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# Cross-border M&A: fundamental issues to M&A transaction

20 July 2021 at 1300-1400 BST / 2000-2100 CST

**#IBAWebinars**



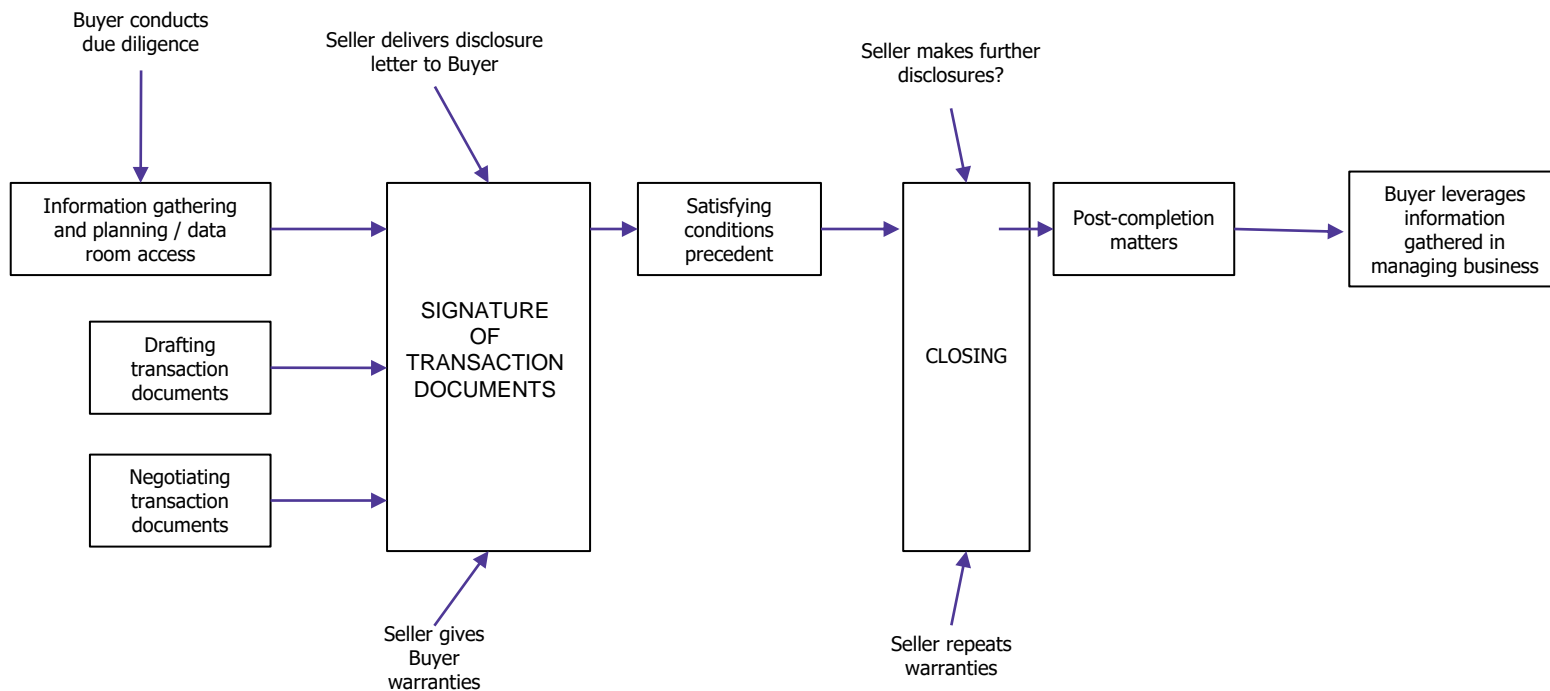
Morgan Lewis

# DUE DILIGENCE IN M&A TRANSACTIONS



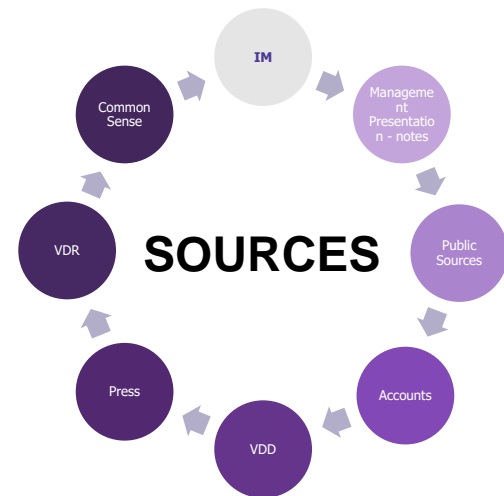
**Joanna Maria El Khoury**

# Transaction Timeline



# Identifying the Scope of Due Diligence

- What is being bought?
- Were there legal risks?
- What is the **Buyer** most concerned about?
- Complicating factors e.g. reorganisations and TSAs



# Identifying the Scope of Due Diligence

- Clearly identify the scope of the due diligence exercise and the type of report required:
  - this requires an understanding of the business, how it generates revenue, its main costs and liabilities, what its most important assets are and what the potential hotspots for issues are.

Subject areas typically covered by legal due diligence include:

- Corporate
- Accounts
- Contracts
- IP and privacy
- Regulatory / Licensing
- Antitrust
- Labour and employment
- Tax
- Bank accounts and borrowings
- Litigation and claims
- Real estate
- Environmental
- Insurance
- Compliance
- Pensions/End of Service Liabilities

# Preparation & Process: Getting Ready

- NDA
  - Any due diligence process requires the execution of an NDA by the party that will receive commercially sensitive information.
- Timetable
  - The time available for completion of the transaction will often dictate the scope of the due diligence process.
- Questionnaire
  - The representatives of the Buyer usually prepare a due diligence questionnaire (“**DDQ**”) to kick off the process (other than in a tender or auction).
