies and their Brazilian subsidiaries in connection with a variety of legal matters in Brazil. He specializes in corporate law, commercial contracts, foreign direct investments and M&A. Martim is a graduate (LL.B.) from the Catholic University of São Paulo Law School – PUC/SP (1994) and holds a Master of Laws degree (LL.M.) from Georgetown University Law Center in Washington, D.C. (1998). Prior to founding CGM Advogados, Martim was a partner at major Brazilian law firms, an attorney with the Inter?American Development Bank – IDB in Washington, D.C., and a foreign associate at Mayer, Brown & Platt (currently, Mayer Brown) in New York, NY.

Meet The Experts

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J. Craig Dickens is the founder and CEO of Merit Harbor Capital, as well as an experienced entrepreneur, certified M&A advisor, investment banker and angel investor. He is responsible for setting the firm's vision, creating a culture of personal service, and recruiting great people to build the team across the country. He currently leads MHC's Food & Agribusiness and Manufacturing / Distribution business segments.

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Mr. Dang Duong Anh is recommended as a Leading Lawyer for Finance, Corporate/M&A and Energy & Infrastructure by many reputable legal directories such as Legal 500, IFLR 1000, Chambers & Partners and AsiaLaw. He is described by clients as "experienced and reliable". Anh's strength lays on Corporate/M&A, Infrastructure & Energy, Real Estate, Mining, Telecommunications and FDI. He has advised in many outstanding M&A deals, including SCG's acquisition of a group of cement production companies valued at $440M and, respectively, of Prime Group valued at $240M; S.A.C's acquisition of Hanacans valued at $110M; Japfa Ltd. IPO and listing of shares in SGX valued at $160M. In Infrastructure & Energy, his remarkable deals include the Vinh Tan 1 BOT project – IFLR and ALB's Project Finance Deal of the Year, Phu My 3 BOT project, Kien Luong 1 BOO project; and Ban Phuc nickel mining financing project.

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He works primarily with boards, CEOs, private equity, family office, and senior leaders and company owners in Fortune 1000 businesses with a particular emphasis on Middle Market mid-sized companies with annual sales of 100 million-1 billion USD to impact sustainable growth and profitability opportunities.

With 25+ years of international experience in consulting activities balanced between both multinational and family controlled enterprises in many business sectors Scott has had the unique opportunity to assist over 135 CEO's and Senior Business Leaders across North and South America, EMEA countries, and Asia.

In summary, Scott is working as a trusted advisor assisting clients with the big decisions necessary for future success.

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There are few people in the world who have the experience, training and certifications Dale has as a Certified Business Intermediary and Certified Franchise Broker. Since 2012 Dale has worked as a Business Broker and Commercial Real Estate Agent in Southeast Florida based in Broward County, Florida. Dale is one of less than 500 active Certified Business Intermediaries in the World (awarded through the International Business Brokers Association).

Dale's business knowledge as a high level financial analyst as well as as a CFO, COO, VP and President has proven to be very valuable for his customers. Dale has significant experience in start-ups, business planning, acquisitions/roll-ups and turnaround situations worldwide.

Q1. Can you talk us through the current M&A landscape in your jurisdiction?

Dang Duong Anh

The M&A market in Vietnam has witnessed significant developments in recent years thanks to the continuous efforts of the Vietnamese Government in creating an open and fair playground. Notably, 2017 observed the biggest M&A deal – Thaibev's acquisition of SABECO (shares valued at US$ 4.8 million) – which marks an escalation of Vietnam's M&A capacity as compared to other ASEAN countries. However, Vietnam is still one step behind other jurisdictions in terms of transparency of local regimes; it requires more aggressive movements from the government to turn its commitments into action.

Scott Newton

Looking at the Italian M&A landscape, there are a number of interesting opportunities to consider. Headline transactions, such as the recent Versace sale, continue to dominate the news.

The big opportunity for both strategic buyers and private equity/family offices however are in the middle market. Industrials and automation are desirable areas, with examples including the Barnes (NYSE:B) acquisition of Gimatic for €370 million in September.

Private Equity continues to search out opportunities in both industrials and pharmaceuticals/life sciences. A recent trend in the Italian market is the high levels of interest from family offices, and their attention to middle market investments.

Despite the number of firms with technology/IP that are still predominantly under family control, 2019 onward promises to be even busier. The Asian investment groups and funds are also both more comfortable and more active in the Italian market, which provides a number of opportunities.

Craig Dickens

The current M&A landscape is set against the backdrop of unprecedented capital available in the market. Private Equity sustaining high levels of dry powder is generating higher multiples across the board, not just in the Pacific Northwest. In our region we are directly impacted by tariffs and trade disputes due to the region's major ports and concentration in manufacturing, particularly aerospace. We have not yet seen a substantial impact on deal activity as a result of the changing dynamics in international trade. The United States is still seen as having valuable assets, perhaps more so if the trade war continues.

Martim Machado

The M&A market has always been active in Brazil. Good business opportunities can be found even when times are difficult, and savvy investors and players are always keen to take advantage of such opportunities. In a bear market, there are M&A opportunities for strategic players with long-term views, for competitors to consolidate, and for international investors with a higher appetitive for risk to find good bargains. No matter how good or bad the economy is, M&A transactions abound. The Brazilian economy is too big to ignore; but that does not mean the Brazilian M&A market is always strong and steady.

A wave of optimism, coupled with what at the time seemed to be sound and promising economic/social indicators, boosted M&A transactions for at least five years as of 2010. However, the political and economic crisis that hit the country and culminated in mid-2016 with the impeachment of President Dilma Rousseff affected the M&A market. 2015 and 2016 were difficult years, and while 2017 and the first part of 2018 saw signs of recovery, current M&A activity is still lukewarm.

Q1. Can you talk us through the current M&A landscape in your jurisdiction?

Martim Machado

The general elections in October 2018 add uncertainty to the current landscape. Investments in general and M&A transactions in particular tend to be put on hold or conducted at a slower pace. While the presidential race is disputed vote-by-vote, investors adopt a "wait-and-see" stance. Once the election is over, investors and market players should have greater clarity on the prospects of the Brazilian economy. Depending on which political forces prevail, and the nature and impact of the initial measures that the newly-elected president should adopt, a new wave of optimism may hit the country. After years of recession or low economic growth, Brazil may see another boom period and the M&A market may be positively affected.

Dale Shepherd

In the United States and in many other parts of the world, over the next 10 years we are going to see the largest transfer of wealth in the history of the world. Baby boomers (born after WWII) are retiring, and in volume. In many cases, their children don't want the business, they want the money. Therefore, cultivating this baby boomer group for future transactions is a key to success. Also, maintaining relationships with acquirors is important, as they may wish to grow their business via bolt-on acquisitions or dispose of a business unit. You, as the M&A Advisor, can benefit by being the go-to guy to solve any of these problems!

Lisa J. Wright

As we approach the end of the Q3 in 2018, global M&A deal activity stands at the highest level ever recorded at this point during a year, with a total of £2.5 trillion of announced deals. This figure reflects just less than a 10% increase on the previous highest figure of £2.3 trillion recorded in 2015, the busiest year on record for M&A deals, and is an increase of 35% on the previous busiest year in record (2007). Once again "mega" deals (defined as deals being over £10 billion in value) have helped drive the figures, with 18 such deals being announced during the first nine months of the year, comparable with 2007 levels, but down on the 24 mega deals announced over the same period in 2015. The 2018 figures have been helped by the fact that this year's top five deals have all be greater than £32 billion, with the largest deal-year to date being the £64 billion ongoing acquisition of Twenty First Century Fox by Walt Disney, compared with only three deals being greater than £30 billion in 2015, with the largest deal of that year being the £54.4 billion acquisition of Time Warner by Charter Communications.

