ABA Section on Business Law Spring Meeting
International M&A Committee

Vancouver, March 30, 10:30 am – 12:00 Noon

Case study

Which party bears the risk of events occurring or becoming known between signing and closing of a M&A transaction?

The Sellers are 30 individuals owning the privately held Canadian company Oceanstar with its headquarters in Vancouver, BC. Oceanstar is a maritime transportation company with operating subsidiaries in Argentina (Buenos Aires), Japan (Okinawa), the US (Charleston, SC) and Germany (Hamburg). The successful bidder is Mitashi Sea Explorer (MSE - Buyer), a publicly listed Japanese trading company with its headquarters in Tokyo, Japan, and part of the worldwide Mitashi group. The purchase price for all shares is Can$ 100million. The rationale of the acquisition is to grow capacities on trans-Pacific shipping routes to better accommodate customer requests.

Oceanstar also operates a separate business unit (port operations) from its Charleston, SC, facility that will be carved out from the transaction and retained by Oceanstar. Buyer’s bid prevailed against comparably priced bids because Buyer agreed to provide transition services to Oceanstar to facilitate a faster closing and allow Oceanstar to transition the carved-out business line to a standalone business after closing.

The Share Purchase Agreement regarding all outstanding shares in Oceanstar was signed on Monday, January 28, 2019, in the Montage Resort in Laguna Beach, CA, after both parties’ attorneys had attended the ABA SBL Standalone M&A Meeting the previous weekend to ascertain that they had properly represented their parties’ interests. The SPA is governed by Canadian law. Closing of the transaction is envisaged to take place at the offices of Sellers’ attorneys, on April 1, 2019. If the Closing has not occurred by June 30, 2019, either party has the right to walk away from the deal.

The transaction requires the approval of the Japanese anti-trust authorities (JFTC) and of the German Cartel Office under the respective laws. The parties have anticipated the possibility that the JFTC and the German Cartel Office will not clear the transaction unless Oceanstar will sell certain of its port slots regarding Okinawa and Hamburg due to market dominance. The SPA contains a clause providing that the parties will use their best efforts to obtain anti-trust clearance in all countries affected. They undertake to fulfill all conditions and obligations imposed by any competent anti-trust authority (hell and high-water clause). The transaction is considered as failed if in any of the countries affected anti-trust clearance cannot be obtained.
The SPA also contains a clause obliging the Sellers to conduct the business of Oceanstar in the ordinary course during the period between Signing and Closing. Any extraordinary business activity must be agreed in advance by Buyer (risk of gun jumping).

It is a closing condition that the Sellers approve the transaction and that no more than 10% % of the Sellers have exercised their appraisal rights.

The parties agreed on a MAC clause both relating to MAEs affecting the company (revenues falling after signing more than 10% monthly) and the shipping market (trans-pacific market contracting by more than 10%, or the Tokyo Stock Exchange Shipping Index falling by more than 10%). The consequence of a violation of the MAC clause is at the election of the MSE to request a purchase price adjustment or to walk away from the transaction.

It is also a closing condition that Buyer provides an Equity Commitment Letter in the form annexed to the SPA and a confirmation letter of Buyer's Bank confirming that funds in the amount of Can$ 75 million will be available to finance the purchase price to the Sellers' reasonable satisfaction.

The SPA also contains a no-shop clause providing that Sellers, their affiliates and representatives are prohibited from soliciting, negotiating with or providing information to potential buyers.

It is a closing condition that the representations and warranties are true and accurate in all material respects (Bring-down disclosure), it being understood that, for the purposes of determining the accuracy of such representations, all MAE qualifications and other materiality qualifications in such representations shall be disregarded (double materiality scrape).

According to the terms and conditions of the SPA the Sellers have agreed to pay a break fee to Buyer if the transaction will not be closed due to action caused by the Sellers. Conversely, Buyer has undertaken to pay a reverse break fee to the Sellers if due to Buyer’s action the transaction will not be completed. Both the break and the reverse break fee amount to 2.5 % of the Purchase Price.

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