

C L I F F O R D
C H A N C E

FUNDAMENTALS OF PRIVATE CAPITAL AND M&A TRANSACTIONS
SINGAPORE | WEDNESDAY, 4 SEPTEMBER 2024

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SHARE PURCHASE AGREEMENTS

IVAN CHAN AND WESLEY TAN

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TYPICAL CONSIDERATIONS

Structure

- Asset vs Shares.
- SPA – secondary shares transaction.
- SSA – primary shares transaction.

Purchase Price/allocation of value

- Completion accounts adjustment – price estimate at signing and risk passes on completion.
- Locked box – price fixed at “locked-box accounts date” and risk passes on locked box date.
- Fixed price – no adjustment and risk allocation through warranty and indemnity protection.

Conditions precedent

- Active c/ps
 - Regulatory approvals.
 - Third party consents.
- Passive c/ps
 - Material adverse effect (MAE).
 - Warranties and undertakings.
 - No injunction.

TYPICAL CONSIDERATIONS

(CONTINUED)

Apportioning risk

- Covenants/undertakings.
- Representations, warranties and disclosures.
- Indemnities (\$ for \$ recovery).
- Termination rights.

Governing law/Arbitration

- Governing law.
- Seat for disputes/arbitration.

Completion mechanics

- Transfer of shares.
- Purchase price payment.
- Other completion steps.