  - The DDQ sets out various sections/areas to be addressed: ensure questions are relevant and add any questions specific to the business in question.
  - A **materiality level** should be agreed by the parties to limit the number of items to be provided and reviewed.

# Diving In: Identifying Red Flag Issues

Examples of “**Red Flag**” Issues:

- **Organizational Documents:** shareholders (other than Seller) having rights of first refusal or tag-along rights, consent issues, evaluation of “nominee” type arrangements in the UAE
- **Material Contracts:** change of control provisions or provisions requiring third-party consents (and the consequences of breaching such provisions), assignability, termination, unusual provisions (e.g., MFNs), final executed copy
- **Finance Documents:** basic terms (debt outstanding, interest rates, maturity dates, prepayment provisions), contingent obligations (e.g., guarantees), restrictive covenants, change of control
- **Labor and Employment:** alternative arrangements (other than permanent employment agreements) such as independent contractors, freelancers, contract labor, which could give rise to hidden liabilities, end of service liabilities
- **Tax:** Target appearing to be effectively managed outside jurisdiction of tax residence, VAT
- **Litigation:** proceedings that may disrupt the main activity of the Target (pending or historical)
- **Environmental:** expiry of permits, bans on crucial products, massive contamination or liability issues
- **Compliance:** compliance with applicable laws particularly for regulated industries (e.g., healthcare, financial, F&B); AML (e.g., undocumented or disguised cashflows), anti-bribery (e.g., unusually high commission payments, ties with governmental officials, etc.)





