Disclosures in corporate transactions: A comparison of the UK/Singapore and US

DENTONS RODYK

February 20, 2017

Introduction

In negotiating the terms of a sale and purchase agreement, whether for a transfer of shares or business assets of a company, a purchaser will often have to rely on the results of its due diligence and the seller's warranties. For a purchaser, the process of negotiating warranties serves to encourage the seller to disclose facts and events that may not otherwise be known in the course of its due diligence. Where such disclosures are not made, the purchaser may be able to claim damages as a result of the breach of the warranty.

To balance the risks that come with the giving of warranties, the sale and purchase agreement is commonly accompanied by a seller's disclosure letter. Disclosures are made by excluding, or carving out the incorrect facts or events otherwise covered under the warranty, to the extent that a disclosure could preclude a purchaser from claiming against a breach of the warranty.

Disclosures can take the form of general disclosures or specific disclosures. Examples of general disclosures can include information that is available publicly or information that is otherwise available to the purchaser such as all matters expressly provided in the sale and purchase agreement and all matters which would be revealed by public searches against the company, such as its business profile information, whether it is involved in any litigation or its ownership rights to intellectual property or real property. In situations where due diligence (extensive or otherwise) has been afforded to the purchaser, the seller may attempt to have all due diligence information accepted as a disclosure to all warranties. In such instances, the seller may include a general disclosure to the effect that, all matters "fairly disclosed" in the documents that were made available to the purchaser for due diligence are disclosed or deemed to have been disclosed.

Specific disclosures, on the other hand, are made in relation to a certain warranty and accordingly specific disclosures are typically cross-referenced to one or more specified warranties.

Naturally, it would be in the seller's interest to make extensive general disclosures while the purchaser would, conversely, resist and seek to accept only specific disclosures. However, as the form and substance of the disclosure letter can be used to a seller's or a purchaser's advantage, it may be worthwhile to examine how different jurisdictions may take different approaches to disclosures and in particular how the concept of "fair disclosure" or what constitutes "fairly disclosed" can be construed in different terms.

UK and Singapore approach

The general practice and mechanism for disclosure in the UK and Singapore are similar. Disclosures are typically contained in a separate disclosure letter where the seller would invariably attempt to have all due diligence

information accepted as a general disclosure to all warranties and to include specific disclosures which will be typically cross-referenced to a specific warranty. Nonetheless, it is common for such specific disclosures to be treated as effective disclosures to all warranties.

English law, however, requires a disclosure to be "fair" and in order to be considered as such, a seller is required to disclose "facts and circumstances…sufficient in detail to identify the nature and scope of the matter disclosed and to enable the purchaser…to form a view whether to exercise any of the rights conferred on him by the contract." (*Edward Prentice v Scottish Power*, [1997] 2 BCLC 264 at 271).Therefore, as stated in the case of *New Hearts Ltd v Cosmopolitan Investments Ltd* [1997] 2 BCLC 249 at 259, mere reference to a source of information in a disclosure letter may not be in itself sufficient to constitute fair disclosure. However, it should be noted that in the cases of *Man v Freightliner Limited* [2005] EWHC 2347 and *Infiniteland v Artisan Contracting Ltd* [2005] EWCA Civ 758, the court indicated that it could give effect to clauses which provided that inferences from the disclosure of documents would be deemed to have been disclosed or that matters which are fairly disclosed are deemed disclosed.

In Singapore, while the High Court in *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] SGHC 158 expressed that the "essence of any disclosure letter, subject to the terms of its contractual setting, is candour", it did not elaborate or set out any parameters as to what "fair disclosure" entails.

Nonetheless, the English cases emphasize the effect of the language contained in the sale and purchase agreement and the disclosure letter, and in particular the use of the term "fair disclosure". If such a term is used, a purchaser should, before accepting such a term, always seek to clarify the extent to which such fair disclosure would enable them to make an informed assessment of the nature, implication and extent of such matters.

US approach

The practice and mechanism for disclosure in the US is arguably more onerous on the seller.

Disclosures in the US generally come in the form of a disclosure schedule integrated into the sale and purchase agreement which may include both general and specific disclosures to specified warranties. However, general disclosures are not common and are typically resisted by a US purchaser, with the implication that the seller would either seek to reduce the scope of the warranties in the sale and purchase agreement; or failing which, it would need to disclose such facts and events as an exclusion or carve-out of such warranty. Indeed, a US purchaser will commonly seek to provide in the sale and purchase agreement that specific disclosures are not treated as effective disclosures in relation to all warranties unless specifically cross-referenced.

However, since US disclosures are usually specific to the warranties, disputes between seller and purchaser in the US tend to focus on the impact of knowledge by the purchaser of a false or inaccurate disclosure rather than what constitutes "fair disclosure". Thus, in negotiating warranties, a US seller will also attempt to include materiality and/or knowledge qualifiers. It should be noted that different states in the US adopt different stances on the effect of such knowledge. For example, in New York, so long as a warranty is part of the basis of the parties' bargain, a purchaser who has knowledge of a breach of the warranty prior to signing can still be considered to have relied on the warranty such that the breach would not be taken as disclosed, as seen in the case of *CBS, Inc. v Ziff-Davis Publishing Co* 75 N.Y.2d 496, 553N.E2d 997, 554 N.Y.S.2d 449 (New York 1990). However, in the Minnesota case of *Hendricks v Callahan* 972 F.2d 190 (8th Cir. 1992), a purchaser was unable to recover damages for a breach of warranty as it had knowledge of the breach.

Conclusion

For a purchaser in a sale and purchase process, the disclosure letter or schedule serves as the last but critical part of

its due diligence investigations where the discovery of new facts or events may entail a renegotiation of the warranties and/or the purchase price. In certain situations, it may even result in a purchaser pulling out of a transaction. For the seller, the disclosure letter or schedule provides a mechanism by which it can seek to limit the scope of its warranties.

Depending on where the sale and purchase takes place or where the seller and the purchaser come from, whether the UK, Singapore, the US or other jurisdictions, it is clear that the form of the disclosure letter and its content matters. It is therefore important for sellers and purchasers, and accordingly their advisers, to ensure that whichever approach is taken in the disclosures, they fully understand the meaning and effect of its terms.

Dentons Rodyk acknowledges and thanks associate Zhong Iek Ka for his contribution to the article.

Your Key Contacts

Valerie Ong
Senior Partner, Singapore
D +65 6885 3625
valerie.ong@dentons.com