PURCHASE PRICE MECHANISMS

POST-COMPLETION ADJUSTMENT VS LOCKED BOX



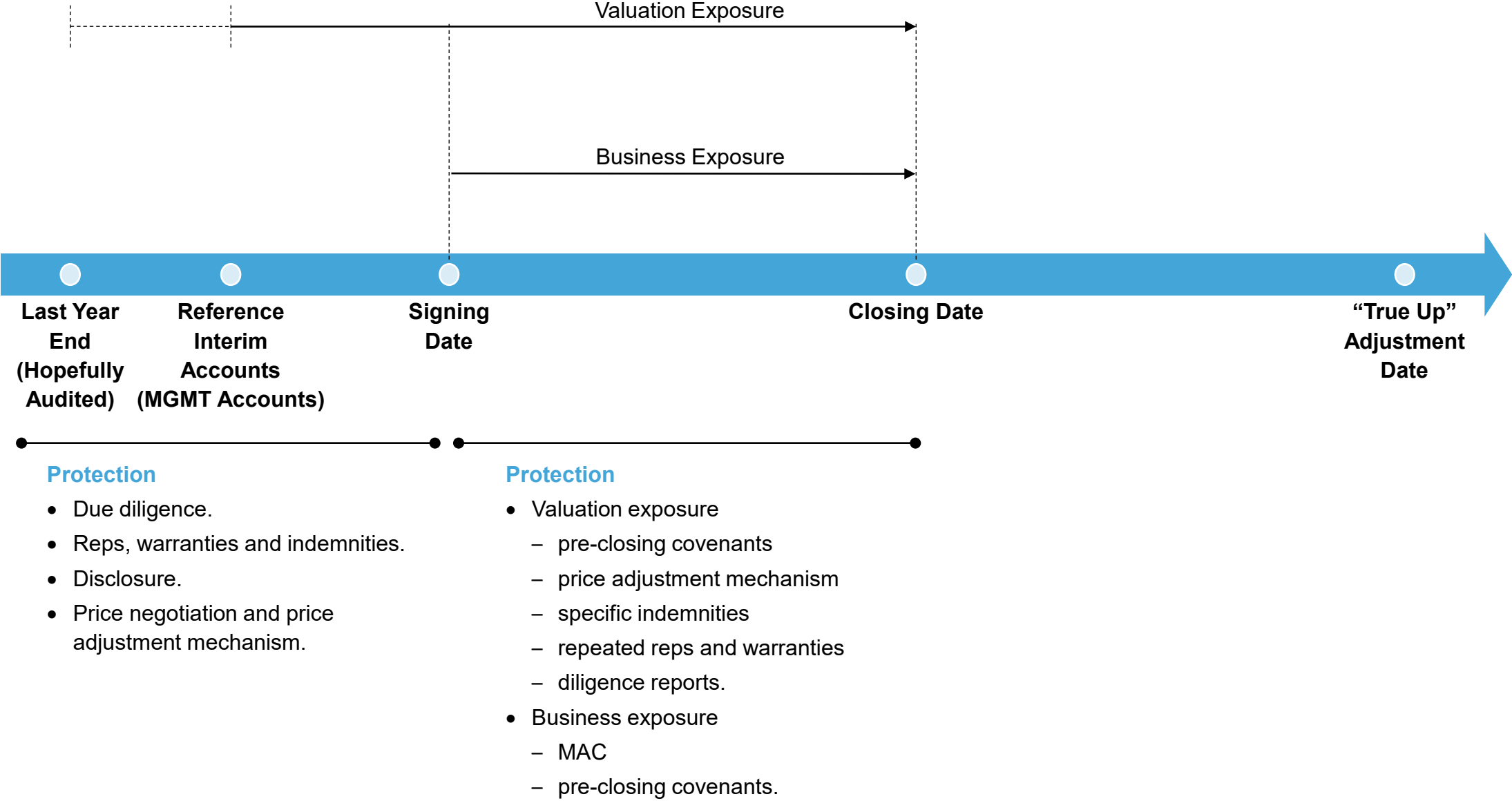
Completion Accounts

- **Buyer takes economic ownership from completion.**
- Enterprise Value vs Equity Value.
- Estimated Equity Value paid on completion.
- Accounts are drawn up post-completion to show actual Equity Value on completion.
- Price adjusted based on completion accounts.