## **Deal Structure for Cross-border M&A**

**Dr. WANG, Jennifer**

**Senior Partner**

**ALLBRIGHT LAW OFFICES**



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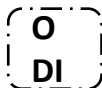
**PART 2 Deal Structure for Cross-border M&A**

**PART 3 Destinations of SPVs in Deal Structure**

**PART 4 Case Study-- Synergy Project (Indonesia)**



# 1. China Overseas Direct Investment Overview



2020

China's overall ODI 2020  
US\$132.94 Billion **Up 3.3%**

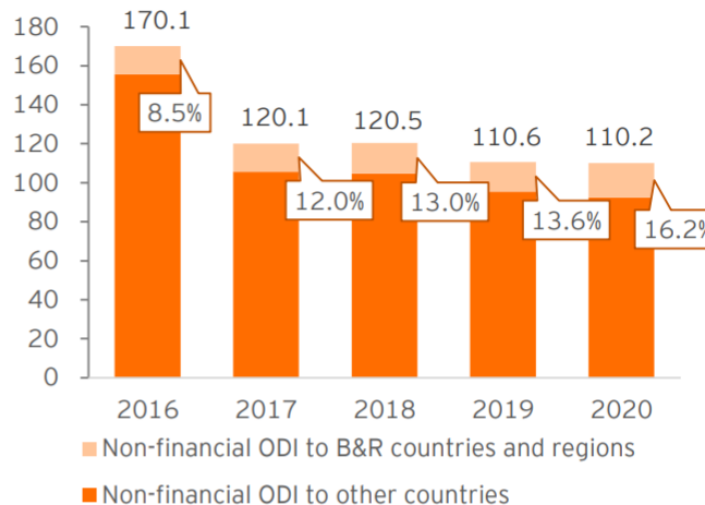
Non-financial ODI 2020  
US\$110.15 Billion **Down 0.4%**

2021

China's overall ODI 2021(Jan-May)  
US\$58.02 Billion **Up 3.3%**

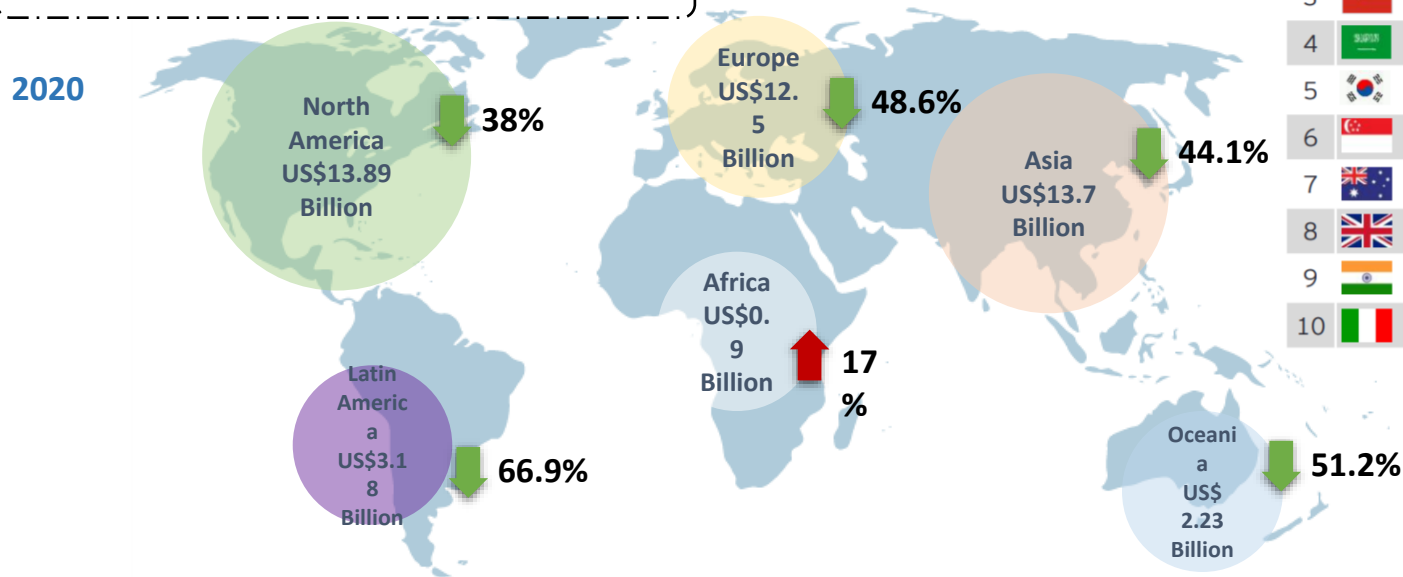
Non-financial ODI 2021(Jan-May)  
US\$43.29 Billion **Up 2.6%**