Private Equity deals are also showing near record levels of activity, with £376 billion of announced deals, a figure comparable with the £379 billion recorded back in 2007, and increase of 37% on the figure recorded for the same period in 2015. With over $1.1 trillion of "dry powder", it's not surprising that such levels of private equity-backed deal activity are being seen. However some caution is being applied with only two deals so far this year being greater than £10 billion in value compared with the seven taking place in 2007.

At the beginning of 2018, many observers felt that there was still a healthy appetite for CEOs to do deals. With US tax reforms being introduced in December 2017, the country that has typically always been the biggest driver of M&A, has made it more appealing for US corporates to bring back large cash reserves typically held offshore and to reinvest these earnings in to corporate targets. Whilst 2018 has also seen increasing trade conflicts, as of the end of Q3, these have not yet impacted global deal levels. This is despite some governments revising M&A regulations, so it becomes more difficult for foreign acquirors to buy companies deemed to be in key areas of their economy.

Q1. Can you talk us through the current M&A landscape in your jurisdiction?

Stéphane Konkoly

The M&A market in Switzerland has been quite healthy in the last few months and will most probably remain active in the near future, given the pressure on many players due to the ever-expanding digitalisation. The overall volume of M&A transactions proved lower than in the previous years, in spite of some large deals with Swiss parties, but the overall number of transactions has increased. This shows that small and medium enterprises are currently driving the move. This trend is and will be supported by the fact that more succession planning is to be expected in the coming years. Consolidation continues in the travel, IT and media branches. Deals also regularly involve participants in strong economic sectors in Switzerland, such as consumer goods, retail and the chemical industry.

Shigeki Tatsuno

The decreasing population in Japan and the consequent shrinking of the domestic market has driven up the number of Japanese domestic M&A transactions in recent years, as more companies seek to consolidate or strengthen their market position domestically through M&A. Additionally, increasing interest among domestic companies in home-grown start-ups with distinctive technologies has also contributed to the rise in domestic M&A activity. At the same time, M&A activity involving foreign buyers or sellers is also growing. This is attributable to the untapped potential that many foreign investors still see in the Japanese market, and the increasing desire of Japanese firms to venture abroad to counter slowing growth at home. Private equity funds ("PE Funds"), both domestic and foreign, have been especially active in the Japanese M&A market in 2018.

M&A involving small to mid-sized companies facing issues of succession have been increasing in particular. These companies often possess advanced technology, and many of their owners therefore choose to sell them instead of winding them down. Such companies consistently attract the attention of reputable domestic and foreign PE funds, among others.

Q2. Have there been any recent regulatory changes or interesting developments?

Dang Duong Anh

Anh: There has been no notable regulatory change with respect to M&A in Vietnam from the promulgation of the Law on Enterprises 2014 and Law on Investment 2014, which took effect from 1 July 2015. Having said that, the concept "Foreign Investor Equivalent" was introduced for the first time in the Law on Investment 2014, and has made a compelling impact on the transactional structure of M&A deals whereby multi-layer ownership is utilised to circumvent certain statutory restrictions on foreign investors. Accordingly, if there is any entity which is neither a foreign investor nor a Foreign Investor Equivalent, they shall not be subject to the statutory restrictions on the business sector, foreign ownership and procedures applicable to foreign investors in Vietnam.

The government has offered great opportunities for the foreign investors in renewable energy projects, since it recently promulgated clear policies and incentives regarding FiT and a proposal on power master plan revisions.

Craig Dickens

Dickens: Recent developments in US tax law have been affecting M&A positively. For example, asset sales being deductible in the first year have been received favourably. Non-commercial bank sources of debt capital are helpful in supporting middle market M&A activity. The Consolidated Appropriations Act 2018 became law in March, allowing Business Development Companies to increase leverage from a 1:1 to a 2:1 debt-equity ratio.

Q2. Have there been any recent regulatory changes or interesting developments?

Martim Machado

Generally speaking, over the years Brazilian laws and regulations have evolved and best practices have been adopted changing how we approach, conduct and document M&A transactions. Alternative dispute resolution methods – notably arbitration – have provided M&A players with a more efficient way to settle their differences without having to resort to the not-always-reliable Brazilian judicial system. Also, the legal market has become more mature, competitive and prepared to handle sophisticated transactions (mainly with the flourishing of new, highly qualified local law firms).

More specifically, our legal M&A market has been strongly (and positively) influenced by the constant interactions between Brazilian and non-Brazilian lawyers, which were fostered by an increasing number of international transactions involving Brazil. These interactions, among other benefits, resulted in the introduction of New York/English style M&A documents – nowadays the market standard – to the local market. This has sparked young Brazilian lawyers to seek knowledge and experience in the US and Europe and has given international law firms an opportunity to set up shops in Brazil (in spite of some initial resistance from the local Bar). Overall, it's contributed to an information and best practices sharing that has added certainty to M&A transactions and has improved the M&A legal practice.

Dale Shepherd

The changes in United States' tax laws have changed how a new entity should be structured. As a matter of fact, many companies in the United States should look at their incorporation structure as there could be many reasons to change the type of incorporation one used in the past to take advantage of these new tax laws to maximise cash to the Owner.

Lisa J. Wright

The last 12 months or so have seen at least three countries implement regulatory changes that impact upon M&A deal activity involving companies who are located within their jurisdiction.

On a positive note, the passing of the Tax Cuts & Jobs Act 2017 by the US Government last December saw some of the most meaningful tax changes in US legislation for a considerable number of years. Whilst there were different aspects to the bill, the two key areas influencing M&A deal activity were the reduction of corporation tax from 35% to 21%, and the lowering of taxes on overseas profits. With deals involving US targets at their highest levels since 2015, and with US listed companies involved in over $761 billion of announced acquisitions as of the end of Q3-2018 (the highest level on record), the evidence suggests that the tax cuts introduced in December 2017 are having a positive effect on US M&A activity.

Other regulatory changes introduced by both the British and German governments respectively might be deemed by those outside of the two countries to be less positive for M&A deals.

In the summer of 2017, both governments announced that they were considering tightening the rules around foreign ownership of UK and German companies. The UK government started its National Security & Infrastructure Investment review, resulting in legislation changes taking effect in July 2018 to the UK Merger and Takeover rules. The new rules, applicable to businesses developing military and dual use technology, computer hardware and quantum technology, now allow the UK government to review any deal where a target company from those industries has a turnover greater than £1 million, whereby previously the revenue threshold was £70 million.

Q2. Have there been any recent regulatory changes or interesting developments?

Lisa J. Wright

The German government implemented its change in July 2017, by tightening its control over acquisitions of domestic companies by foreign companies by introducing amendments to the Foreign Trade and Payments Ordinance. These changes allow the German Federal Ministry for Economic Affairs and Energy to block certain acquisitions more easily based on national security reasons. As recently as August 2018 there was speculation that further restrictions might be introduced by lowering the ownership threshold for foreign companies from 25% to 15%, so that more foreign acquisitions of German companies in specific industries would be open to review by the German government.

Such legislative changes are clear signs that governments are becoming increasingly concerned about M&A deals and the potential impact on cross-border deals that certain industries might have on broader national security issues.

Stéphane Konkoly

Recent changes still affect M&A transactions. The transparency rules regarding the identity of shareholders and beneficial owners, which were not clear at their implementation in 2015, will remain a hot topic since the Swiss Federal Council is preparing a new law that might even strengthen the sanctions without removing the existing uncertainties. In January 2016, the Financial Infrastructure Act entered into force. It replaced the previous Stock Exchange and Securities Trading Act with new rules regarding the acquisition of Swiss listed companies, with respect to frustrating actions for instance. The Financial Services Act, which will probably enter into force in 2020, will bring some simplification on the obligation to establish a prospectus. This will offer an alternative to a plain M&A deal for small and medium enterprises. All in all, Switzerland continues to be a deal-friendly jurisdiction.

