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VOL. 14, NO. 5 SEPTEMBER-OCTOBER 2020

The Road to Global Closing: Drafting Local Transfer Agreements in Cross-Border Carve-Outs

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After months of planning, negotiation and drafting, the sale and purchase of a carve-out business with operations around the world often snaps into focus with the signing of a global purchase agreement. Press releases may be issued, the parties and their myriad advisers may rest briefly and even congratulate one another. But this milestone is really only something akin to two strangers, having met and measured the other's worth, agreeing to set off together, albeit on binding terms, for a far-off destination that they have only etched out in their minds and in their contract: a global closing.

The challenge in selling or acquiring a carve-out business is that the target business may be commingled around the world with other business units that the parent company intends to retain. As a result, the target business often needs to be separated, either at or prior to a global closing. This separation generally involves a combination of equity and asset transfers in jurisdictions around the world to effectively "package up" the target business for sale (in the context of a pre-closing reorganization), or to deliver the business directly to the buyer at closing (in the context of a direct sale). As such, getting to global closing in a carve-out transaction often requires successfully navigating a series of local closings around the world — a daunting task even before the world became a patchwork of different local and national lockdowns and work restrictions related to COVID-19.

In this article, we describe some of the key drafting considerations for local transfer agreements in the context of a global carve-out transaction, as well as issues that buyers and sellers should consider in connection with these agreements. It is worth noting at the outset that our specific focus in this article, preparation of effective local transfer agreements, is only one of several important legal considerations at the outset of the implementation phase in a carve-out transaction.

Template Agreements

The form agreements to be used for local asset and share transfers are often an afterthought in the negotiation and execution of a global purchase agreement. While not contentious (the key terms of the deal have already been agreed), these local agreements do require attention and the deal team should understand the range of country-specific issues that may be encountered as the forms are localized for use in target jurisdictions. Templates for these agreements may be agreed upon as exhibits to a global purchase agreement, or prepared after signing. In either case, the parties should expect that the forms will need to be further customized for use in each jurisdiction where assets or shares are being sold.

The local agreements should represent a bring-down of the terms of the global agreement for local implementation. These templates should be brief and silent on risk-allocation issues already addressed in the global agreement. For example, representations and warranties and indemnification obligations should be addressed in the global purchase agreement and not replicated in, or contradicted by, similar provisions in the local agreements. Ideally, the local agreements should also contain a clear provision that the global agreement controls in case of any conflict.

While these may be sound first principles, there are a number of country-specific issues that can make the roll-out of uniform local transfer agreements more challenging. Below we will look at some common issues in the context of asset transfers, as well as share transfers.

Asset Transfer Jurisdictions. Where it is decided that specific assets related to the carve-out business need to transfer in multiple jurisdictions, the first question the parties may ask is why, should each local asset buyer and local asset seller not simply sign a short, bill of sale-type document that purports to transfer all of the relevant local assets and liabilities by reference only to the terms of the global agreement. Tempting as this may be, this type of agreement will not be acceptable in many jurisdictions and will lead to inconsistent changes and additions as the agreement is localized for use.

We find the better approach is to prepare a brief but comprehensive business transfer agreement or "BTA" at the outset that brings down key commercial terms of the deal that are relevant for the local transactions. By placing these terms into the context of local transactions, local BTAs can help streamline implementation and increase consistency across the different jurisdictions involved in a project.

- *Referencing the Global Agreement.* In drafting a template BTA, the parties may find that there are certain terms in the global purchase agreement that are relevant to the local transactions, but that would be too cumbersome to replicate or summarize in the local agreements. In this case, it is acceptable in most jurisdictions for the local BTA to incorporate certain terms of the global agreement by cross-reference.

  The right balance here is to draft an agreement that local advisers and/or third parties can review on its face and readily discern the key terms of the local transaction, but that also may refer back to the global agreement for certain complex or specialized deal issues. Once the form is set, centralized coordination and review of any local drafting changes is critical to ensure that the local agreements remain consistent with the global terms.

  There are, however, certain jurisdictions and types of transactions where making any reference to the global agreement is strongly discouraged. For example, in China, references to the global agreement in a local asset transfer agreement may prompt tax authorities to question whether the price allocation to the local transaction is reasonable or to request a copy of the global agreement for review.

  It is relatively easy to work around this issue at the global level. For example, the parties may choose to enter into a private side-letter agreement that confirms that any "non-reference" local transactions are nonetheless part of the global transaction and subject to the terms of the global purchase agreement. While the global purchase agreement itself should already contain language to this effect, a side-letter agreement can be used for added certainty and clarity.

- *Schedules*. In preparing the schedules for a local BTA, the parties will again need to balance the use of inclusive, "catch-all" language that refers back to the global agreement with the need to

more specifically describe the assets and liabilities that are actually transferring in a given jurisdiction. Generally, we do suggest specifically scheduling any important assets that need to transfer in a jurisdiction, *e.g.*, material contracts for the local carve-out business, while also deferring to the broader global definitions of transferring assets and liabilities as a backstop.