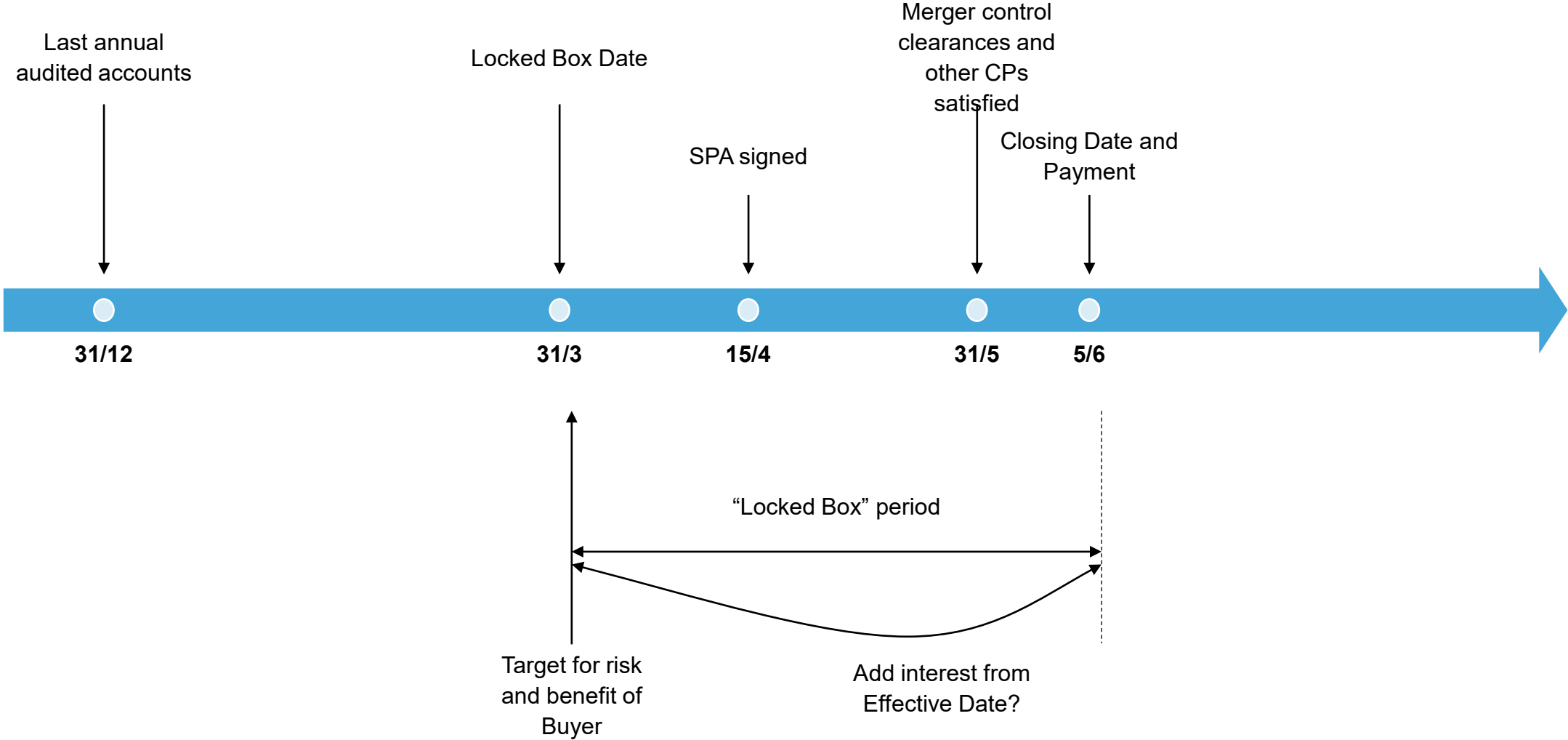
Locked Box

- **Buyer takes on economic ownership from a prior effective date.**
- Fixed price determined as at locked box date (e.g. date of most recent audited accounts).
- Interest rate “ticker” on purchase price from locked box date.
- No post-completion adjustment.
- Seller indemnifies Buyer on \$ for \$ basis for any “Leakage” between locked box date and completion date unless otherwise agreed (permitted leakage).

POST-COMPLETION ADJUSTMENT MECHANISM



LOCKED BOX MECHANISM



POST-COMPLETION ADJUSTMENT VS LOCKED BOX

PROS

Post-Completion Adjustment

- Ability to true-up – only pay for the value which a Buyer will get (price will be adjusted if business has deteriorated before completion).
- Ability to check completion accounts when in full control of the business (for Buyer).
- Economic benefit in the business – Seller gets credit for running the business and receives full profits up until completion.

Locked Box

- Certainty of price.
- Simplicity – management time not tied up in preparing and debating post-completion accounts.
- Cost – no post-completion adjustment results in cost savings.
- Increased control over process for Seller.
- Simpler SPA.
- Removes debate over exposure to performance/risk.
- Less scope for disputes/manipulation.

POST-COMPLETION ADJUSTMENT VS LOCKED BOX

CONS

Post-Completion Adjustment

- Cost and time to determine accounts.
- More complex SPA – focus on accounting policies, accounts process and disputes process.
- Outcome unknown at completion – Buyer and Seller not sure of exit price until finished.
- Greater scope for manipulation and disputes.

Locked Box

- For Buyer, concerns around value leakage – need tight control and visibility on actions taken from agreed effective date to completion.
- Integrity of financial information is key, as no ability to adjust the price after completion.
- Not always appropriate to nature of business (e.g. highly cyclical or high working capital variability).
- Relies heavily on availability of enforcement.

CONDITIONS PRECEDENT

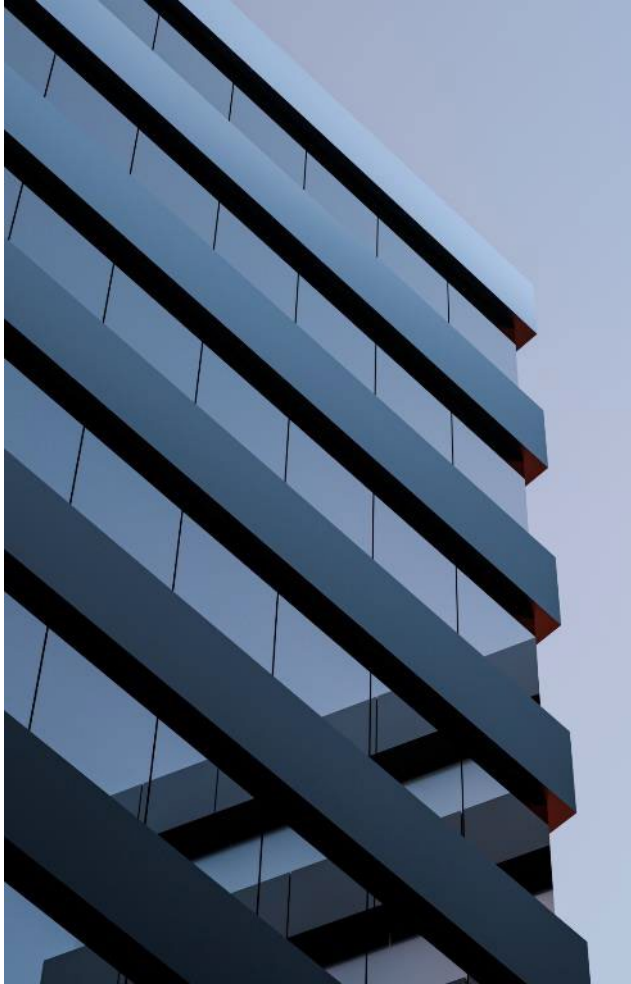
Typical conditions precedent

- Regulatory/anti-trust approvals.
- Third party consents (e.g. change of control).
- Shareholders resolutions.
- Deal specific/commercial c/ps.
- No MAC.
- No breach of warranties.

C/ps affect certainty of completion.

Active/passive c/ps.