Q3. What are the main benefits to the different acquisition structures available in your jurisdiction?

Dang Duong Anh

A foreign investor may choose one of the following forms of acquisition in Vietnam:

(i) share transfer
(ii) assets transfer
(iii) project transfer

Each acquisition structure possesses its own advantages and limitations, subject to the intention of the investor and the circumstances. While asset transfer is not popular due to the absence of a specific legal framework in place, share transfer and project transfer are more commonly seen and opted by foreign investors due to their concrete regulations and transparent licensing procedures. That being said, the form of asset and project transfer grants the investor with the "cherry-picking right" i.e. the acquiror may expressly pick and choose the selective assets and liabilities to receive from the seller without absorbing the undesirable ones. The transferee will succeed any tax and land rental incentives granted before to the former project owner in case of the share or project transfer, but the asset transfer shall not be secured for the asset buyer with the succession.

"The transferee will succeed any tax and land rental incentives granted before to the former project owner in case of the share or project transfer, but the asset transfer shall not be secured for the asset buyer with the succession."
- Dang Duong Anh -

Q3. What are the main benefits to the different acquisition structures available in your jurisdiction?

Martim Machado

Most M&A transactions in Brazil are structured as share deals. Asset deals are permitted in Brazil, but are much less common. Asset deals do require buyers to have a legal entity in Brazil to purchase the assets and do not automatically entail the transfer to buyers of tax enrolments, operating and environmental licenses, tax benefits and other special tax regimes, employees and contracts. Specific actions, which are sometimes costly and time consuming, will be generally required when buying assets in order for them to be transferred (assuming that they are transferable, which may not always be the case). Accordingly, (a) tax enrolments and licenses will have to be amended (to reflect the name of the buyer); (b) tax benefits and special regimes (to the extent transferable) will have to be transferred; (c) employees will probably have to have their employment agreements with the seller terminated and will have to be retained by the buyer; and (d) contracts will have to be assigned and amended (which are likely to require third party consents). For that reason, share deals are preferred.

Furthermore, asset deals do not necessarily mitigate the successor liability risk (i.e. the risk of buyers being held responsible for the past liabilities associated with the purchased assets; mainly tax, labour/social security and environmental liabilities). When a transaction involves only the purchase of individual assets to be relocated to a facility of the buyer, with the seller remaining present and doing business as usual, it will be possible to argue that the buyer will not be responsible for the past liabilities associated with the purchased assets. However, when the transaction entails the acquisition of all or almost all assets of the seller, plus the transfer of other required documents risk of the buyer becoming responsible for past liabilities associated with such business is great. It is perhaps as great as the one inherent to a share deal, especially when the seller ceases from doing business following the sale of the assets.

Stéphane Konkoly

A share deal will offer the buyer the possibility to acquire a target without closing actions that are too complex. This type of transaction is also preferred by sellers domiciled in Switzerland since the purchase price will not be taxed as revenue (capital gain). However, it might in some instances be exceedingly difficult to ascertain the ownership of the shares that are transferred. Potential sellers in the SME segment have often not taken sufficient care on the formal rules governing the transfer of shares in the past. In such a case, the buyer might consider an asset deal. The main benefit is that the purchaser will be able to choose the assets it wants to acquire while excluding risks (such as tax risks). The closing actions might be complicated in such a case since each asset will have to be transferred following the specific transfer rule for this type of asset. To minimise these difficulties, the parties may agree to transfer the assets under the provisions of the Swiss Merger Act. In such a case, the assets would be transferred Uno Actu as per the law, although there remain some disputes as to the transfer of agreements under this procedure. The disadvantage of this structure is that some elements of the transaction will have to be published with the commercial register and will therefore become public. There are pros and cons in each setup. Therefore, the choice of the acquisition structure heavily depends upon the particularities of the case.

Shigeki Tatsuno

Most investors, whether they are Japanese companies investing abroad or foreign investors seeking a foothold in Japan, would generally consider a share acquisition structure first. The main advantage of a share acquisition lies within its simplicity. Share acquisitions are generally more straightforward and take less time to complete.

However, as share acquisitions also involve the concomitant purchase of contingent liabilities or less desirable business segments of a company, some buyers prefer a carve-out acquisition structure. Such a structure can take the form of a corporate split or a business transfer under Japanese law, and it allows buyers to focus only on a specific segment of a target. A special purpose company is also commonly used as the buying entity in such transactions, if the buyer wishes to ring-fence its existing business from the acquired business or the debts and contingencies relating thereto.

Q4. What is the key to negotiating better purchasing agreements?

Dang Duong Anh

On a case-by-case basis and subject to the essence of the transaction and the position of the parties in a particular transaction, the keys in negotiating the purchasing agreements from the buyer's perspective may vary from one deal to another. One mechanism commonly applied in Vietnam is the use of an escrow account, opened in a licensed bank. The stated account will serve to retain the purchase price, which will only be released to the seller upon his satisfaction of all pre--agreed conditions.

The conduct of a comprehensive due diligence, in all material aspects (i.e. legal, financial and business), will also enhance the buyer's negotiating power. As a matter of fact, the domestic companies normally have trouble complying strictly with every detail under Vietnamese law, of which several provisions are relatively vague and may be interpreted differently by the relevant authorities. Negotiating with careful due diligence will be helpful for foreigners to eliminate or mitigate the risks attributable to the target company.

Scott Newton

The first step to negotiating better purchasing agreements are to clearly lay out the criteria for both the buyer and the seller of what is most important to each party. Making thinking visible regarding priorities to the buyer and the seller enables the development of a better purchase agreement that everyone can comfortably sign off on within the required timeframe.

Secondly, it is critical to keep the outcome in mind. When purchase agreements become problematic, the root cause is often a diversion from the goal and a myopic drill down into details that are not key to the deal.

Thirdly, ensure that communication between the parties remains open and that there are paths other than just legal and due diligence open to regularly communicate throughout the development of the agreement. I suggest nominating a person for both the buyer and the seller who are neither legal nor due diligence, and are responsible for a communication flow on each side to develop the best agreement on time.

Lastly be sure that your agreement keeps the strategic objectives in mind. The agreement needs to encompass the outcomes that are driving the strategic motivation for the transaction. As the buyer, regularly refer to the strategic case and business capabilities you are attaining from the purchase and ensure the agreement represents those goals.

Craig Dickens

Purchase agreements are a culmination of much preparation, both for the operations of the business and the expectations of owners looking to sell. Staying ahead of the negotiation is essential. Greater specificity up front by getting more terms nailed down at the start of the negotiation will typically work out favourably for a client. Working with founders and first time sellers or those accepting institutional capital for the first time, it is more important than ever to educate based on all the intricacies of the M&A process to increase likelihood of closing. Managing seller expectations and filling education gaps helps guide the client from miss-stepping during the negotiation.

"As the buyer, regularly refer to the strategic case and business capabilities you are attaining from the purchase and ensure the agreement represents those goals."
- Scott Newton -

Q4. What is the key to negotiating better purchasing agreements?

Martim Machado

Every M&A transaction is different. No matter how experienced one might be, there is always something new to learn from an M&A transaction. And this is particularly true in Brazil. The size of the deal is not often commensurate to the challenges it presents. With smaller deals involving medium-sized targets, family-owned companies are sometimes more complicated than high profile transactions between sophisticated players.