If the parties have access to a recent balance sheet for the carve-out business in a given jurisdiction, this can also be included in the schedules and referred to as *indicative* of the types of assets and liabilities that are intended to transfer in that jurisdiction as of the closing date.

Any local assets that are publicly-registered or that may be subject to specific local requirements (*e.g.*, shares of stock, intellectual property rights or permits), as well as any real property transfers, should also be clearly defined in the schedules. While these asset categories often require additional specific conveyance documentation, clear references in the schedules are helpful in order to demonstrate to third parties that the relevant assets are intended to transfer as part of the business and to make it easier for the parties to confirm consistency with their agreed upon global strategies for separation of real estate, IP and permits. An itemized list is also helpful for any tangible assets that may be transferring at a site, but a "catch-all" approach can generally be used here, if needed.

The acceptability of different drafting approaches for schedules does vary by jurisdiction. While most jurisdictions follow some form of the broad principle that an asset must be reasonably described or discernable in a contract in order for it to transfer, this principle is more narrowly interpreted and regulated in some jurisdictions. In Germany, for example, the principle of clarity (*Bestimmtheitsgrundsatz*) requires different levels of specificity depending on the asset category at issue.

Schedules are thus another area where local advice is required, but centralized coordination is essential in order to ensure that the commercial terms of the global deal are fully implemented in each jurisdiction.

- *VAT.* Developing a more robust local agreement can also help support characterization of the local carve-out transaction as a "transfer of a going concern" in value-added tax ("VAT") jurisdictions. The likelihood of obtaining tax exemptions that may be available for this type of transaction is maximized where a BTA is used to describe the business that is transferring, and often to include language that specifically describes the intended tax treatment.

  Given the important link between the transfer documentation and the tax treatment in this area, it is critical for a deal team to connect its indirect tax and legal advisers in VAT jurisdictions early in the process, so that each team understands the timing for the respective work streams and the local agreements support the intended tax treatment in each jurisdiction.

  Another area of confusion in VAT jurisdictions is that asset transfers in these countries often require preparation of an itemized invoice showing all of the assets that have transferred and the value allocated to each of them. It is important to keep in mind that in most jurisdictions this itemized invoice is not a corporate legal requirement, but is rather more like a tax filing in connection with the local transaction, and it is often due only after the transaction has already closed,

e.g., 30 days after local closing. Again, early communication and planning on VAT issues can help to avoid last-minute emergencies or confusion about the respective corporate and tax requirements for a transaction.

Share Transfer Jurisdictions. Where a seller subsidiary primarily operates the target business, and/or the seller has been able to transfer any non-target business assets out of the subsidiary prior to closing, the parties may opt for a transfer of ownership of the entity itself to the buyer. The structure of equity transfers in the context of a carve-out transaction will depend on a number of factors, including tax planning and timing.

In the context of a pre-closing reorganization, for example, the seller may reorganize target business entities into a new chain through a combination of share sales, contributions or distributions. Alternatively, the deal structure may contemplate a direct transfer of the shares of a target business entity to a buyer entity at global closing.

As with asset transfers, we recommend preparation of a template share transfer agreement that can be localized for use in each jurisdiction where shares are transferring. Many jurisdictions will recommend or require the use of a local-law governed share transfer form. For consistency across the deal and to maintain the priority of the global purchase agreement, these local forms should be used *in addition to* rather than instead of the global template agreement, wherever possible.

Ultimately, however, the transfer of legal title to shares will occur pursuant to the laws of the jurisdiction of the transferred entity. As such, it is critical to understand the local mechanics for these transfers, particularly where a local closing is time-sensitive or part of a series of transactions that need to occur in sequence.

- *Notarial Deeds and Meetings*. For share transfers in civil law jurisdictions, depending on the structure of the transfer, a meeting before a civil law notary and the execution of a notarial deed will often be required to complete the transaction. For example, a local notarial meeting is required any time the shares of a Dutch entity are transferred; the same is true in Germany. In Luxembourg, a notarial meeting before a Luxembourg civil law notary will be required to authenticate changes in share capital that may be necessary as a result of contributions into or distributions from a Luxembourg company.

  In the context of a global carve-out transaction, special attention needs to be given to civil law notarial requirements from a planning and documentation perspective. As the notary is most often a third party, scheduling a notarial meeting or formalizing a notarial deed may raise timing concerns related to closing deadlines or other sequential transactions. To avoid last minute delays, it is imperative that civil law notaries are given an opportunity to read and understand the local transaction documents in advance of any planned closing.

- *Beneficial Ownership*. In addition to notarial requirements, there are a number of other types of local requirements that can delay (sometimes significantly) the transfer of legal title to shares in a given jurisdiction. These include, among other things, locating or replacing physical share certificates, employee notification requirements, stamp duty assessments and public registration processes.

