

HOW LAWYERS CAN AVOID THE PERILS OF SELLING DISTRESSED ASSETS

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Among the priorities for lawyers working on distressed assets transactions is ensuring there is a

good strategy for handling communications between the buyer, the target and the employees

The nature of transactions involving distressed assets gives rise to numerous, highly complex legal issues which do not usually arise in the context of other M&A deals. These issues include matters related to employment, tax, accounting, regulatory and compliance, and therefore specialised law firms have a key role to play in ensuring that transactions will be conducted in the most efficient way possible, while avoiding potential pitfalls.

Distressed M&A deals are often highly sensitive from a political point of view in the sense that they may involve substantial job losses and will therefore attract the attention of government. What can and cannot be said in a particular context must be considered extremely carefully, and law firms can offer extremely valuable advice in this regard, while also providing guidelines in order to avoid potential problems.

Strong communications needed

The employment-related implications of these type of transactions are of course huge. Action by trade unions often precedes the acquisition of a business – the acquisition may involve the transfer of employees, and so a solid strategy for handling communications between the buyer, target and the employees is essential. Lawyers can bring extraordinary value when advising on how to best handle these issues. The impact of a deal from a labour law perspective can also vary depending on the structure of a transaction – a share deal, for example, will have different implications to an asset deal.

The legal issues associated with carve-out deals are particularly complex. Instead of the more straightforward acquisition of a whole company, this type of transaction will involve the acquisition of certain assets, employees or financial liabilities, which need to be extracted from a company. In this context, adequate provisions have to be made in order to ensure a seamless transition, as well as the successful continuity of the business. For example, the target's corporate compliance function will have to be designed. Contracts for a wide array of services will also need to be in place – consider, for example, the acquisition of a factory and its employees from a company that owns a further two manufacturing plants. The seller will have run the target's IT systems up to that point, and as a buyer you need to ensure that these remain fully operative, which gives rise to a series of questions ranging from which systems may be shared and to what extent, to which security measures are in place and what guarantees can be offered should a breach occur. These are all issues that lawyers need to consider carefully.

As part of a carve-out deal, the creation of a new company is always necessary. This has complex legal and tax implications for international investment funds – the expertise of lawyers is also essential here in structuring the new company within the holding company in the most efficient way possible. The same applies to asset transfers in Spain, especially if these involve real estate, which can attract very substantial charges. The regulatory framework also varies depending on the region, which adds further difficulty to the process. Specialised lawyers are extremely well placed to advise on these issues, as well as others such as the cross-border structure of the transaction, which is a crucial aspect for international clients.

Water-tight contracts needed

The industrial implications of distressed deals are also very significant, and water-tight contracts regulating all aspects of the relationship between buyer and seller need to be in place. Lawyers need to consider and negotiate issues ranging from the regulation of costs and margins to non-compete agreements; lawyers can also provide strategic advice that will have a substantial impact on the business. For example, by successfully negotiating the non-inclusion of a non-compete clause in a contract, the lawyers can enable the opening of new business opportunities and increase the profitability of the company.

Lastly, distressed M&A transactions have unique implications from a financial and accounting point

of view. In non-distressed situations, acquisitions are comparatively straightforward and don't involve purchases for negative amounts, which is often the case in a distressed context. Lawyers play a key role in handling issues such as the efficient management of investors' funds from a tax point of view, as well as ensuring potential pitfalls are avoided.

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