I believe what is more important than effective due diligence for a successful M&A transaction (whilst not diminishing the importance of exercising good due diligence), is having a good understanding of the party's goals (including the adverse party's goals) and the ability, knowledge and experience to properly deal with the issues that a thorough due diligence exercise will uncover. Spotting the issues is not always the problem, but not knowing how to address them in a timely, sensible and mutually acceptable way may "kill" a transaction.

Dale Shepherd

Negotiations require a lot of preparation. Too many people want to "wing it" with the negotiations. It is always much better to sit down and talk about and plan regarding what one can be flexible about and what cannot be changed. Remember: the worst notes are superior to the best memory. Also don't talk too much; the old adage of "you have two ears and one mouth" applies. Listen and try to use what is said to your advantage. I have had purchase agreement negotiations where the other side made commitments and I used a language in the agreement that lightly or strongly stated what they said they would or would not do post-closing. It always works well to document everything you can.

Stéphane Konkoly

In my view, the key factor is knowledge; being both the seller's or the buyer's knowledge. Nothing puts a strain on the negotiations like the seller not knowing the company it is selling intimately enough, refusing any indemnity clause and requesting low liability caps and high de minimis and deductibles by fear of financial consequences it cannot foresee, and wanting to qualify any and all representations and warranties with the seller's (best) knowledge. In turn, it is most important that the buyer has access to a well-prepared documentation to conduct its due diligence in order to assess fully the potential risks of the target and of the deal structure, and to be able to decide which conditions of the purchase agreement are still acceptable and which ones are deal breakers. The mutual trust and respect between the parties (and their advisors) also plays a major role in achieving a well-balanced purchase agreement. This includes overcoming cultural differences between the parties.

Shigeki Tatsuno

Familiarity with the target's industry is important, as this would allow the buyer to ask the right questions and seek appropriate representations and warranties in the agreement. Furthermore, adequate industry knowledge would enable a buyer to identify the key areas of focus and to negotiate the purchase agreement accordingly.

The conduct of proper due diligence is also essential, as this would give the buyer a sense of the appropriate purchase price and payment mechanism, which are always key considerations in an acquisition. Effective due diligence will also highlight areas of concern, that can then be reflected in the terms of the agreement.

Furthermore, it is critical in Japan to have professional advisers who are familiar with the Japanese M&A market, the nature and culture of the Japanese target and, where the buyer is a foreign entity, the perspectives, preferences and objectives of foreign buyers.

Q5. What are the main transactional challenges and how are you able to overcome them?

Dang Duong Anh

Transactional challenges could arise from the course of due diligence, licensing and from the status of the target itself.

Due diligence is implemented based on the data and documents provided (voluntarily) by target company, which are not always the most updated or sufficient ones. Meanwhile, public research on companies in Vietnam (particularly unlisted companies) only gives access to very limited and general information; thus it will not help the buyer much in knowing the target company. If the target company is unwilling to disclose full information during the due diligence, it is hard to know them.

With respect to acquisition by acquiring shares of an existing company, many M&A deals are challenged due to the failure of the shareholders/capital contributors of the target company in making full contribution of charter capital as registered with the authority. The laws of Vietnam requires the target to first reduce the charter capital by the amount unpaid, and later to increase the charter capital by the amount to be acquired by the investor. The complexity in licensing procedure in this case could become an obstacle for closing the relevant M&A transaction.

Following that topic, licensing in M&A deals could meet some complications due to the involvement of the state's capital in the target company. Instances where a target company is wholly owned by the state, or is a subsidiary of a state-owned company, the transfer of shares in the target company would mostly be subject to public auctions, which could be significantly time-consuming and unfavourable to investors.

Scott Newton

The biggest transactional challenge is trust between the parties. The barrier between buyers and sellers created by an absence of trust will result in failure. My recommendation is to establish trust as quickly as possible, and to determine mutually agreeable ground rules for the transaction to proceed.

Particularly in family controlled firms, there is a concern as to how the new owners plan to operate the business. For example, I worked with one group where the family did not choose to proceed with the highest bidder because they did not have confidence the new owners would protect the employees and the brands. Instead they chose another fund, where the principals took the time to spell out how they planned to develop the business, what their retention track record was in similar industries, and made sure the board were comfortable with the risks involved. My recommendation is: when approaching family controlled groups, be sure to take the time to review your plans post transaction and what it will mean to the employees and other key stakeholders.

In the middle market there are also barriers related to valuations and transition of control. The buyers are concerned that following the sale, key people will leave the business. An earn-out bonus structure serves in this case to align buyer, seller, and key management interests for both retention and performance.

Lastly, we see difficulties related to overly aggressive escrow requests with unreasonable conditions attached. I suggest the key to success here is to take a good look at the risks involved and focus on protecting only the risks that have material impact on the transaction. Too often a transaction is slowed down and can face failure because of a large and often immaterial escrow request or guarantee. Clearly the buyers need to be protected, however do not let an overly onerous checklist for escrow stand in the way of the purchase. My recommendation is to identify the risks which could be deal breakers, and focus on solving those as opposed to an overly broad guarantee request set.

Q5. What are the main transactional challenges and how are you able to overcome them?

Craig Dickens

Dealing in the middle market, an obstacle we often encounter is our client lacking robust and accurate financial information. We overcome this by preparing early, gathering significant amounts of financial data up front and performing a QofE upfront. Managing expectations with regards to multiples and transaction values are a factor in most transactions. We begin to temper multiple expectations earlier and manage expectations throughout the process. Clients often do not come to us with a plan for the future of the business. This is not particularly a surprise on a sell side transaction, as the owners are looking to get out of the business. We work with the seller to perform an imaginative exercise regarding the future potential of the business and explain the acquiror's need to review, as they will be most interested in the potential of the going concern. It is our goal to ensure all pro-forma projections are well thought out, substantiated and pressure tested. In a rising interest rate environment, the costs of deals are going up. We have to get creative with deal structures to address acquirors need for higher returns to offset this cost.

Dale Shepherd

Time and notes are the challenges. A successful transaction requires detailed notes in an information memorandum and an excellent model of the business and the future. Time is the enemy because if a deal takes too long it can lose its sense of urgency and interest and be forgotten about. A timeline which everyone agrees to is a crucial key to a successful closing, whether you are a buyer or a seller.

Lisa J. Wright

Buying a company will never be the easiest thing a CEO will do during his or her tenure; however the rewards for doing a good deal are worth all the time, effort and expense that goes into finding, and then actually acquiring, the right target. Appointing the right advisors, being prepared to work with them and listening to their advice will be critical to ensure that any challenges that arise during the deal are overcome.

Having identified the right target company, there are several areas that should be considered and addressed by both the acquiror and target company before the due diligence and any subsequent negotiations continue. These include reaching an agreement as to how the deal should be structured. Should it be a stock or asset purchase or a merger (far less common), each party will inevitably have a view as to which is most preferable for them. How will the deal be paid? Will it be an all-cash deal, or will a component of the payment to the target company's shareholders be via shares in the acquiring company?

Add in to this equation the complication of any escrow or earn-out payments. As earn-out payments are typically linked to the future performance of the target company and the target company's shareholders may not have envisaged staying on after the deal, this can be an area of contention between both parties. Inevitably an acquiror will expect representations and warranties along with indemnification from the target company. This is just in case something unexpected comes along after the deal has concluded that can be proven to have been the responsibility of the target company prior to the acquisition, in which case it should have been disclosed at the due diligence stage. Having overcome any of these potential deal hurdles, closing the deal can also throw up a few last challenges such as agreeing on the closing conditions. Even the timing of the closing can be important to those involved.