China's non-financial ODI (US\$ Billion)



# 1. China Overseas Direct Investment Overview

## China ODI Geographical analysis



## Top 10 Destinations of China ODI

	Country	2020	2019
1	US	13.1	15.6
2	Germany	5.1	1.8
3	Chile	3.0	4.6
4	Saudi Arabia	3.0	-
5	South Korea	2.8	2.0
6	Singapore	2.8	7.4
7	Australia	2.2	4.2
8	UK	2.1	10.2
9	India	1.6	3.9
10	Italy	1.4	0.5

## 2. Cross-border M&A Deal Structure

### a. Why do companies establish SPV?

Deal structure is a series of arrangements conducted by the investors to coordinate and achieve the final transaction. When considering the deal structure for cross-border investment, the investors will always consider tax benefits, risk isolation and exit mechanism.

In particular, the following factors are important:

- ① Tax issues
- ② Commercial and legal risks
- ③ Flexibility of exit mechanism

## 2. China Overseas M&A Deal Structure

### a. Why do companies establish SPVs?

#### ① Tax aspect

The use of SPVs may have a future tax advantage. For example, given that Luxembourg is a tax haven in the EU and the tax treaty between the Luxembourg and Germany, the dividend withholding tax and capital gains withholding tax on corporate acquisition transaction between the two Member States are 0. Thus, Chinese companies investing in Germany through SPVs established in Luxembourg will help the company to reduce taxes when there is any dividends or capital gains obtained from the target German company.

#### ② Risk Isolation

The establishment of SPVs between the Chinese investor and the overseas target company can help to isolate the target company's debt risk, operation risk and bankruptcy risk to a certain extent.