CONDITIONS PRECEDENT



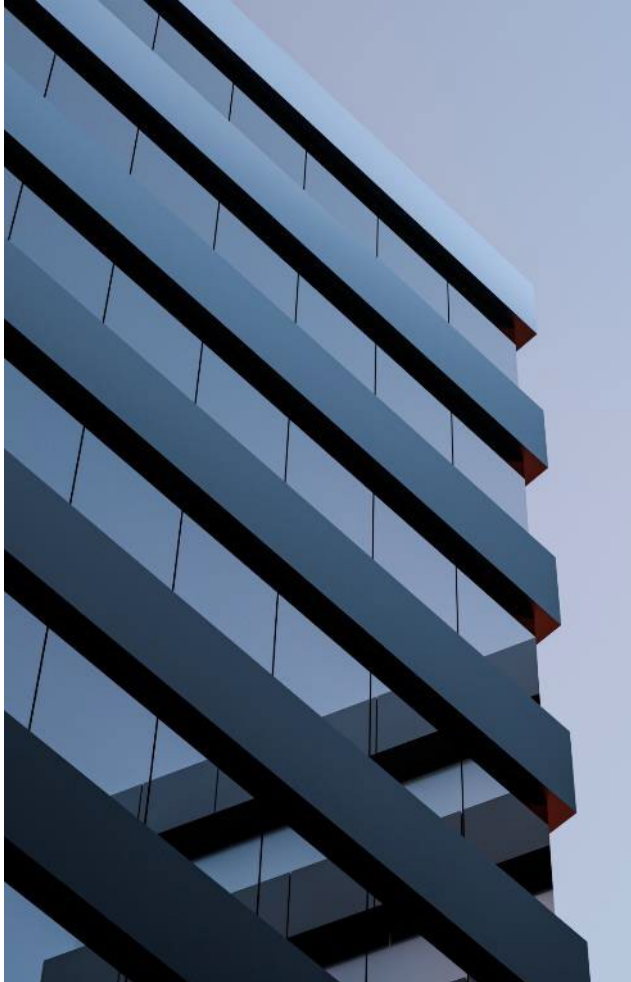
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APPORTIONING RISK - UNDERTAKINGS



Pre-completion undertakings

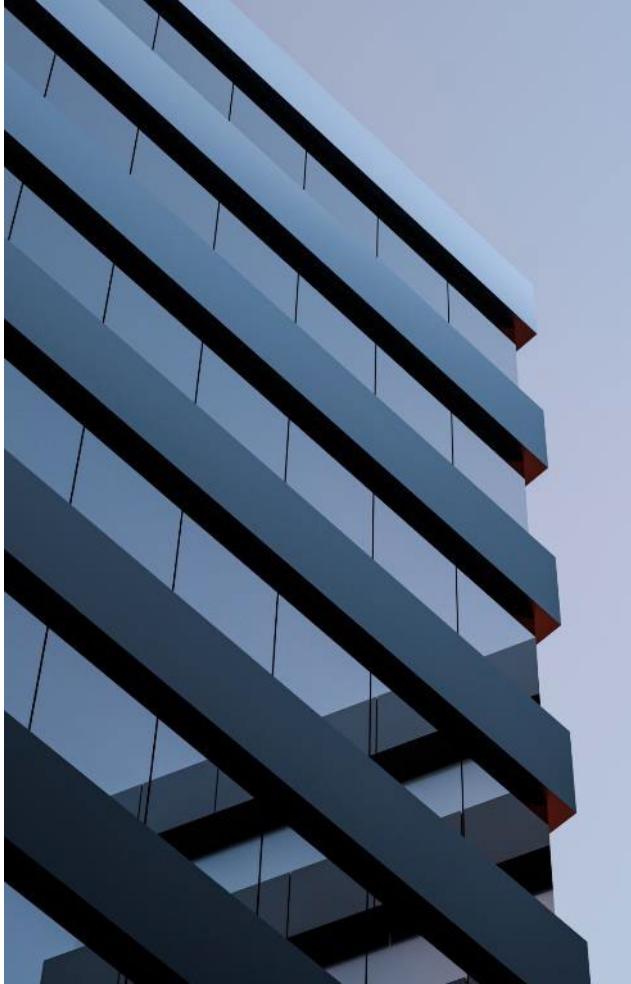
Negative undertakings/covenants:

- Preservation of value (e.g. no new debt, no dividends).
- Preservation of terms/business (e.g. no change to employment terms, no new business lines).
- Leakage covenants.

