

大成 DENTONS

# Let's make a deal: Critical success elements of cross-border M&A deals

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The background of the image is a complex, multi-level highway interchange with several overpasses and ramps. The entire image is overlaid with a semi-transparent purple color. Three large, dark purple circles are positioned over the image: one in the upper right, one in the center, and one in the lower left. The text 'Setting the Stage' is written in a white, bold, sans-serif font, centered horizontally and partially overlapping the central circle.

# Setting the Stage

## Let's set the stage

- What do we mean by cross-border M&A?
- Our hypothetical scenario:
  - A Canadian company (Buyer) wishes to use its cash to acquire two private target companies (Targets): (i) a U.S. company and (ii) a U.K. company.
  - Each Target has offices, employees, customers, and suppliers in its home jurisdiction and in multiple foreign jurisdictions.



# Transaction Administration

# Project Management of Multi-Jurisdictional M&A

- Importance of putting in place the right TEAM from the start
- Delegation of diligence review
- Transaction documentation
- Post-closing local implementation

# One-Stop Shop for Legal and Advisory Services

- Working with ONE FIRM instead of multiple firms
- Cost-efficient process
- Cross-over of legal advice and deal advice

An aerial photograph of a complex multi-level highway interchange, featuring numerous overpasses and ramps. The entire image is overlaid with a semi-transparent green filter. The text 'Substantive Considerations' is centered in the upper half of the image in a white, bold, sans-serif font.

# Substantive Considerations

# Up Front Considerations

Consideration	Canada	U.S.	U.K.
Anti-Trust	Competition Act – Potential pre-merger notification	Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) – Potential pre-transaction filing	Competition Act - overlap of UK and EU anti-trust framework
Foreign Investor Approvals / Notifications	Investment Canada Act – Potential “net benefit to Canada” review and pre-closing Ministerial approval	Committee on Foreign Investment in the United States (CFIUS)	New UK FDI regime  EU FDI screening framework
Target Approvals (board, shareholders, and others)	Factors include: type of transaction; public vs. private company	Varies by state. Potential impact to transaction structure.	Factors include: type of transaction; public vs. private company



# Transaction Structure

Consideration	Canada	U.S.	U.K.
Tax	<p>Sellers generally want deferred tax treatment</p> <p>Tax considerations often frame the transaction structure</p>	Similar	Similar
Form <ul style="list-style-type: none"><li>• asset sale</li><li>• share / stock / equity sale</li><li>• merger or amalgamation</li><li>• plan or scheme of arrangement</li><li>• carve-out</li></ul>	<p>Structure can take various forms (or combinations of forms)</p> <p>Considerations include:</p> <ul style="list-style-type: none"><li>• target approvals</li><li>• third-party consents</li><li>• impact on permits / licenses</li></ul>	Similar	Similar
Securities Compliance	Provincial laws	Federal and state laws	National and EU laws

# Diligence considerations

Consideration	Canada	U.S.	U.K.
Target's employees <ul style="list-style-type: none"> <li>• at-will vs. term employment</li> <li>• classification</li> <li>• benefits and pensions</li> <li>• unions</li> </ul>	Transaction structure (e.g., asset vs. share deals) factor into how to deal with employees.  "Fire and hire" vs. automatic transfer of employment	At-will employment is typical  Government focus on employee classification and benefit plans.	Typically automatic transfer of employment  Defined benefit schemes a key focus of due diligence
Privacy and Data Security	Well-developed protection(private sector; health data; anti-spam)	Evolving protection at federal and state levels	Well-developed protection
Environmental, Social and Governance	Increasing focus and legislation on disclosure for public companies	Protection at federal and state levels	Rapidly developing focus area  No standardized approach
Regulatory considerations and regulated Industries	E.g., Energy Boards and Health Canada	E.g., Import/export, state public utility commissions, the Federal Energy Regulatory Commission, and the Food and Drug Administration	E.g., Financial Conduct Authority Oil and Gas Authority
COVID-19	Health and safety, federal and provincial support	Stay-at-home orders, compliance with federal, state and local laws and guidance, Paycheck Protection Program Loans	Health and safety, state support, redundancies



# Select “Market” Terms

## Select “Market” Terms

- Canada, the U.S., and the U.K. have many similar “market” terms (statistically speaking).
- Many of the key differences relate to post-closing indemnification and fraud claims.
- Why do we care?
- The following slides include select information provided by the Mergers & Acquisitions Committee of the American Bar Association in its (i) 2018 Canadian Private Target M&A Deal Points Study, (ii) 2019 Private Target M&A Deal Points Study, and (iii) 2019 European Private Target M&A Deal Points Study.

# Survival Periods

- Survival periods specify the post-closing period during which Buyer can make an indemnification claim for breaches of representations and warranties (R&Ws). For example:

“Sellers shall have liability with respect to breaches of R&Ws (other than Fundamental R&Ws, as to which a claim may be made at any time) only if Buyer notifies Shareholders’ Representative of a claim on or before the date that is \_\_\_ months after the Closing Date....”