Clearly none of these transactional challenges are insurmountable given the number of deals globally between large and small companies and across differing geographies. However, it's important that no party involved in a transaction should think it will be without its challenges!

Q5. What are the main transactional challenges and how are you able to overcome them?

Stéphane Konkoly

The first question to solve is the deal structure: share deal versus asset deal. The answer depends on the particularities of the case, as said before. The second issue is generally the law governing the purchase agreement, in particular when the parties and the target are not domiciled in the same jurisdictions. The choice of law influences the available transaction structures. For instance, the procedure to transfer assets under the Swiss Merger Act if Swiss law applies; and the type of purchase agreement that will be negotiated(common law-based agreement being usually more complex and extensive than agreements based on continental law, although globalisation tends to uniform the standards in cross-border transactions). The price structure (locked-box, closing accounts, earn-out, etc.) will trigger a specific set of transactional challenges with respect to leakage covenants, representations and warranties as to the accounts being true and complete, and calculation of the earn-out price component with mechanisms to solve divergences. Then, as always, discussions on indemnities, representations and warranties and liability limitations are quite time-consuming.

Shigeki Tatsuno

Labour issues frequently pose a challenge to foreign investors in Japan. Japanese labour law prohibits the unilateral dismissal of employees unless such dismissal is, among other factors, "objectively justifiable". The standard for proving objective justification is, however, quite high. As a result, it is extremely difficult for any employer in Japan to unilaterally terminate an employment contract. Foreign investors with the intention of undertaking pre/post-merger integration that involves a reduction in a Japanese employee headcount should accordingly bear this in mind. One way of counteracting this problem is to consider negotiating for the seller to take responsibility for both the reduction of headcount before completion, and for any subsequent claims that may be mounted by retrenched workers.

Another common challenge is the retention of key personnel in the target company after completion. When investing in Japan, foreign investors should be mindful of the need to hold on to key persons at the target company because they are often instrumental in ensuring a smooth ownership transition, especially in the technology sector. It is therefore essential to ensure that key employees at the target are not made to feel that their jobs are at risk because of the transaction, or that they would receive less recognition following a post-transaction restructuring. Some investors have overcome this problem by offering key persons attractive compensation and performance-based incentives, such as stock options. More generally, prior communication with employees of the target Japanese company with understanding of local sensitivities, conducted well before the consummation of the transaction, have also proven helpful.

Q6. Can you summarise the importance of due diligence in M&A transactions as well as outlining any relevant methods or strategies?

Scott Newton

Due Diligence in many cases focuses on the numbers, transactions and possibly anti-corruption/compliance. Little time is spent on the 'people' component other than employee contracts and labour laws. I observed a very successful fund make a large investment recently, and while thousands of hours were dedicated to due diligence, the time spent on people was small.

In most cases, and particularly in industrial ones, the people will determine whether or not your investment is successful and whether integration performs on time and budget. My recommendation is to increase emphasis on people, and in particular perform deep dives into key management. Key questions to ask are: will they stay? Why or why not? What motivates them? How will they perform in a larger organisation? What will be lost? What needs to happen for maximum value creation? What risks can be minimised so that creativity is not stifled? What are the links between the brand and the employees? How will this change post acquisition?

Asking the tough 'people' questions early on will pay strong dividends. You may want to consider involving your board in interviews and discussions with key management about what their roles will be, what their thoughts are on strategy, and challenges in the business. This is an overlooked area of due diligence that can be unlocked, and will also greatly assist you in developing your post integration program. I think the board (and/or investment committee) have been underutilised in this role, and where appropriate provide a different set of eyes and perspectives that will assist in developing the best picture of value.

Martim Machado

Taxes, labour and environmental issues are usually the villains in every Brazilian M&A transaction, but the lack of proper accounting controls and systems, the unreliability of financial statements and other difficult-to-believe-problems that not even a very keen investor is able to anticipate, also lead to uncompleted transactions.

Properly defining the scope of the due diligence, carefully planning the work to be done, and keeping track of what is important and what is not as the work is executed are key in any due diligence exercise. A thorough due diligence exercise is very important to a successful transaction. Representations and warranties, indemnity provisions and similar risk-allocation mechanisms (hold-backs, earn-outs, escrow accounts, etc.) are important tools to mitigate risks. But without a proper due diligence, such representations and warranties, indemnity provisions and other mechanisms cannot be tailored to specifically and effectively protect buyers.

Dale Shepherd

There are books written on due diligence. One item missed by many people is the insurances that are in place and how far back they cover claims and/or unforeseen issues. Another is a thorough look at tax obligations and potential obligations. These are two areas that generally do not receive enough attention in a due diligence process. The rest of the review of the profit and loss and the balance sheet is almost text book. The key is not what is on the books, but what is not there. There needs to be a deep understanding of the business to perform a meaningful due diligence.

"Representations and warranties, indemnity provisions and similar risk-allocation mechanisms (hold-backs, earn-outs, escrow accounts, etc.) are important tools to mitigate risks."
- Martim Machado -

Q6. Can you summarise the importance of due diligence in M&A transactions as well as outlining any relevant methods or strategies?

Lisa J. Wright

For any corporate undertaking an acquisition, one of the key drivers for that acquisition is whether the deal will deliver both shareholder value and a return on investment. For listed companies, whose every move is scrutinised by shareholders, analysts and the markets, it becomes even more critical that any acquisition pursued and delivered by the CEO is not found wanting. Thus, the role of due diligence in an M&A transaction is a critical one and should be carried out by appropriately skilled professionals. It should be applied to a multitude of different areas within the target company. Certain aspects of an acquiror's due diligence can be carried out prior to establishing contact with the desired target company. Determining the potential strategic fit between the target and you, the acquiror, having an external view on the competitive landscape in terms of where your target company sits and understanding the market your potential target company operates in, are areas where work can be carried out in advance of more detailed conversations.

Having established contact with the target company there are areas where the types of due diligence to be carried out are more obvious. Looking at the company's financial history; understanding the tax structure or any litigation issues that might be ongoing, determining assets; identifying key employees and determining the management structure and organisation culture. However, in today's increasingly complex world of M&A deals, there are additional areas where it is prudent to take a closer look at the target of your choice. Identifying non-tangible assets, such as any intellectual property and who owns it, is an area of increasing importance. Does the target face any environment issues that might impact upon it and ultimately you as the acquiror at later point in time? And finally, anti-trust and government regulations; having previously referenced the increasing interests of governments in to M&A deals, this is a key area of due diligence. A lot of time and money could have already been spent getting the deal to the point where it then goes for government or regulatory approval, only to be knocked back or with conditions of sale being applied.

Stéphane Konkoly

From a psychological point of view, a due diligence can be a selling instrument helping the seller to convince the buyer that the target is professionally run, therefore supporting the purchase price and reducing the necessity of too extensive representations and warranties. From a financial, tax and legal point of view, the conduct of a due diligence has become such a standard that only few buyers (if any) would agree to close a deal without any investigation, aside from the purchase of a target or business from a distressed seller. The seller might nevertheless be tempted to restrict the extent of the disclosed information, be it for valid reasons (confidentiality, data protection) or to hide some problematic issues. In the latter case, the strategy might backfire during the negotiations of the purchase agreement since the buyer might insist on obtaining from the seller a representation in the purchase agreement to the complete disclosure of all necessary information in the due diligence. The seller will usually try to benefit from an extensive disclosure of documents by limiting the buyer's claim in case the triggering event or issue was disclosed (fairly or not) in the due diligence documentation.