## 2. China Overseas M&A Deal Structure

### a. Why do companies establish SPV?

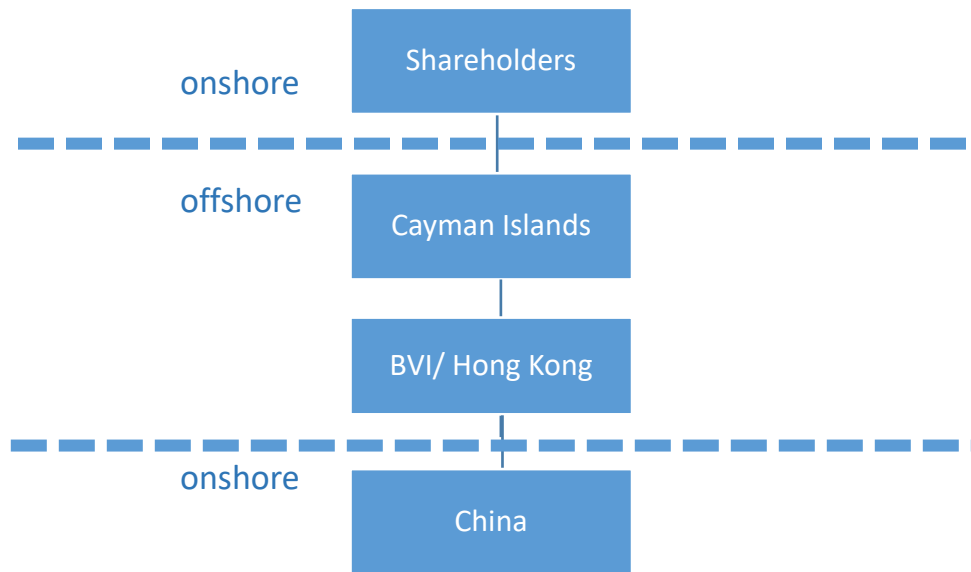
#### ③ Flexibility to exit

- Due to **China's special regulation on ODI and foreign exchange control**, a suitable deal structure is essential for Chinese companies to invest overseas. If a Chinese investor plans to invest overseas by M&A, they shall file with the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration of Foreign Exchange (SAFE). When they determine to sell the foreign subsidiaries and get the investment gains back to China and then re-invest overseas, they shall file with these authorities again. While, if SPVs established, Chinese investors who sell the foreign subsidiaries will get the investment gains back to SPVs, thus it would be easier for them to re-invest overseas.
- As for **state-owned enterprises (SOE)** in China, their overseas investments are under strict approval procedures by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC). While by establishing SPV, the decision on overseas investment would be made within the group through a simplified procedure .
- In some **host countries**, equity transfers will go through complex procedures and need to be approved by or filed with many authorities. It is more flexible for those companies who set up multi-level SPVs to sell their shares of the SPVs at different levels than selling the shares in the subsidiaries in the host countries.

## 2. China Overseas M&A Deal Structure

### b. How to design deal structure?

Below is an example typical for foreign investors to make investments in China



- **Top-level**  
in tax havens or low-tax areas.  
e.g. Cayman Islands
- **Middle-level**  
in countries or regions with tax treaties and lower tax rate.  
e.g. Hong Kong
- **Bottom-level**  
China



### 3. China Overseas M&A SPV Destinations

Destinations for Chinese companies to set up SPVs for their crossborder M&A

#### Globally

- Cayman
- BVI
- Hong Kong

#### Regionally

- SE Asia - Singapore
- Middle-east - Dubai
- South America - Panama
- Africa - Mauritius, Barbados
- EU - Luxembourg, the Netherlands
- North America - State of Delaware (US)



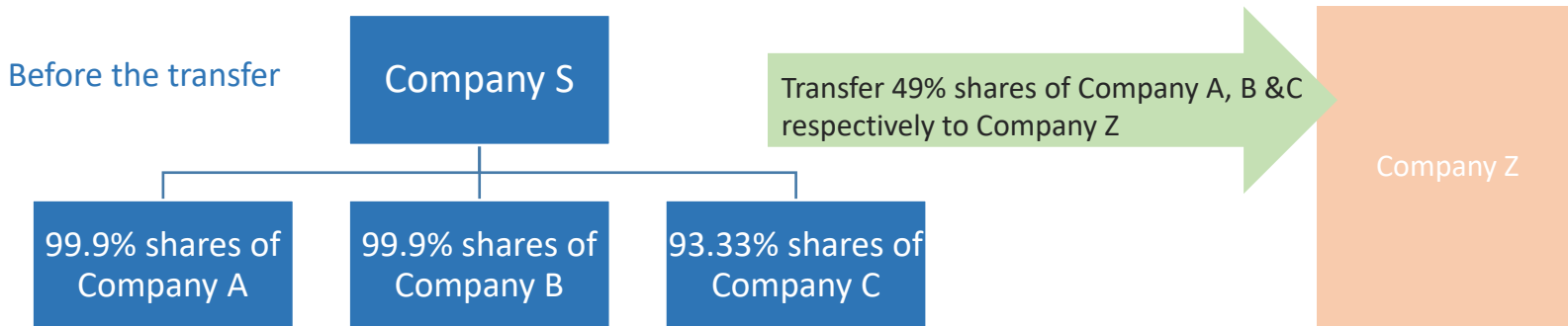
## 4. Synergy Project (Indonesia)

### Background

Investor Company Z intends to acquire the equity interests in three subsidiaries (i.e. Company A, B and C) of Indonesian Company S.

Company S, A, B and C are all located in Indonesia.

Investor Z is a PRC company.



