
ALI-ABA 24th Annual Advanced Course of Study: Corporate Mergers and Acquisitions

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Sitting comfortably in front of our computers on a temperate Bay Area morning, we had the opportunity to attend the two-day Web cast of the ALI-ABA *Annual Advanced Course of Study: Corporate Mergers and Acquisitions*. Hailed as an “indispensable overview of sophisticated strategies and techniques,” the conference lived up to its reputation. The conference offered relevant topics addressed

by speakers with impressive credentials and experience. For young attorneys attempting to soak in the “sophisticated strategies and techniques” might have posed a daunting task. Fortunately, that pursuit was aided by the thorough course materials provided, and the convenience of being able to attend the conference (held in New York) without having to travel.

Round 1

The Thursday mid-morning session was led by Lewis R. Steinberg of UBS Securities LLC, and dealt with one of the backbone issues of structuring and negotiating an acquisition: tax considerations. Mr. Steinberg began by tackling the effects that historical tax liabilities plus acquisition-related and future tax liabilities can all have on the economics of a transaction. Historical tax liabilities, or the pre-closing tax liabilities of the target company, are often allocated between the buyer and the seller.

However, they warrant special consideration, especially in light of future audits on pre-closing tax years, at which point the general indemnity provisions or escrow arrangement of the deal may have expired. Taxes attributable to the acquisition transaction must be analyzed by both parties, as they may represent an increase or decrease of the purchase price (depending on which party bears the costs). And finally, when considering future tax liabilities, the parties will need to examine the availability of losses, carryforwards and credits, as well as the basis of the target company's assets.

Steinberg also stressed the importance of tax opinions for tax-free acquisition agreements. These opinions generally require Buyer and Seller each to make a series of representations, based on representations that the IRS used to require when it was issuing letter rulings in this area. Both parties' respective tax counsel are generally required to render a clean opinion as to the tax-free status of the transaction. However, the acquisition agreement can be structured so that if either tax counsel refuses to issue an opinion, the opposing counsel can issue its opinion to both parties as a means of satisfying the closing condition.

Of course, not all of the tax considerations of an acquisition can possibly be covered in a short one-hour session. Nevertheless, Mr. Steinberg's presentation was informative and touched on the core tax issues.

Round 2

Day 2 began bright and early with a presentation on Pre-Deal Legal Considerations presentation given by Brad Malt of Ropes & Gray LLP. Mr. Malt provided five early-stage topics to consider, starting from the conception of the deal to its closing. The highlight was the practice tips he gave from his own experience.

First topic on the agenda was the need to find an acquisition target, and for that, the usual first task is to hire a finder. Here, Malt divulged his first practice tip, which was simply to use large measures of care when dealing with finders. While acknowledging finders' unflattering reputation, Mr. Malt also recognized the importance of clearly and carefully defining one's relationship with finders by the terms of a contract. Dealing with finders is an inherently ambiguous area because there is no statutory law for finder's fees. That means the governing terms of the contract must be particularly comprehensive and specific.

To lend greater credence to this point, Malt discussed an actual deal, where two finders both claimed a right to payment, when only one of them had identified and secured a target. Regrettably, both were paid, with one receiving the finder's fee and the other receiving payment out of a settlement. This example underscored two points. First, the reputation of finders may in fact be well-deserved. Second, there's a need for great care in dealing with finders by clearly defining the terms of the contract.

Malt's treatment of this first topic continued through many other aspects of dealing with finders, such as excluding certain transactions from a finder's fee, and how the finder's fee is calculated. All other points were thoroughly addressed through his outline provided with the other course materials.

The presentation continued through a similarly illuminating treatment of confidentiality agreements, letters of intent, due diligence, and purchase price consideration. Malt peppered each discussion of the issues with practice tips evidencing his expertise, and adding significant value to the program.

Due Diligence

It may be hard to make the due diligence process sound exciting. Nevertheless, Brad Malt's discussion of diligence was rewarding, and could well serve as a point of encouragement to other young attorneys who have taken their turns in electronic data rooms, laboriously typing long summaries of their investigations. Malt describes diligence in the acquisition context as an aspect with considerable value. At minimum, it validates a client's investment decision.

In addition, it can help an attorney think about the risks of a deal and draft better purchase and sale agreements. It may also add another layer of safety for reps and warranties. One of Malt's practice tips for diligence addressed the dicey issue of just how much diligence to do, and when. In fact, a large bill for diligence work in the hands of an unappreciative client may cause friction or even accusations of paranoia. These dangers call for clear, upfront communication regarding the areas in which diligence should be performed. Devising a work plan may help practitioners steer clear of unwanted tension over due diligence issues, when there is surely plenty of other tension to go around!

Additionally, customizing due diligence to the client's situation and needs provides greater value. Malt used an example of the purchase of a trampoline manufacturer for which he performed diligence on products liability (in reference to the risk of selling trampolines to risk-averse trampoline users).

Bringing it Home

Day 2 ended with a mock negotiation over the acquisition of a private company. These kinds of theatrics can be tough to pull off, but they

can provide a much clearer take on the points, with a little entertainment thrown in. The mock negotiation here was well done, illustrating several difficult areas which can slow and attenuate the acquisition process. The major focus was on the financial structure of the deal. Given the current economic climate and the level of cooperation likely be to received from banking institutions, it was especially important for the buyer to have the seller secure financing and make assurances that it would be able to proceed with the deal. The panelists were obviously very experienced, which brought a real-world twist to the negotiations.

The 12 hours of instruction this course provided were both enlightening and engaging, covering quite a wide range of topics. For example, panelists reviewed such pertinent topics as anti-trust issues, employee benefits and executive compensation, and buying a distressed or bankrupt company (the latter being of particular concern in these economic times). For an advanced and sophisticated course on mergers and acquisitions, this ALI-ABA conference is one not to be missed. To purchase an online version of this course or for information about other ALI-ABA courses and live events, go to *www.aliaba.org* or call (800) 253-6397.

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