Shigeki Tatsuno

Allocation of sufficient time for the proper conduct of due diligence is one of the most important considerations in M&A. This is because time is needed both for risks in respect of the target to be properly negotiated and addressed within the acquisition scheme, and for such risks to be adequately addressed through the terms of the purchase agreement. Often, this means commencement of due diligence at the initial stages of a bid, so as to give the buyer a sense of what an appropriate bidding price would be. Moreover, timely due diligence is also demonstrative of the buyer's commitment to a transaction.

To ensure a meaningful and expeditious due diligence exercise, buyers should also prepare in advance document request lists that focus on central aspects of a target's business. By doing this, buyers can often mitigate information overload and avoid the distraction of irrelevant information.

Q7. Which industries or jurisdictions currently provide the best opportunities?

Dang Duong Anh

H1-2018, M&A trends saw the dominance of the real estate sector with Vinhomes raising US $1.3bn in investment via stake sale in units from GIC Private Limited[1], the acquisition of shares by CapitaLand of Hien Duc Tay Ho JSC,[2] and other million-dollar deals. Together with real estate, the recent IPO of reputable institutional entities (including Techcombank and VPBank) gives the banking sector a major proportion in the M&A transactional value within the same period. On top of that, the rise of foreign investors' interests in acquiring renewable energy projects and fintech companies draws significant attention.

1 http://cafef.vn/lo-dien-hang-loat-thuong-vu-ma-lon-tren-thi-truong-bat-dong-san-viet-nam-trong-6-thang-dau-nam-20180725112050319.chn
2 http://cafebiz.vn/nhung-thuong-vu-ma-bat-dong-san-dinh-dam-nua-dau-nam-2018-20180730134247287.chn

Scott Newton

In Europe, I see great opportunities in the middle market in Italy and Spain.

There are companies that possess strong IP in automotive, chemicals/materials, industrials, and medical devices/pharmaceuticals. Unlike in the United States, valuations in Europe are not over exuberant, and this leaves many interesting deals open.

Strategic buyers coming into Italy and Spain are finding they can purchase excellent companies that allow them to bolt on the capabilities and technologies they are missing. In many cases this can also provide market access into the Middle East, India, and China, which speeds up the overall group strategy.

Private Equity investors are increasingly active in Northern Italy. Industrial automation and life sciences offer a number of opportunities to develop. The key is in finding technologies that can be better deployed, providing the scale for increased profitability.

The Non Performing Loans (NPLs) divestment from the banking sector in Italy continues to offer a number of opportunities for funds that have the capabilities to manage this type of investment.

Craig Dickens

Our firm operated across a multitude of industries and we feel M&A opportunities exist in just about every one of them, however tech and healthcare continue to be in high demand globally. It seems like more companies can be classified as 'TMT sector' today as tech touches everything, and gains in the market are being achieved by those with the best tech solutions. Buyers are going down-market for world class tech solutions as well, leading to earlier exits in the sector. Healthcare technology continues to make strides from supply chain logistics to new devices and new drugs showing promise in treating some of the world's most devastating diseases.

Dale Shepherd

No matter where you are in the world there are opportunities. It takes time and thought to come up with strategies that are game changing in the marketplace today. 'Following the herd' means that you are walking in the droppings that others leave. This is not good.

Q7. Which industries or jurisdictions currently provide the best opportunities?

Shigeki Tatsuno

With the population decline in Japan, policymakers are hoping to promote greater interest in Japanese start-ups involving the latest technologies, such as the internet of things (“IoT”), artificial intelligence (“AI”) and financial technology (“FinTech”), in the hope that more effective utilisation of technology and artificial intelligence will lead to enhancements in productivity and economic growth. As the Japanese government is expected to introduce more initiatives in the coming years to incentivise investments in these areas, they present opportunities for foreign investors. Furthermore, based on the trend of recent public listings in Japan, it would seem that technology start-ups prefer to exit through an M&A, rather than an IPO, and this accordingly also provides pre-IPO opportunities for investors. More traditional companies, such as those in the manufacturing industry, present another investment opportunity. Some of these companies possess advanced in-demand technology, but are unable to continue operations due to inadequate management, cash flow or other problems. Investors who are able to appropriately restructure such companies therefore could potentially reap significant rewards.

Turning to other jurisdictions, Japanese companies in recent years have been increasing their focus on the emerging markets of Southeast Asia and elsewhere, where sizable and young demographics provide an attractive counterpoint to Japan’s shrinking domestic population. More recently, Japanese companies seeking stable returns and established brands are also favouring investments in the more mature markets of the United States and Western Europe. Japanese companies often target, among others, the consumer product and food and beverage sectors in emerging countries. In mature markets, by contrast, Japanese buyers tend to seek targets in sectors relating to life sciences, information technology and high-end or innovative manufacturing.

Q8. What are the most common disputes in cross-border M&A transactions?

Scott Newton

Common Post closing disputes in cross-border M&A transactions are related to balance sheet adjustments and earnout adjustments.

Balance Sheet adjustments in the middle market internationally often relate to the conversion to GAAP (USA) or IFRS from local accounting standards (for example, Italian Accounting Standards/ IAS). The root cause in this dispute stems from assumptions made prior to the transaction and/or generic language used in agreements. A clause that references “Generally Accepted Accounting Practices” may be useful in the United States, but internationally it can be problematic. My recommendation is to ensure the language is very clear as to what accounting standards will be used and how they will be applied. It is useful to insert examples of how adjustments will be calculated. In an agreement with a buyer from China and a seller from Europe, the inclusion of detailed examples of possible adjustments prior to closing eliminated a series of potential problems and disputes.

Earnout adjustments create friction, which distract both management and the buyers from focusing on what is important to generate value. Earnouts that reference adjusted EBITDA may be common, but they open up a series of problems. My suggestion is to keep earnouts as simple as possible, and to minimise the use of adjustment mechanisms which create controversy. Importantly, when developing the earnout in the beginning, be sure to carefully consider the impact the transaction will have on the business.

One overlooked area of dispute that should carefully be investigated is laws and practices related to Anti Corruption and Anti Bribery acts. The buyer needs to perform detailed due diligence in this area before finalising the transaction to ensure they are not opening up a dispute area, which post transaction can be expensive and difficult to resolve.

Q8. What are the most common disputes in cross-border M&A transactions?

Martim Machado

Most of the disputes I have seen in cross-border M&A transactions are related to the enforcement of indemnity and earnout provisions. Risks overlooked during the due diligence exercise, or not properly mitigated during the contract negotiations, may materialise after closing and discussions as to whether they were related to pre-closing facts, events or circumstances, were disclosed in representations and warranties, were carved-out from indemnity provisions or were affected by liability caps or time-period limitations abound. As to earnout the provisions, disputes normally arise when the target company does not perform as expected in the hands of its new owner and earnout payments are withheld. Distraught sellers tend to credit the underperformance to actions taken or decisions made by the new management and claim the withheld payments. Parties may resort to mediation when these disputes arise, but usually arbitration is the method deployed to definitively solve such disputes.

Dale Shepherd

You always need a top-notch tax advisor when doing cross-border transactions. Small things in an agreement and structure can have huge impacts on the future of the business.

Stéphane Konkoly

M&A disputes are quite seldom in Switzerland. The reason might be that the parties take the conduct of the due diligence as a serious matter and that through this they achieve a purchase agreement that covers the most important issues with sufficient precision. It must, nevertheless, be said that transactions and purchase agreements become so complex that it is sometimes not clear enough whether a party's claim is sufficiently substantiated to ask a court to resolve on the dispute. Therefore, in most of the cases disputes will be settled out of court. Quite often, such disputes do not arise in connection with pure legal issues, but pertain to disagreements on figures, such as the calculation of the earnout component or determination of the purchase price based on closing accounts or the inaccuracy of financial statements.