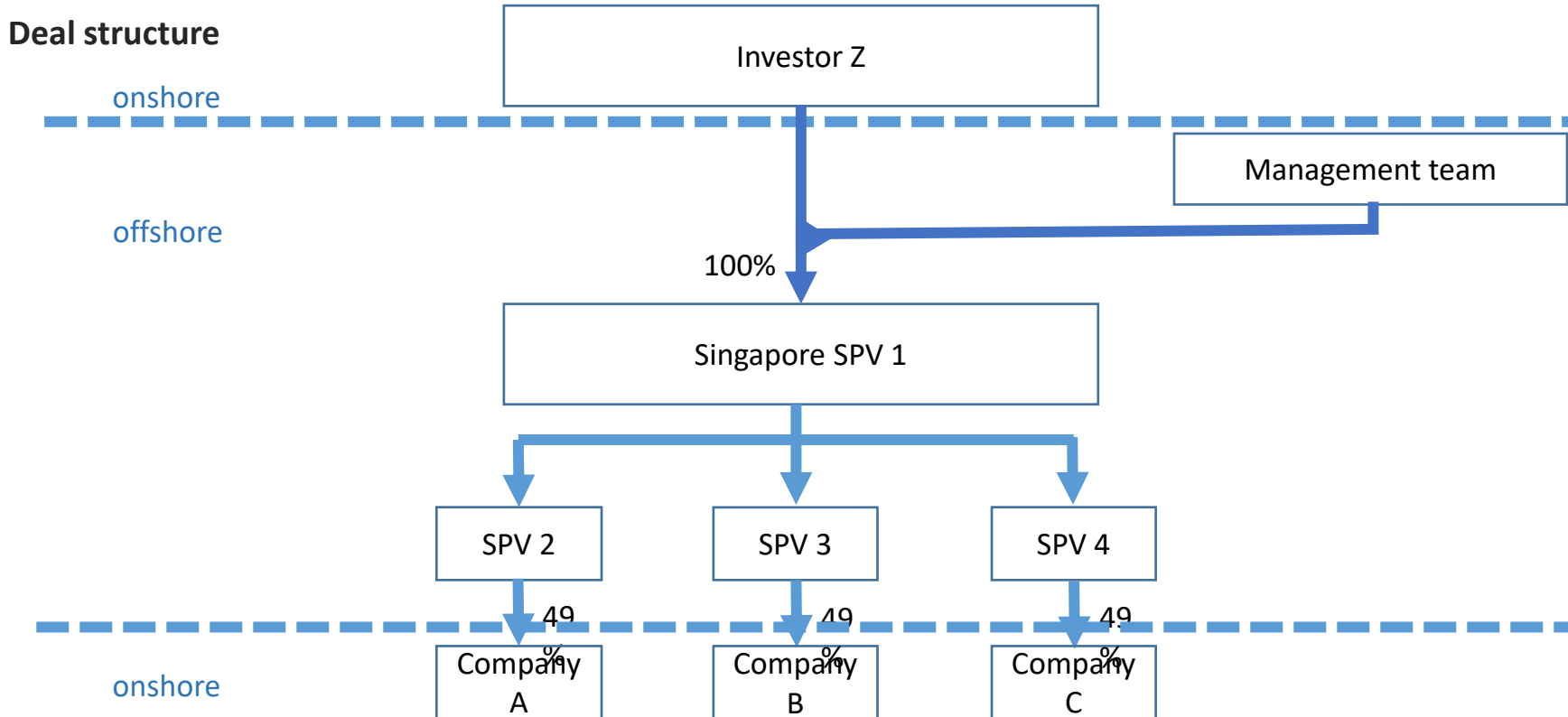
## 4. Synergy Project (Indonesia)

### Establishing SPV in Singapore

Preferential Policies for Singapore company investing in Indonesia

E.g. Double Tax Treaty between Indonesia and Singapore. On 4 February 2020, Indonesia and Singapore signed a new double tax treaty. The treaty is still subject to ratification by competent authorities of the two countries. It prevents capital gains tax if a shareholder of one country sells or transfers shares of a company in the other country. This would make Singapore a tax-efficient holding jurisdiction for investors (e.g. private equity investors or investment funds) who want to avoid tax on capital gains.