Survival Period	Canada	U.S.	Europe
≤ 12 months	22% of transactions	44% of transactions	21% of transactions
≤ 18 months	65% of transactions	90% of transactions	58% of transactions
< 24 months	67% of transactions	91% of transactions	59% of transactions

# Baskets

- A “basket” generally serves as a proxy for materiality with respect to Buyer’s indemnification claims.
- If the aggregate damages exceed the basket, then the amount for which the Sellers are responsible might be calculated in one of three ways:
  - **Deductible.** For example:

“Sellers shall not be required to indemnify Buyer for any damages until the aggregate amount of damages exceeds \$1,000,000 (the “Deductible”), in which event **Sellers shall be responsible only for damages exceeding the Deductible.**”
  - **Threshold / First Dollar.** For example:

“Sellers shall not be required to indemnify Buyer for any damages until the aggregate amount of damages exceeds \$1,000,000 (the “Threshold”), in which event **Sellers shall be responsible for the aggregate amount of all damages, regardless of the Threshold.**”
  - **Hybrid.** For example:

“Sellers shall not be required to indemnify Buyer for any damages until the aggregate amount of damages exceeds \$1,000,000 (the “Threshold”), in which event Sellers shall be responsible **only for damages in excess of \$500,000 (the “Deductible”).**”

## Baskets (continued)

Basket Type	Canada	U.S.	Europe
Deductible	30% of transactions	74% of transactions	6% of transactions
Threshold / First Dollar	44% of transactions	23% of transactions	56% of transactions
Hybrid	7% of transactions	0% of transactions	26% of transactions
TOTAL Baskets	81% of transactions	97% of transactions	88% of transactions

# Materiality Scrape

- A “materiality scrape” specifies that materiality qualifiers are disregarded for purposes of determining (i) whether a R&W was breached and/or (ii) the amount of damages resulting from the breach for indemnification purposes.
- There are typically two types of materiality scrapes:
  - For determining (i) whether a breach occurred and (ii) the losses resulting from the breach. For example:  
“Target’s representations and warranties shall be deemed not to be qualified by any references to materiality or Material Adverse Effect **for purposes of indemnification** under this agreement,”
  - For determining only the damages resulting from a breach. For example:  
“Target’s R&Ws shall be deemed not to be qualified by any references to materiality or Material Adverse Effect **for the sole purpose of determining damages resulting from a breach of a R&W (and not for determining whether a breach has occurred)**.”



## Materiality Scrape (continued)

Materiality Scrape?	Canada	U.S.	Europe
Yes	42% of transactions, of which:	93% of transactions, of which:	5% of transactions
breaches and damages	35%	74%	unclear
damages only	65%	26%	unclear

# Caps

- A cap limits the amount of damages Sellers must pay for breaches of R&Ws (other than Fundamental R&Ws). For example:

“The aggregate amount of all damages for which Sellers shall be liable resulting from a breach of a R&W (other than a Fundamental R&W) shall not exceed \_\_\_% of the Purchase Price.”

Cap?	Canada	U.S.	Europe
Yes	94% of transactions, of which:	99% of transactions, of which:	94% of transactions, of which:
≤ 10% of price	23%	71% (w/o RWI)	25%
≤ 15% of price	34%	94% (w/o RWI)	38%
≤ 25% of price	45%	96% (w/o RWI)	64%

# Non-Reliance Provision

- A non-reliance provision is a contractual stipulation that the Buyer is not relying on any statements outside the four corners of the acquisition agreement. For example:  
“Buyer (i) acknowledges and agrees that **Target has not made** and is not making **any R&Ws** regarding the subject matter of this Agreement, express or implied, **except for the R&Ws contained in this Agreement and** (ii) represents and warrants that **Buyer has not relied on** and is not relying on **any R&Ws** regarding the subject matter of this Agreement, express or implied, **except for the R&Ws contained in this Agreement.**”
- In some jurisdictions, a non-reliance provision can serve as a contractual bar to a fraud claim based on statements made outside the acquisition agreement (e.g., statements in projections or in management presentations).
- In other jurisdictions, a court may consider a non-reliance provision as a fact in determining whether Buyer relied on a statement made outside the acquisition agreement.

Non-Reliance Provision?	Canada	U.S.	Europe
Yes	30% of transactions	81% of transactions	74% of transactions



# Representations and Warranties Insurance

# Representations and Warranties Insurance (RWI)

- What is it? Why use it?

Policy Parameter	Typical Amount
Transaction value	\$20 million - \$1 billion  Often used for transactions between \$50 million and \$500 million
Coverage amount	<ul style="list-style-type: none"><li>• 10% - 30% of transaction value</li><li>• generally, the coverage should be at least \$5 million for the policy to be cost-effective</li></ul>
Retention (deductible)	0.75% - 1.5% of transaction value
Policy Premium	2% - 4% of the coverage amount (the premiums for smaller transactions tend to be at the higher end of the range)
Scope of coverage	<ul style="list-style-type: none"><li>• breaches of R&amp;Ws in purchase agreement</li><li>• indemnification for pre-closing taxes</li><li>• policies include several common exclusions from coverage</li></ul>
Survival of R&Ws (coverage term)	3-4 years for general R&Ws and 5-7 years for Fundamental R&Ws

## Representations and Warranties Insurance (RWI) (continued)

- RWI is common in for U.S. and U.K. transactions. It is still in the early stages in Canada but Canada has well-established RWI brokers and insurers.
- In the U.K., RWI tends to be cheaper but more restrictive.

# Thank you



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