  Particularly at this moment in time, when courts and government offices may be intermittently closed or only working on reduced schedules, any public process that is required to complete or formalize transaction may be slowed down, or left in administrative limbo for months at a time. For this reason, it is important for

local share transfer documents to include language on the transfer of beneficial ownership at local closing, notwithstanding any possible delays in the formal transfer of legal title.

This language can be adapted from the provisions of the global purchase agreement on delayed assets, but these global provisions will likely need to be changed or supplemented in certain respects to specifically address rights pertinent to share ownership. Beneficial ownership is not recognized in all jurisdictions, but including a provision on beneficial ownership transfer in your template share transfer agreement can often help to avoid unnecessary delays or slow-downs in global transactions where a large number of share transactions need to occur in sequence or simultaneously.

Governing Law

Because the local transfer documents are only intended to implement the deal as agreed in the global purchase agreement, the local agreements should apply the same governing law as the global agreement, to the extent possible. Local advisers may have some objection to the application of, for example, Delaware law, to a transaction in their jurisdiction, particularly if they are less familiar with large, cross-border implementation projects.

And in many cases, there are valid reasons why local law must apply to some extent in order for the transaction to be valid, *e.g.*, a transfer of shares in the relevant jurisdiction. Many of these local concerns can be addressed through the inclusion of a proviso in the governing law section of the local agreement that stipulates that the governing law of the global purchase agreement applies, except to the extent that mandatory provisions of other jurisdictions apply to the sale and transfer of the assets or shares at issue.

Of course there are also certain documents that are, by their nature, necessarily governed by local laws, *e.g.*, notarial deeds or local forms for share transfers. This is why we recommend using a template transfer agreement or other link to the global agreement (*e.g.*, by side letter) for all local transactions in addition to any local, prescribed forms. Notwithstanding local requirements, the goal is always to ensure that local implementation remains aligned with the global deal to the fullest extent possible, including with respect to applicable law and resolution of disputes.

Valuations and Settlement

While valuations and the flow of funds for a carve-out transaction are largely outside the scope of this article (and relevant considerations will vary depending on the transaction structure) there are a few key points to keep in mind from a drafting and implementation perspective. Regardless of the transaction structure, it is always important for the parties and their legal advisers to (i) keep track of timing for valuations (*i.e.*, when the value for a local transaction is expected to be available versus when the value will first be needed in local implementation documents); (ii) understand how certain value(s) will need to be used and represented in the local documents; and (iii) understand how the value will ultimately be paid or settled for a transaction.

In terms of settlement, the parties may be interested in using a single payment between parent entities in respect of a global purchase price, or a series of payments between different affiliates that are not directly involved in the local transactions. Most jurisdictions will allow for payment in respect of a local purchase price to be made between parent entities or other affiliates, but there are some jurisdictions and transaction types that need to be settled locally.

In particular, asset transfers in certain jurisdictions with more restrictive foreign exchange controls, *e.g.*, India, China and Brazil, must be settled with local payments. In all cases, the language used to describe settlement of a local transaction should be checked with local legal advisers in the jurisdiction where assets or shares are being sold.

Conclusion — Getting to Closing

While smart drafting and centralized coordination of local transactions can help to avoid many of the common pitfalls in corporate implementation of a global carve-out transaction, every transaction presents unique issues and challenges. Among the recommendations we have outlined in this article, the importance of communication between the different internal and external teams working across a transaction cannot be overstated.

The most difficult obstacles that arise on the road to a global closing are rarely purely corporate, tax or regulatory issues. Rather, they are issues that may impact or be affected by each of these areas. A global purchase agreement provides a roadmap for implementation, but early and effective communication between the different functional teams working on a carve-out transaction is the best way to avoid surprises on the road ahead and to ensure that effective solutions are found in time to keep a deal from running off course.

Third Circuit Clarifies Requirements for Risk Factor Disclosures in Merger Proxies

pursuant to Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a).

The Court focused its analysis on Item 105 of SEC Regulation S-K relating to risk factors and held that Item 105 disclosures must be specific, in plain English, and framed in the context of the disclosing entity's industry or business; mere boilerplate and generic discussions do not suffice. *Id.* at *9. The Court reversed a dismissal of claims based on alleged material omissions and affirmed dismissal of claims based on allegedly misleading statements of opinion in a proxy statement/prospectus filed on Form S-4. In so doing, the Court also took the opportunity to "reiterate the longstanding limitations on securities fraud actions that insulate issuers from second-guesses, hindsight clarity, and a regime of total disclosure." *Id.* at *1.

Background

On August 27, 2012, Hudson City Bancorp Inc. ("Hudson") and M&T Bank Corp. ("M&T") executed a merger agreement, pursuant to which M&T would acquire Hudson. *Jaroslawicz v. M&T Bank Corp.*, 2020 WL 3278679 (3d Cir. June 18, 2020). The merger agreement required approval by the shareholders of both banks. To provide the required notice, Hudson and M&T issu