## 4. Synergy Project (Indonesia)



## Dr. WANG, Jennifer

### Senior Partner

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Dr. WANG, Jennifer's practice areas include corporate investment and financing, mergers and acquisitions. Dr. WANG, Jennifer has provided legal services for direct and indirect investment and financing projects for dozens of Chinese and foreign-invested enterprises.

Dr. WANG, Jennifer has also been focusing on mining and energy laws and has garnered unique experience in this field. She has provided legal services to many mining and energy enterprises in the acquisition of mining rights, restructuring and reorganization, coal-electricity joint operations and A projects.



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# Key drafting consideration for cross-border M&A

Pranav Srivastava,  
Phoenix Legal, New Delhi



# INTRODUCTORY

- Cross-border M&A v. domestic M&A
- Objectives of good drafting – enforceable and precisely convey commercial intent
- Not capable of two different meanings
- Not allow exploitation of ambiguity in language
- Simple and concise drafting
- Illustrations for practical situations
- The importance of boilerplate





# IMPORTANCE OF A LOCAL QUALIFIED LAWYER

- System of law – civil law vs common law approaches
- Business and market practice
- Different approaches by Courts
- Local law issues



# GOVERNING LAW AND DISPUTE RESOLUTION

- Choice of law – parties involved
- Local law mandatory
- Dispute resolution by court or arbitration
- Ad hoc or institutional
- Foreign seated or local seated



# EXCHANGE CONTROL IMPLICATIONS

- Capital account convertibility
- Pricing of capital instruments
- Escrows, deferred consideration, earn-outs
- Call/ put options
- FDI consideration – sectoral caps, prohibition and national security



# TAX IMPLICATION

- Tax havens
- DTAA's – Limitation of Benefit provisions
- Transfer of capital assets deriving substantial value from assets in other countries
- General anti avoidance rule



# EXECUTION FORMALITIES

- Stamping requirement
- Valid authorization
- Witness requirement
- Registration requirement
- Notarization/ counsalrization/ apostilled





## PhD in Civil Law

- University of Sao Paulo, School of Law (USP)
- 2020

## Master in Civil Law

- University of Sao Paulo, School of Law (USP)
- 2010 – *summa cum laude*

## Degree in Law


- University of Sao Paulo, School of Law (USP)

## Languages

- English
- Spanish

## Area of Practice

- Antitrust/Competition
- Competition damages litigation
- Contracts and M&A – inbound and outbound investments
- Arbitration and dispute resolution

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1. EFFECTS AMONG JURISDICTIONS
  2. MOMENT OF CLEARANCE REQUEST
  3. CRITERIA FOR MANDATORY CLEARANCE REQUEST
  4. ASSOCIATIVE CONTRACTS
  5. PROBLEMS TO APPROVE HIGH CONCENTRATION TRANSACTIONS