Positive undertakings/covenants

- Undertaking to operate the business in the ordinary course.
- Rectifying certain due diligence findings (e.g. apply for certain licence, negotiate certain renewals).
- Undertaking certain actions agreed by parties (e.g. to support Buyer's antitrust filings).

APPORTIONING RISK - UNDERTAKINGS



Pre-completion undertakings

- Undertaking to share information, provide access to records.
- Non-compete, non-solicit covenants.

APPORTIONING RISK



Warranties

- Statements of fact.
- Contractual promise as to state of affairs.
- Breach of the promise can give rise to claim for damages.

Disclosures

- Qualifies warranties.
- “Neutralises” parts of the warranties such that no claims may be brought.

Indemnities

- Typically given in respect of contingent risks that may or may not materialise e.g. tax, known litigation, environmental liabilities.
- Agreement to reimburse a party on a \$ for \$ basis in respect of a contingent liability.
- Alternative to indemnities: reduce purchase price or escrow (more appropriate for risks that are likely to materialise).

WARRANTIES

What warranties are given?

- Fundamental warranties: title, capacity and authority.
- Business warranties.
- Tax warranties.
- Information warranties.

What is the purposes of the warranties

- Underpins valuation – chance to adjust the price after completion.
- Elicit disclosure from the Seller about its business.
- Allocate risk between the Seller and Buyer.
- **Usually given by the seller(s)/management.**

Protections for Buyer

- Reasonable set of warranties.
- Repetition of warranties on completion.
- C/p in respect of “no material breach of warranties”.

Warranties qualifications

- Materiality.
- Seller’s awareness.
- Disclosures.

APPORTIONING RISK



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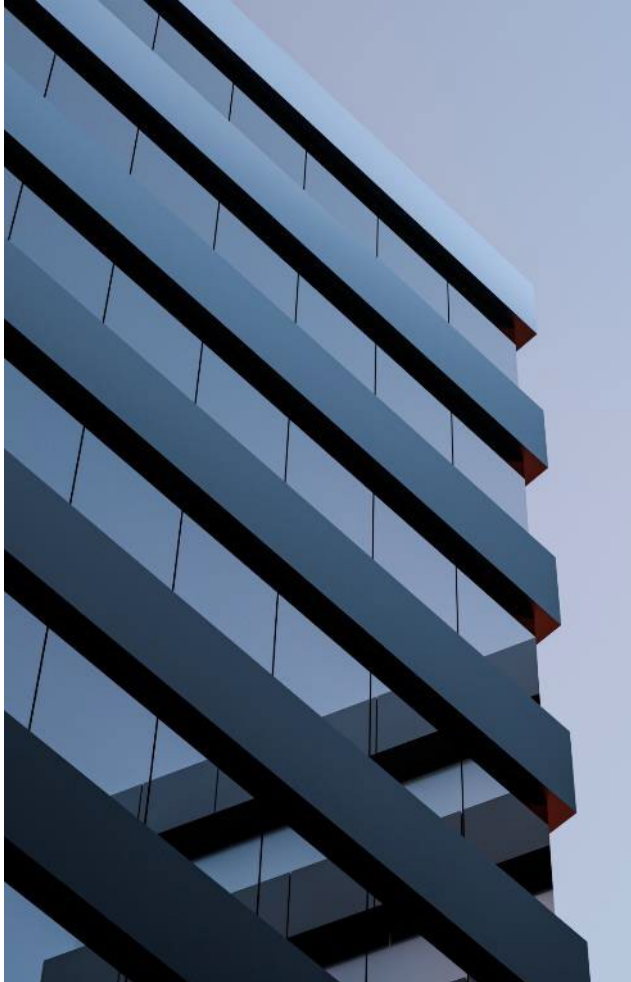
LIMITATION OF SELLER'S LIABILITY



Limitations

- Limits on small ('de minimis') claims and basket/threshold.
- Overall "cap" on liability.
- Time limit for bringing claims.
- Buyer's awareness.
- Anti-sandbagging.

DISCLOSURE LETTER AND W&I INSURANCE



Disclosure Letter

- Purpose to elicit disclosure of information.
- “Front-end”: general disclosures.
- “Back-end”: specific disclosures.

W&I Insurance

- Sell-side and buy-side.
- Costs: premium, seller and buyer underwriting fees, broker break fee.
- Benefits: relationship with management, speed of recovery.
- Coverage – what is covered?
- Common exclusions (matters known to buyer, anti-bribery/ corruption/AML, fraud product liability, environment/pollution).
- Policy limit, de minimis, retention.

PLEASE GET IN TOUCH AND CONTINUE THE CONVERSATION

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