Shigeki Tatsuno

Cross-border M&A disputes in Japan often arise from a breach of representations and warranties, whether as a result of inaccuracy in the target's financial statements, the seller's failure to disclose material documents or information, or other reasons.

Disputes about adjustments in purchase price are also relatively common, particularly in large cross-border transactions, where minor differences in the interpretation of the adjustment mechanism could have significant financial impact.

Transactions using short-form agreements with general provisions, sometimes preferred by Japanese parties, also give rise to a higher likelihood of disputes about the interpretation of matters not expressly provided for in the agreements.

"Quite often, such disputes do not arise in connection with pure legal issues, but pertain to disagreements on figures, such as the calculation of the earnout component or determination of the purchase price based on closing accounts or the inaccuracy of financial statements"
- Stéphane Konkoly -

Q9. What buyer protections exist for buyers entering into unfamiliar territory?

Dang Duong Anh

Investors in Vietnam are facilitated with safeguards under the laws of Vietnam and international treaties that Vietnam is a member, including, inter alia, the following protections:

- Legal assets of foreign investors in Vietnam shall not be nationalised or confiscated by administrative measures;
- State performance guarantee shall be granted by a decision of the Prime Minister for important projects in the area of infrastructural development to ensure the compliance of the state agencies or state-owned companies under the cooperation contract with foreign investors;
- In case of any change of law in Vietnam affecting the investment incentives applicable to foreign investors, they shall be assured to use the policies and incentives that are more favourable to them. In some special cases where incentives can no longer be applicable due to change of law, investors can request help from the state for remedial measures. In return, investors may be entitled to tax return, damage recovery supports from the state and adjustment of project objectives;
- The accession of Vietnam to WTO and over 30 multilateral and bilateral agreements have created a regime to encourage foreign investments in Vietnam. Foreign investment in most services (except a few special industries such as pharmaceutical distribution, telecommunication, audio-visual services and entertainment services) are now open for 100% ownership of foreign investors. Lower import/export tax rates and custom facilitation have also been gradually applicable as a part of the "market-opening" schedule of Vietnam; and
- With respect to dispute between investors settled by foreign arbitration, foreign arbitral award shall be enforced in Vietnam via the recognition and enforcement mechanism under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award as Vietnam has become a member of this convention since September 1995.

Dale Shepherd

A great attorney who knows deals gives protection, not your normal business attorney or friend; a CPA and or tax advisor who understands deals and how they should be structured to the benefit of the Buyer are most useful. Do not count on your M&A advisor to be the one who knows all – they don't. M&A advisors know how to package a business for sale; they know how to promote a business and find potential buyers; and, they know how to be an intermediary to make sure the deal moves forward and closes. They are not experts in ever changing laws, tax structures and contract wording. Experienced deal attorneys and experienced transactional CPAs are knowledgeable about these matters, and what M&A advisors do and do not know, and when you need to bring a specialist in to handle a tough matter. A note on attorneys is that inexperienced attorneys sometimes want to impress everyone with how smart they are; as a result they can, and sometimes do, kill deals. Be careful.

Stéphane Konkoly

W&I (warranty & indemnity) insurances are not common in the Swiss M&A landscape. The buyer will therefore have to rely on standard protections. One can distinguish between pre-closing, contractual and post-closing protections. The conduct of a thorough legal, tax and financial due diligence by professional advisors familiar to the relevant industry sector and market practices is probably the most efficient pre-closing protection to gain knowledge of the territory. This includes advice relating to all necessary authorisations as conditions precedent to the closing. If closing does not occur simultaneously to the signing of the purchase agreement, the buyer should insist on a stringent conditions precedent (MAC clause, conduct of the business in the usual course, etc.). In negotiating the purchase agreement, the prudent buyer will make sure to request an escrow or deferred payment on part of the purchase price (next to indemnities and reps and warranties). This is crucial when the seller is an individual who can easily change his or her domicile to hide his or her assets. Non-compete and non-solicitation covenants coupled with a contractual penalty offer a common post-closing protection.

Q9. What buyer protections exist for buyers entering into unfamiliar territory?

Shigeki Tatsuno

Buyers sometimes request for sellers to hold a stake in the target for a certain period of time after completion, to position the seller as a co-stakeholder and to motivate it to continue growing the target's business.

Where a seller controls other entities along the target's business chain, such as entities that provide a source of supply or demand for the target, or entities that provide synergies of some kind to the target's benefit, a buyer could also make its acquisition conditional on the execution of some sort of collaboration agreement between the target and the relevant seller-owned entity to address "stand-alone" issues.

Additionally, it is often important for a buyer to identify the key personnel at the target who are able to assist the buyer in navigating an unfamiliar business environment.

The buyer could also build in some provisions in the sale and purchase agreement for its own protection, such as indemnity and material adverse change clauses, as well as representations and undertakings that address specific areas of concern.

Q10. Can you outline the importance of implementing an effective post-merger integration strategy?

Dang Duong Anh

The booming industries like energy and infrastructure, education, pharmacy, and telecommunication are still heavily regulated regarding the participation of foreign investment. The Vietnamese government has started a process to relax the restrictions applicable to the stated lines, among others, and reduce the burdens of the bureaucratic procedures. In practice, the licensing process is gradually changed to electronic method rather than the current one-stop service.

The capital flow from countries, which already has substantial proportion in Vietnam's foreign investment segment (i.e. Japan, Korea, Singapore and the U.S.), will keep its pace within the near future. Meanwhile, the capital market is expected to observe more remarkable M&A deals like Thaibev's acquisition of SABECO owing to the latest IPO of giant groups (i.e. VinHomes, Vincom Retail, Techcombank).

The signing of the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) in March 2018 remarks another milestone of Vietnam in welcoming global trading activities. That being said, it remains to be seen how signatory countries (including Vietnam) will perceive and turn their commitments in the CPTPP into practice.

Scott Newton

Harvard Business Review research indicates that more than 70% of merger efforts fail. Forbes estimates the failure rate at 83%. M&A transactions consume an enormous amount of your company resources and management focus. The investment is large and the consequences of failure are heavy. This high risk underscores the importance of a strong post-merger integration strategy and deployment program.

I think the biggest issue surrounding post-merger integration is that the excitement of the deal, the adrenaline to close, and the enormous output of energy surrounding the transaction are absent following the closing. What remains are a large number of concerned customers, employees, suppliers, and other key stakeholders asking the question of "What does this mean for me?"

Q10. Can you outline the importance of implementing an effective post-merger integration strategy?

Scott Newton

The post-merger efforts are underestimated in many cases of failure, so the first step in effective post-merger integration is to accurately define and allocate the resources necessary for success. Transition of control issues, branding conflicts, competition bureau requests, and labour unions for example, all require significant investments in time and expert resources.

A good post-merger integration program will assist you in employee retention, customer satisfaction, and ultimately long term value creation. Integration is hard work, rarely glamorous, and time consuming. A successful integration program revolves around effective decision making combined with strong communication and interpersonal skills. If you or your board are unsure you have the resources required to successfully deliver on the implementation plan, the transaction needs to be reconsidered.

Dale Shepherd

On a scale of one to 10, a 15! We could do an entire webinar just on the importance of a post-closing integration plan. Communication through a written plan disclosed to all parties is a huge key to success. I have worked with difficult unions, Islamic countries, Japanese, Koreans, Chinese, Italians, Germans, British, Argentines and many others. With a plan laid out and discussed in advance of closing, you avoid surprises that can derail the effectiveness of integration. I have also seen the work by investment banking firms who think that they are brilliant because they have, or can, raise money; and, I have seen these same people destroy businesses through arrogance. Having a plan and sharing the plan with everyone involved is integral to success.