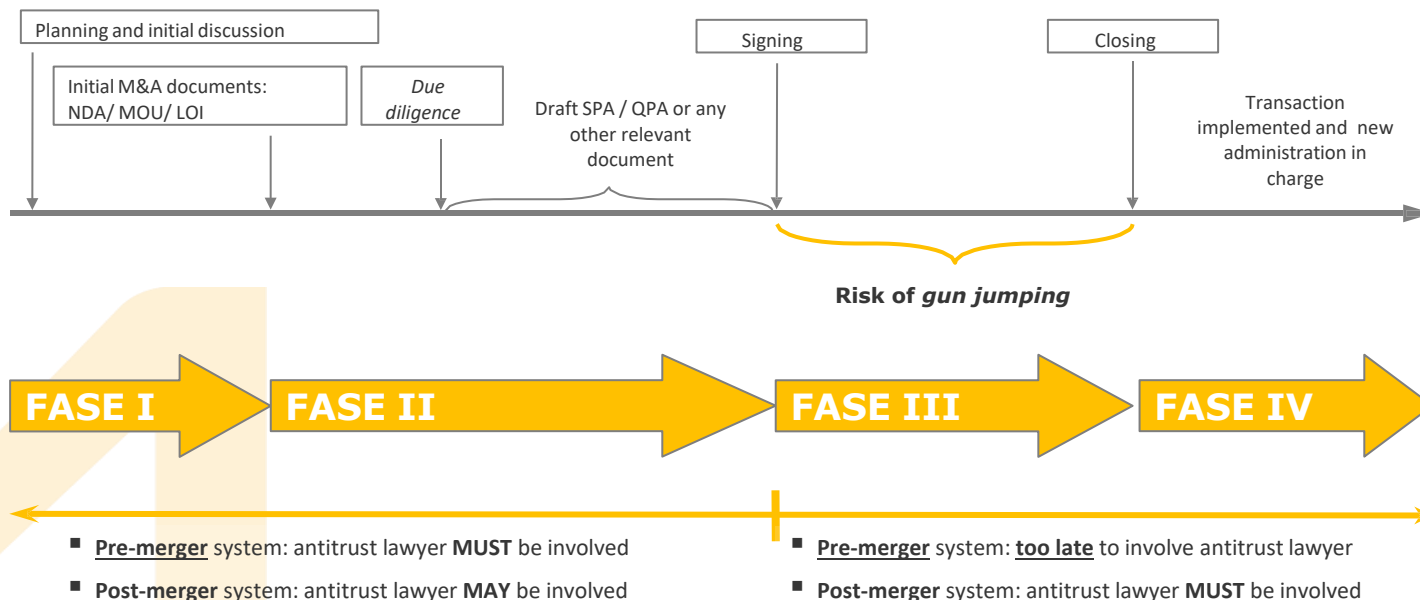
## 1. EFFECTS AMONG JURISDICTIONS

- ❑ Importance to recognize the jurisdictions impacted by the transaction
- ❑ Contract's applicable law and headquarters of the parties are not the only relevant jurisdictions: need to consider where the parties make business
- ❑ Even jurisdictions where parties do not have a branch or subsidiary may require an antitrust clearance, if company exports that country

## 2. MOMENT OF CLEARANCE REQUEST

- ❑ Brazil adopts the pre-merger notification system, the same of USA and EU
- ❑ Other countries may adopt the post-merger notification requirement, which Brazil adopted for many years before 2012
- ❑ It is important to confirm system adopted by each jurisdiction impacted by the transaction to not incur in gun-jumping or any other infraction which may result in big fines to the parties

## 2. MOMENT OF CLEARANCE REQUEST



## 3. CRITERIA FOR MANDATORY CLEARANCE REQUEST

- ❑ Important define the economic group of each party
- ❑ The relevant information is the turnover of the entire economic group, not only the party's figures
- ❑ In Brazil, transactions need to be cleared by antitrust authority if one of the groups presents turnover in Brazil of BRL 750 million (around EUR 115 million / USD 145 million) and the other group presents turnover of BRL 75 million (around EUR 12 million / USD 14 million)
- ❑ Each country has similar triggers, but with specific values, which somehow is related to country's GDP

## 4. ASSOCIATIVE CONTRACTS

- ❑ M&A transactions are the most important cases of mandatory antitrust clearance
- ❑ However, there are other cases, varying according to each jurisdiction
- ❑ In Brazil, other collaborative contracts also need to be submitted to antitrust authority for mandatory clearance.
- ❑ It is applicable for the following contracts, if they are more than 2 years long: joint venture, consortium, associative contracts (IP, R&D etc)

## 5. PROBLEMS TO APPROVE HIGH CONCENTRATION TRANSACTIONS

- ❑ Sometimes, a transaction can be approved by some jurisdictions, but not by others. In this case, lawyers need to provide a solution
- ❑ Obvious solution is to carve-out the company or assets in that specific country, but this can be a bad solution for the business
- ❑ It is possible to make an agreement with the antitrust authority. In Brazil, it is possible to execute an ACC, to reduce the market power or defining rules to prevent its illegal exercise