Lisa J. Wright

Having put a substantial amount of financial resource and effort into completing a deal and upon waking up from the deal closing celebrations, the next key step in the process is to start integrating the target company into the acquiror's corporate structure. However, it is important to stress that for an integration to be successful, its planning should commence very early on in the deal process, as more critical information about all aspects of the target company is being shared during the due diligence phase. Information disclosed at the due diligence stage allows the acquiror to "flesh out" more detailed plans for maximising their return on investment by determining strategic synergies, aligning corporate cultures and potential cost savings that could be immediately gained etc.

It would be very unlikely that any post-deal integration plans would ever go totally to plan. The aim is to minimise the number of unforeseen problems by ensuring that a clearly defined time scale and detailed plan has been agreed in advance of the deal's completion, so that all those involved know the outcome that they are working towards. Communicating the integration plan to the employees of the target company is, in my opinion, an important facet of integration that should not be overlooked by the acquiror. Employees of companies that have been acquired can be very unsure as to their own futures and many people are uncomfortable with any kind of change, let alone the major changes that can occur because their employer has been acquired. Thus, it's important to communicate to employees of both parties the timelines and plans that are being implemented to integrate the target company into the acquiror, so that employees feel engaged and part of the integration process.

"Employees of companies that have been acquired can be very unsure as to their own futures and many people are uncomfortable with any kind of change, let alone the major changes that can occur because their employer has been acquired."
- Lisa J. Wright -

Q10. Can you outline the importance of implementing an effective post-merger integration strategy?

Stéphane Konkoly

Like in most jurisdictions, in many instances M&A transactions in Switzerland will fail to deliver the sought-after value because of post-merger problems, and not problems related to risks not discovered during the due diligence, or to inadequate provisions of the purchase agreement. Often, the human factor is forgotten by the buyer. Foreign buyers in particular need to understand not only the legal background of the business they are acquiring, but above all, the cultural compatibility between their managers and the people actually running the business. Fear of job loss, employee demotivation, high staff turnover and departure of key people or managers prove the biggest challenge to the financial success of an M&A transaction. Without proper strategy, the energy and time consumed by the cultural integration will be missing for optimising business synergies and developing new business opportunities; customers might feel neglected and could seek a safer harbour with competitors.

Shigeki Tatsuno

A successful and efficient integration process is often dependent upon key persons at the target company. It is therefore important, even as early as the due diligence stage, for the acquiror to identify personnel capable of contributing to a smooth integration and successful future operations. The acquiror should, as soon as practicably possible after identifying such personnel, induce them to stay with the target company through reassurance or discussion of future incentives.

Placing key persons from the acquiror within the target company would also enable the acquiror to win over the target's employees, whether through the establishment of rapport between the acquiror and the management team of the Japanese target, or the creation of a corporate vision among the target's employees that unifies with the acquiror's objectives. The importance of showing respect to the target's employees should also not be overlooked.

Q11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Scott Newton

On the M&A front the use of technology is accelerating. Starting from deal sourcing and flow, through to due diligence and closing, more firms are moving away from the use of spreadsheets and towards tools that significantly increase productivity and security. This is a positive change, and while the middle market was slower to adapt they are also now moving in this direction quickly.

Consolidation in many industries still needs to take place, and the requirements for scale combined with the abundance of capital available lead to a 2019 with an increase in both the number and value of transactions.

Automation in industry will be a very hot investment sector, and with China emphasising industrial technology, we expect to see increased interest and cross border transactions taking place for the next three to five years.

Family Offices are shifting away from private equity, and in many cases starting their own funds and/or making direct investments. A new report from the Middle Market shows that more than 80% of family offices now have at least one full time employee dedicated to sourcing and investing in new direct deals. This will have a large impact on valuations, the role of private equity, and the shifting needs and requirements for banking and finance.

Disruption caused in traditional financial institutions by fintech start-ups has been undervalued. The combination of fintech offerings, together with new technology adaptation by millennials, will result in shifts in the banking and finance markets that are much larger than many anticipate. This upset will create significant opportunity.

Q11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Scott Newton

In an ideal world, the biggest change I want to see is a shift away from nationalism, and an emphasis on the enormous positive value creation realised through globalisation. At the moment, false promises of nationalism and a return to protectionism run the risk of significant disruption to industry with little or no long term benefit.

Craig Dickens

I expect more creative ways to deploy capital from private equity, further pressuring strategic buyers. We will likely see more capital chasing fewer premium companies along with consolidation of larger firms and industries. There will probably be a continuation in the rush to buy vs. build technology solutions, as competition in the tech world remains ever-changing at a rapid pace. I anticipate disruption at every level of the economy. Founders and entrepreneurs need to plan for further investment in tech to keep up. Folks remember The Great Recession in 2008, and are increasingly focused on de-risking, as we see rates rise, the economy adapt and the market react.

Dale Shepherd

I believe some smart, moneyed parties are going to start doing roll-ups again. There is a lot of money to be made in a well thought out acquisition plan to grow a business and create huge value for the shareholders/owners. This used to be the way moneyed people made a lot of money in past decades. Although it became a bit old school, it still works.

Lisa J. Wright

It currently appears that nothing seems to be stopping the global surge in M&A deals. Cross-border deals involving US companies should continue apace given their ability to bring in to play previously held off-shore cash reserves. And with those companies that have been more domestically-focused also benefiting from lower corporate tax rates, I can foresee strong interest from US acquirors in pursuing acquisitions as part of their growth strategy for some time to come.

As previously referenced, private equity buyers are also sitting on substantial amounts of "dry powder" which ultimately must be invested. Where that money will be invested is a different matter. Private equity firms are not just competing amongst themselves for the best targets, but also have cash-rich corporates with their eyes also on the same potential targets, who are willing to pay more because they have a longer -term strategy involving the target. For several years now, private equity firms have been willing to look at each other's portfolios for secondary opportunities and I do not realistically see that changing.

Brexit "D-Day" is edging ever closer and, at the time of writing, no deal has been agreed between the UK and the European Union. As we get ever-closer to 29 March 2019, it would be unsurprising if interest in UK companies as potential targets tailed off significantly. If negotiations carry on as they currently are, and the UK endures a "hard" Brexit, then the level of uncertainty that this would bring in multiple areas for foreign buyers may well be a significant deterrent for them to even think about entering discussions with UK based targets. The reverse could be said of UK acquirors, who might see an acquisition within the EU as a way of ensuring that trade borders remain open via a Europe-based subsidiary.

Q11. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

Lisa J. Wright

Given the levels of announced M&A activity seen so far in 2018, it is highly likely that 2018 will break the previous record of 2015, but 2019 does seem far less clear-cut. Next year, Brexit will finally be upon us, consumer debt is at an all-time high (higher than in 2007) and the world's two largest economies, the United States and China, though both strong, seem to be slugging it out against each other in a trade war. The latter two factors (consumer debt & trade wars) could continue to have absolutely no effect on global deal making as we have seen this year, or they might finally start to impact upon corporate confidence, which would surely see M&A deal activity slow.

Shigeki Tatsuno

"Abenomics", the expansionary monetary policy advocated by Prime Minister Shinzo Abe since late 2012, has been generally well-received, and has led to an increase in corporate profits and a rise in Japanese M&A activities. This expansionary policy, and the general market optimism in Japan, looks set to continue in the foreseeable future following Mr. Abe's recent election victory in September 2018, which gives him another three year term. Although "Abenomics" has undergone several adjustments since its inception, the essence of this policy, which is to increase the supply of money in the economy in collaboration with the Bank of Japan, has remained unchanged. Accordingly, the current inbound and outbound M&A trends in Japan are expected to remain buoyant in the coming year.

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